



EASO curriculum for members of courts and tribunals

JUDICIAL TRAINER'S GUIDANCE NOTE ARTICLE 15(C) QUALIFICATION DIRECTIVE (2011/95/EU) A JUDICIAL ANALYSIS

May 2015



European Asylum Support Office

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A JUDICIAL ANALYSIS

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(*) The EASO training strategy is available at www.easo.europa.eu

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1. Introduction and purpose

With the purpose of supporting quality and harmonising (quasi-)judicial decisions made in asylum cases across the EU, and in line with the mandate contained in the founding Regulation, EASO provides two-fold training support for members of courts and tribunals in Member States and Associated Countries that includes the development and publication of professional development materials as well as the organisation of professional development activities. Article 15(c) Qualification Directive (2011/95/EU) — A Judicial Analysis ⁽¹⁾ is the first chapter of such materials created. It aims to put at the disposal of members of courts and tribunals dealing with international protection cases a helpful tool to further the understanding of protection issues in certain instances.

To further the understanding of the materials, EASO organises workshops to provide future Judicial Trainers at national level with an in-depth overview of the chapter as well as the methodology suggested for the organisation of workshops. This Judicial Trainer’s Guidance Note supports the consistent and coherent use of the chapter in professional development activities to be organised at national level. Therefore, it should be read and understood only in conjunction with the chapter. It introduces the objectives and aims of the professional development sessions to Judicial Trainers as well as illustrating some tools at their disposal when conducting an efficient professional development meeting. It also suggests different case examples or scenarios that may be used. This collection of case examples is by no means definitive or exhaustive and Judicial Trainers are encouraged to draw on their own (national) experience to compliment the illustrative materials contained in this note. This note also provides practical assistance on the organisation and implementation of professional development sessions. It is to be used without prejudice to the specific national law provisions and to the nature of the jurisdiction in each Member State.

The content in this Judicial Trainers Guidance Note has been drafted in close collaboration with and with the approval of several members of the working group of judges who contributed to the drafting of the Judicial Analysis itself. The Judicial Analysis working group consisted of Mihai Andrei Balan (Romania), John Barnes retd. (United Kingdom, UK), Bernard Dawson (UK), Michael Hoppe (Germany), Florence Malvasio (working group coordinator, France, FR), Marie- Cécile Moulin-Zys (France), Julian Phillips (UK), Hugo Storey (working group coordinator, UK), Karin Winter (Austria), legal assistants to the court Carole Aubin (FR), Vera Pazderova (Czech Republic) and in addition, Roland Bank, legal officer, (United Nations High Commissioner for Refugees, UNHCR).

Three members of this working group (Florence Malvasio, Michael Hoppe and Julian Phillips) were selected to participate for the purpose of drafting a Judicial Trainers Guidance Note and their invaluable contribution to and supervision of the drafting process was highly appreciated. In addition comments were received from a number of sources, including the participants of pilot workshops drawn from members of courts and tribunals from a significant number of Member States. These workshops were implemented using this Guidance Note in order to assess its suitability for use in professional development sessions for members of courts and tribunals. This was invaluable in ensuring the final product is guided wholly by the needs of members of courts and tribunals. Those involved in drafting this Guidance Note are grateful to all who have made comments, which have been very helpful in finalising the Guidance Note.

2. Objectives and aims

Reflecting the diverse systems and/or practices in Member States and Associated Countries for the professional development of members of courts and tribunals, this Guidance Note is not intended to be an exhaustive compendium of training methodologies. Rather it is intended to assist national Judicial Trainers in shaping their national sessions. It aims to:

- ensure members of courts and tribunals understand the position of Article 15(c) QD within the wider framework of international protection.
- raise understanding among members of courts and tribunals of the main challenges that arise in Article 15(c) QD cases.
- develop an understanding of the need for a structured approach to analyse Article 15(c) QD cases.
- ensure that members of courts and tribunals understand and can apply the interpretation of Article 15(c) QD adopted by the CJEU and ECtHR.
- provide members of courts and tribunals with an increased capacity to identify relevant jurisprudence and other materials.

⁽¹⁾ Published on 16 March 2015 and available at <http://easo.europa.eu/wp-content/uploads/Article-15c-Qualification-Directive-201195EU-A-judicial-analysis.pdf>.

Considered in conjunction with the Judicial Analysis, this note aims to provide practical information on tools for use during professional development activities. Both the Judicial Analysis and the Guidance Note will be updated periodically.

3. Who should use this note?

The note is intended to be used by Judicial Trainers providing training at national level using the accompanying Judicial Analysis prepared by the working group of EASO's network of courts and tribunals. The Judicial Trainer should have relevant knowledge and experience in European and national asylum law. Previous experience or specific training as a Judicial Trainer at national level is not imperative but this could contribute to a more robust use of the note. It is recommended that the national Judicial Trainer has attended the specific workshop for Judicial Trainers on the chapter organised by EASO.

4. Preparing the professional development activity

When preparing the professional development activity, the Judicial Trainer should clarify certain aspects that affect the implementation phase. This non-exhaustive list of elements is provided to stimulate this process:

- What information do I need to organise the professional development session?
- From where could I procure the information and how?
- Is a preparation phase needed? How should I organise it?
- Which tools would be most useful for the activity and why?
- How should I structure the professional development activity?
- Would it be useful to involve third parties (NGO's, UNHCR, etc.) in the session?
- Do I need to involve the national body responsible for judicial training (if any)?
- Who should be responsible for the administrative/organisational/financial aspects of the activity?
- How do I plan to collect and use feedback from the session?

5. Useful Tools

5.1. Factors to be considered when choosing a specific tool

In order to attain the objectives and aims of the professional development activity, various tools are available to the Judicial Trainers. Choosing the right tool can be influenced by a number of factors:

National context — This refers to specific rules and/or practices in Member States and Associated Countries concerning the implementation of professional development activities for members of courts and tribunals (e.g. pre-existing national curricula; training competences, administrative/financial arrangements etc.). Judicial Trainers should be familiar with this aspect as it may have a direct impact on the choice of methodology and activities used.

Number of participants — The number of participants should be commensurate with the aims of the session and the resources available, e.g. having a very large group may not be positive given the limited capacity or the physical structure of the rooms used.

Nature and experience of the participants — In order to ensure maximum benefit for all participants, the composition of the group is highly relevant when deciding what tools ought to be used. The level of experience and familiarisation with asylum law should be assessed by the Judicial Trainer. Moreover, potentially inhibiting hierarchical structures must be considered in order to properly tailor the tools chosen to the participants' needs.

The time available — The duration of the activity must be considered during the preparatory stage and when selecting methodologies. This decision will reflect on the tools used, the composition of the audience and the number of participants.

Other factors — Depending on the particular situation in the Member State or Associated Country concerned, other factors may need to be considered such as the location of the activity and its accessibility, the number of sessions that can be organised, the number of Judicial Trainers available, technical resources, financial and administrative limitations etc. In addition, the physical capacity and the structure of rooms in the premises used for professional development activities is relevant depending on the national context, the number of participants, the tools chosen for facilitation and the time available.

5.2. Available tools

The following is a non-exhaustive list of the range of professional development tools that are available to Judicial Trainers:

- Individual preparation
- Presentations (front-loaded lectures, visual presentations, audio and video podcasts etc.)
- Small group discussions
- Case studies
- Role play exercises
- Moot court sessions
- Other

The tools are differentiated by the level and form of interaction between the Judicial Trainer and the audience and also amongst the participants. When choosing a specific tool, the Judicial Trainer should have a clear picture on the information to be conveyed and the available resources. It is essential to adopt a holistic approach to choosing the methodology to be employed. Ensuring synergy between the tools used in the professional development session can lead to a more coherent outcome.

5.3. Use of the Judicial Analysis and compilation of jurisprudence

The Judicial Trainer should make use of the Judicial Analysis to structure the professional development session and the use of tools. Given that the compilation of jurisprudence covers European, international and national jurisprudence in many Member States the Judicial Trainer can use it as a source of inspiration to draft case studies/case scenarios or to conduct small group discussions, role play or moot court sessions. Moreover, participants in the professional development sessions can use the compilation to support their arguments or to rebut those of other participants in case of a debate.

5.4. Adaptation to national context

The Judicial Trainer should correlate the analysis with the relevant national provisions. This includes considering the nature of the jurisdiction within the country in question, i.e., is there a full and *ex nunc* examination of both facts and points of law or is there simply an examination of points of law in the framework of an *ex tunc* cassation. The fact that some participants may be limited to hearing cases on an *ex tunc* basis should not affect their participation in the professional development session. Rather, the main aim is to ensure a consistent and uniform interpretation and application of Article 15(c) QD, regardless of the level of jurisdiction. Nonetheless, when choosing and implementing different professional development tools, the Judicial Trainer should take into account the judicial hierarchy in the Member State or Associated Country concerned and its practical implications.

5.5. Overview of each tool

The following section aims to provide Judicial Trainers with general information on ‘when’ and ‘how’ to use a specific tool. The Judicial Trainer must decide which tools to use during the session, the order in which they are used and what information participants are given and when (before or during the session). When making this decision, he/she should take account of the factors described in 4.1., the use of the analysis and the compilation of jurisprudence according to 4.2. and the necessity to adapt to national context as mentioned in 4.4. Although the majority of the tools require group work (pairs, small or large groups), the importance of plenary discussions should not be underestimated. This helps to guarantee consistency and coherence of the professional development experience by ensuring that different experiences and perspectives are shared.

5.5.1. Individual preparation

In order to ensure the active involvement of participants, an individual preparatory session could be envisaged. The preparatory session may consist of, but is not limited to, the following activities:

- disseminating (by e-mail or other suitable method) the Judicial Analysis and other documents relevant at national level (e.g. national compilations of jurisprudence on Article 15(c) QD) to all participants;
- making document available for advanced reading on an online repository, where available;
- stimulating interaction between the participants via e-mail or using available platforms. In this scenario, the Judicial Trainer can act as an observer as well as providing clarifications on any issues raised by the participants. The Judicial Trainer may encourage interaction by raising specific questions based on the analysis and the national jurisprudence, e.g. what is the practice concerning child soldiers or forced recruitment in country X?;
- collecting specific information relevant to other tools and the preparation of the professional development session, e.g. which aspects of the materials raised questions; which issues might require further emphasis being put on them during the session; or, what is the extent of expertise and specialisation of the participants etc.?

An individual preparatory session must be of sufficient duration to allow the participants to become familiar with the materials provided. It can be easily organised in advance with the preparatory work to be done by participants in their place of residence.

5.5.2. Presentations (front-loaded lectures, visual presentations, audio or video podcasts etc.)

Presentations are a time-efficient and easy way to provide participants with a general overview of the Judicial Analysis or some specific parts of it. The Judicial Trainer may use this tool to refresh the participants' memories at the outset of the session. This is particularly useful where there was no preparatory stage or where there is a considerable time lapse between the preparatory and the face-to-face sessions. It can also be used as an initial impulse with a view to stimulating general discussions on the chapter. Presentations may include front-loaded lectures, visual presentations, audio or video podcasts.

Lectures are the most common form of presentation with a long standing tradition in training activities. Nonetheless, they have been proven to be less effective than other methods in achieving long-term learning aims. They also raise significant challenges for the Judicial Trainer who has to provide information while trying to keep the attention of the audience. The Judicial Trainer must decide if this form of presentation might be beneficial for participants within the national context.

Front-loaded lectures can be accompanied by **visual presentations** using software, but these should not be too detailed. It is recommendable to focus on key headings instead of trying to be comprehensive. The wording on slides must be concise and could benefit from some pictorial content to ensure a user-friendly approach to the session. Presentations should generally not exceed 45 minutes given the danger of losing the participants' attention.

Podcasts are an effective and user-friendly way to deliver information allowing beneficiaries to simultaneously perform other activities as long as they do not interfere with the learning aims of this tool. Compared to lectures and slide-based presentations which are tools used primarily during the professional development session, podcasts can be useful before and during the session. The Judicial Trainer should seek to organise information in episodes no longer than 10-15 minutes. This ensures that the listener remains focused on the message that is being conveyed. An introductory podcast providing an overview of the general structure of the analysis is advisable. Podcasts should be easily accessible on a variety of devices. In this respect, the Judicial Trainer ought to avoid using complex demonstrations in the presentation as they might not be visible or comprehensible for all types of devices.

5.5.3. Small group discussions (SGD)

SGD can be used to generate discussions on specific aspects of the chapter. They provide a framework within which all the participants in the group can be involved and can express their views.

Focus of the SGD

The Judicial Trainer should carefully choose the questions for discussions ([for examples of questions please see Annex 1](#)). Where appropriate, the input received in the preparatory session should be considered. He/she can use the same set of questions for all SGD or prepare different sets of questions for each. Using the same set of questions can result in a more homogenous outcome. Nevertheless, it is important not to rigidly confine the natural flow of the discussions to the questions that have been raised if other relevant issues should arise. Questions should be clearly formulated and not overly long. To encourage discussion, open questions should be used i.e. worded in such

a way that they cannot be answered with a simple ‘yes’ or ‘no’ answer. Alternately, instead of asking questions, the Judicial Trainer could encourage the participants to present relevant national or European court decisions to illustrate the way in which they apply Article 15(c) QD. This would create the framework for discussions and thus for a better understanding of different aspects of the analysis.

Duration of the SGD

The ideal duration of SGD ranges from 45 to 90 minutes depending on the topics selected. Longer sessions run the risk of being counter-productive.

Designing the groups

The Judicial Trainer should divide the participants into groups taking account of, *inter alia*, the level of experience and specialisation of the participants, the type of jurisdiction they represent (e.g. administrative jurisdiction, court of first or second instance), geographical distribution (e.g. mixing participants from different regions of the country to stimulate dialogue), professional status (e.g. members of courts or tribunal or those who work for courts and tribunals such as legal advisers, paralegals, rapporteurs, researchers etc.), content of the questions, the estimated duration of SGD, space and time available etc. The Judicial Trainer should plan in advance to divide the participants based on these considerations and on any information obtained in a preparatory session. However, the approach taken should be sufficiently flexible to allow for further adjustments *in situ* depending on particular circumstances.

SGD moderators

The Judicial Trainer may wish to identify a moderator within each group, preferably before the session, taking into account previous experience in delivering training, level of expertise, specialisation in the field of asylum, etc., thereby ensuring that he/she has adequate knowledge of the questions posed. This person’s role would then be to guide discussions in an efficient way without overly imposing his/her personal views. The moderator should encourage the members of the group to express their ideas and opinions on all the topics under discussion during the time allocated. Moderators ought to be provided with the list of questions before the SGD. This will enable the Judicial Trainer to prepare the sessions in conjunction with the moderators. Moderators should not disclose the questions to the other members of the group in advance of the session.

Implementation of the SGD

During the session, the Judicial Trainer provides the participants with information on the purpose and the objectives of the SGD. The composition of the groups, the identity of the moderator, the duration and the location should be available at the start of the session. The moderator presents the questions for discussion to the group and agrees on the order in which to approach them and how to inform the plenary on the outcome of the discussions. This can be done by the moderator, by a member of the group, each member of the group can inform the plenary regarding one/more topics etc. During the SGD, the Judicial Trainer’s role will be to supervise the overall exercise and to ensure that the moderators fulfil their role properly. This also entails ensuring that the participants are actively involved in the discussions and that all the topics are covered within the time allotted without adversely affecting the flow of the discussions.

Presentation of the outcomes and discussions with the plenary

The Judicial Trainer will suggest the order in which each group will present the outcome of discussions. The group moderator is requested to encourage participants to make use of the Decision Tree during their deliberations and when reaching a decision. This takes into account the necessity to ensure a certain synergy between the topics addressed. Each group should present their conclusions after a pre-determined period of time. After each set of conclusions has been presented, the Judicial Trainer will give other groups the opportunity to comment. At the conclusion of the session, the Judicial Trainer will ensure that any conclusions drawn are discussed and refined by reference to the Judicial Analysis, including the Decision Tree. This last step is crucial in order to further continuity in the judicial decision-making process.

5.5.4. Case studies

Case studies are a form of problem-based professional development tool which are particularly useful for members of courts or tribunals as they reflect the actual roles of such persons in the appraisal of international protection needs. They can contribute to the development of common practices based on furthering common interpretations and applications of concepts. Moreover, they are well suited to enhancing the dialogue between members of courts and tribunals who, during the exercise, are required to solve certain situations by working together and considering different opinions, methods, and perspectives. Not only does this have a palpable benefit in terms of individual professional development but it also serves to strengthen contacts between members of courts and tribunals from diverse instances, courts and regions.

Types of cases

A case study may be based on a real situation or any amalgam of situations. The outcome may, in principle, be already known.

- A *problem case* or *decision case* may be used. Participants must identify and analyse a problem, consider a decision-strategy and make a decision.
- Alternatively a *case history* may be employed. A full description of a (problem) situation is given to the participants, including the solution. After that, they:
 - Must explain the content of the case.
 - And/or explain why this solution is chosen.
 - And/or determine the suitability of the chosen solution.

Variations on problem cases are:

- *In basket case*: (relevant and irrelevant) materials have to be sorted under time pressure.
- *Action maze*: the case is divided in pieces, as a result of which decisions constantly have to be made during the process.
- *Critical incident*: the last but one stage of a situation is discussed. Participants are asked to analyse the situation, to indicate what additional information they need and ultimately take a decision.

Developing a case — general considerations

Writing a case study often requires investing time researching and compiling information. This will depend on the experience of the Judicial Trainer and the resources at hand. It goes without saying that the quality of the case study will influence the quality of the analysis made by the participants. The complexity of the case will depend on the information/idea(s) to be conveyed. The information given to the participants about the case has to be structured and is generally presented in a chronological order. The key actors have to be introduced and the objectives and challenges need to be defined. A good case study will make the participants think critically about the information provided and assess the situation very carefully before reaching a well-reasoned decision.

When preparing a case study, the Judicial Trainer should focus on why and how to apply a certain concept not on remembering facts and details. Nonetheless, using details can make the difference in choosing or not a certain solution for the case and thus they help the Judicial Trainer to stress a particular point of interest. The Judicial Trainer should make sure that he/she provides the right data to allow participants to reach appropriate conclusions. The answer to the case study should not, however, be obvious or too easily discerned. The Judicial Trainer would be well advised not to use cases that have already been decided upon by courts and tribunals and that are very likely to be familiar to the participants. Where more than one case is used, the Judicial Trainer should seek to balance their levels of complexity. Two equally complex cases are time consuming and may affect the implementation of the other tools which succeed in the session.

Step by step plan to develop a case study

1. Identify the learning outcome of the case study:

What knowledge, skills and competences should participants have developed by participating in the case study exercise?



2. Prepare the case:

- What should be the content of the case?
- Will you be provided with the case or will you draft it yourself?

Describe a practical situation which is recognisable for your participants. The fact that the audience is mixed (i.e. members of courts and tribunals of different levels of jurisdiction) should be taken into account when drafting the case.



3. Determine the complexity of the case according to three dimensions:

- Analytical (do the participants have to find the solution themselves?)
- Conceptual (is the underlying information known or not?)
- Presentation (should the information be presented in a structured or unstructured manner?)



4. Define a case plan:

- Determine the necessary steps.
- Determine which data is required.
- Determine from whose perspective (or perspectives) the case will be examined.
- Determine how to gather the necessary data.



5. Gather the necessary information and analyse it.



6. Design assignments:

- Design assignments and plan your case discussions.

Don't forget to consider your learning outcomes, for instance:

- Acquiring new knowledge in practice.
- Enabling participants to acquire new competences such as problem solving in relation to a specific situation. This can be achieved by allowing the participants to analyse the problem and suggest a solution.



7. Design/establish:

- The case scenario.
- The case dossier: all the documents which the participants will receive.
- The way in which participants will be supported (i.e. does the Judicial Trainer provide supportive input, what other sources/means of support may be open to participants?).
- The procedural course of action regarding reaching an outcome (will the case be judged using some form of evaluation? If yes, how?).



8. Revive the case, for instance by:

- Using the active voice of a verb.
- Offering information through verbs.
- Varying the structure and length of sentences.
- Giving actual information
- Adding quotations from documents and hearings.
- Showing how different persons or authorities look at the event.



9. Formulate instructions for the participants:

- Provide a good introduction.
- Which information is relevant for the assignments?
- Which role(s) do the participants fulfil?
- Do the assignments have to be carried out in steps or as a whole?
- Do the participants have to search for information, and if yes, where can they find it?
- How much time do the participants have to perform their assignment(s)?
- How should the participants present their results? In writing? On a flip chart? An oral presentation?

Duration of a case study session

Depending on the factors mentioned above, the Judicial Trainer should estimate the duration of the case study session in order to be able to properly fit this tool within the agenda of the meeting. Usually, this type of session takes between 60 to 90 minutes. Although a longer session is possible, they often run the risk of being counter-productive.

Complying with confidentiality requirements

As case studies reflect real-life scenarios, data protection concerns must be respected. Such issues shall be dealt with according to the prevailing national rules.

Use of a case study

In order to effectively participate in a case study, participants could be divided into groups, whereby the size of the individual groups will depend on the overall number of participants. Within these groups, it is recommended to mix members from different courts and tribunals taking into consideration specific aspects, inter alia, geographical representation, different types and levels of jurisdiction, experience in the field of asylum etc. The Judicial Trainer should aim to structure and direct the discussion, using, where appropriate, the questions conceived as part of the preparations for the case studies and ensuring that the aspects to be considered are adequately reflected. The Judicial Trainer also plays an advisory role as an expert on substantive queries of law or interpretation.

Outcome of a case study session and reporting to the plenary

If the participants are divided into groups, each group will decide what and how they will present their final conclusions and the solution to the plenary. The Judicial Trainer should seek to ensure that each group explains very clearly the methods and steps which it used to reach its conclusions and ultimately to adopt the solution(s). This process should make reference, where appropriate, to the Judicial Analysis and aim to draw on the information provided in that document. The Judicial Trainer should allow each group to express their point of view concerning the case studies solved by the other groups. To that end, each group may nominate a person on ad hoc basis or before the plenary. Having more people from the same group expressing a point a view can be useful for the meeting but the Judicial Trainer must ensure that adequate time is apportioned to each group. Simply propagating a particular point of view as right or wrong should be avoided; the Judicial Trainer is encouraged to make every attempt to guide discussions.

5.5.5. Role play

A role play provides a good opportunity to simulate a situation in which a particular problem or a conflict situation is handled in a realistic manner and in which it is often possible to challenge perceptions previously held by participants or to acquire and practice new skills. The participants are assigned a specific role to play with limited instructions on the nature and extent of the role. They must then play out the scenario, trying to imagine themselves in the situation of the person they are playing. This provides scope for the participants to react spontaneously, making use of one's own thoughts, motives and feelings.

Although the participants are free to fill their role as they see fit, certain details relating the role to be played are decided in advance and it is not permitted to depart from this information. Situations that favour the use of a role play could be:

- the handling of some complaints concerning the procedure in court;
- conducting a hearing to clarify the personal circumstances of the applicant in cases of indiscriminate violence present in the country of origin; dealing with evidence, including lack, insufficient or contradictory country of origin information;
- assessing the situation of persons with special needs in specific contexts etc.

Participants might conceivably be requested to play the role of a judge, prosecutor/State advocate, claimant/appellant's advocate, appellant, intervener, witness etc.

Role play can be commonly used to:

- Practice skills, e.g., questioning.
- Create awareness of the motives of other — attitude building.
- Learn problem solving.

Role play requires careful structuring of the preparation, performance and discussion afterwards. To make a role play work well, the group of participants should not be too big. While some participants will play the roles, others will act as observers, albeit with defined tasks and specific matters for consideration.

The preparation

Some points to note during the preparation include:

- Choosing a problem or (conflict-)situation

The Judicial Trainer must ensure that the situation is suitable for role play. The situation should not be too abstract and must be related to the work situation of the participants. It should be realistic and easily understandable.

- Defining and describing the roles

The roles should be realistic and should not be a caricature. It is important to fine tune the roles and to describe the relations between the roles in the role description. The Judicial Trainer should provide the participants with sufficient information. He/she can also choose to verbally brief the various participants. The Judicial Trainer should agree with the participants in advance that respect must be shown for each other's interpretation of the various roles

- Making a sketch of the situation

The situation sketch defines where the situation takes place, what is the precise nature of the (problem) situation, etc. Participants who are not taking part in the role play can observe the play by specific assignments.

The role play exercise

Facilitating a role play is an intense activity. When facilitating a role play, the Judicial Trainer's role changes somewhat to that of a process supervisor. Some suggestions for the performance of this exercise are:

- Provide a short explanation of the role play: Introduce the problem/situation, roles, background information in as much detail as necessary;
- The Judicial Trainer can try to ensure that the situation has been understood by asking the participants to share their experiences from similar situations or by briefly discussing the situation;
- Inform the participants of the aim of the role play;
- Ensure that participants are not compelled to participate but to encourage them to do so by invitation. 'Would you like to try?' sounds different than 'You will take this role'. The Judicial Trainer should allow participants, if possible, to choose their own role. He/she should take into account that some participants may feel uncomfortable or insecure participating in a role play;
- Ensure everyone accepts that a participant (not an observer) is entitled to interrupt the role-play for good reasons;
- Be aware that the role play is a means and not an aim in itself. It is useful to instruct participants that, although they begin in a certain role, this role does not have to be maintained slavishly or to the point of absurdity. Gradually, as they gain in confidence, participants can add their own slant and interpretation to the role they are playing;
- Give participants the opportunity to prepare their role and imagine themselves in the situation;
- If some participants are observing the role play, the Judicial Trainer can give them specific observation assignments;
- The Judicial Trainer should choose a position in the room that gives him/her a good overview of the role play. He/she must be directly approachable and be capable of intervening if necessary. The participants also should have a good view of all persons involved in the role play situation;
- The Judicial Trainer should stay alert during the role play. He/she should only correct the participants if they are wandering away too much from the subject. In general, the Judicial Trainer can end the role play when the situation has been dealt with from different perspectives angles and no new information is being added by the participants.

The discussion following the role play

It is essential to have a plenary discussion with the participants, the observers and the Judicial Trainer upon conclusion of the role play. This enables participants to reflect on the experience and digest what has happened. Open questions such as 'How do you feel the exercise went?'; 'Where did problems arise; what were they?'; 'How did you experience your role?'; 'What knowledge have you gained from the exercise?' etc. should be put to the individuals and to the group and can guide the discussion. In this way, participants can be encouraged to share information and their experience(s) with the rest of the group and diverse point of views will be brought forward. It is worth taking sufficient time for this part, especially in situations where the discussions have been emotional or otherwise challenging.

5.5.6. Moot courts

A moot court consists of engaging in an elaborated debate within a framework similar to a court hearing on a specific case. A panel of participants assumes the role of judges and is asked to make a ruling (generally on appeal) on a decision of a lower instance. The other participants meanwhile prepare the arguments to be advanced on behalf of the parties to the proceedings. This will generally include a State body, the applicant for international protection and, in some cases, a third party intervener. The basic facts of the case must be established in advance. They cannot be disputed and, unless resources and time constraints permit, witnesses cannot be called to testify. The parties must remain focussed solely on the interpretation and application of the legal provisions in the decision of the lower instance as well as the adherence to procedural requirements. [See Annex 3 for a moot court case example.](#)

How to develop and conduct a moot court

1. Identify the aspects to be considered in the session: Which issues raised in the Judicial Analysis should the participants consider in the session? It is possible to deal with a range of (linked) issues during the moot court and the Judicial Trainer is free to decide on the complexity of the case.
2. Select a real case or draft a suitable hypothetical situation: The case has to be relevant to the aspects to be considered in the session. The Judicial Trainer of the moot court should then prepare a fact scenario which includes information on evidence submitted before the lower court and the content of its decision. It is often

necessary to also develop a limited amount of country of origin information related the particular situation in the claimant’s country of origin. This is particularly so in relation to situations of generalised violence.

3. Prepare a set of rules for the hearing before the court: The rules can be inspired by the national rules on procedure before the court if this does not preclude the proper implementation of the session. General aspects that should be taken into consideration when developing the rules include:
 - The facts of the case are to be taken as having been already established by the lower court. No arguments can be made as to their accuracy;
 - The order in which the parties will present their oral submissions should be set out in advance of the moot court and made available to all participants. Generally, it is advisable to allow the claimant to make submissions first, followed by the State and then any third party interveners. If further submissions are deemed necessary and would further the aim of the moot court, the State may be called upon again, followed by the claimant;
 - The court may question the representatives on any aspect of their pleadings. Participants are expected to answer on the spot. Nevertheless, the court may give them the possibility to benefit from a brief second round of consultation on the questions posed if it deems necessary. Although the court has this prerogative, it should exercise it judiciously and avoid excessive interruptions;
 - Oral arguments must be limited to specific time constraints. The judges have the power to extend these limits if necessary but only for very limited duration;
 - Groups may wish to reserve speaking time to rebut the arguments of the other party;
 - After hearing the arguments of the parties, the panel of judges will deliberate and make a decision on the case within the time limit allocated.
4. Estimate the duration of the session: This will depend on the complexity of the case, content of materials, number of participants, the rest of the agenda for the professional development activity etc. It should include the time needed to make organisational arrangements, to prepare the oral arguments, to deliver them before the court, to deliberate and present the reasoned decision, to inform the participants of the decision made and to discuss it in the plenary. The Judicial Trainer should establish appropriate time limits for each part of the session and he/she is responsible for ensuring that the participants adhere to them.
5. Divide the participants in 3 groups:
 - The judges — will make the decision on the appeal (preferably consisting of an uneven number of members);
 - The representatives for the claimant — will provide arguments on behalf of the claimant. These are usually aimed at overturning the decision of the lower court;
 - The representatives of the State — will provide arguments on behalf of the State. These are usually aimed at having the decision of the lower court upheld;

The Judicial Trainer can divide the participants before or during the professional development session, taking into consideration the preferences of participants. Each group should choose one or more representatives to present the arguments before the court. The judges’ group should designate one member to chair the hearing. If possible some participants could be involved in the process of developing the moot court session. In this case, they should be included in the panel of judges. It is also possible to create a fourth group if the number of participants requires this and it would serve to advance the purpose of the moot court session. Third parties may be involved in the moot court session as independent bodies or to support the arguments of one of the two parties depending on the case and the applicable legislation in the Member State or Associated Country (UNHCR, NGO’s, learned academics etc.).

6. Provide each participant with the factual account and the rules for the hearing before the court: This information can be provided in advance or on the day of the professional development activity. Make sure that all participants have understood their roles as well as the procedure to be followed in the moot court.
7. Conduct the moot court hearing: The Judicial Trainer will ensure that each step is followed according to the rules of procedure established and that time limits for each segment of the moot court session are complied with, except in situations where the panel of judges decide to proceed otherwise based on relevant arguments.
8. Discuss the results after the court has delivered its decision: After the decision is made, the Judicial Trainer will assist in the subsequent discussion of the exercise. This should be limited in time but should offer the opportunity for participants to state their views both on the case and the way in which the moot court was implemented.

5.5.7. Other

The Judicial Trainer should consider using other specific tools if available at national level and if they serve as an efficient means to reach the objectives of the professional development activity.

6. Do's and don'ts during the session

Given that facilitating professional development activities may not be a regular occurrence for the Judicial Trainer, he/she may find moderating discussions between other members of courts and tribunals a challenging experience. Here are some suggested 'Do's' and 'Don'ts' that might be a useful reference:

Do

- State the learning outcomes that should be achieved by the conclusion of the activity;
- Outline the structure and agenda of the meeting and clarify any uncertainties;
- Explain your role as the Judicial Trainer from the beginning of the session;
- Ensure that all participants are introduced to each other;
- Make every effort to create an environment in which all participants feel comfortable raising points for discussion and asking questions;
- Attempt to identify participants who can help you throughout the facilitation process, e.g., as group Judicial Trainers, rapporteurs for a specific task, etc. The information obtained on each participant prior to the training can be particularly useful in this respect.
- Ensure that discussions are focused to the question/issue being discussed. Try to avoid becoming bogged down on irrelevant aspects;
- Try to stick to the agenda as much as possible. Where changes are needed, consult with the participants and try to reach a broad consensus;
- Together with the participants, draw conclusions after each activity in the session;
- Ask participants to evaluate the session. Providing a questionnaire can help to achieve this aim.

Don't

- Provide too much information at one time. This can be overwhelming if participants are not familiar with the matters being discussed. Avoid using too many or excessively long/complex case studies. Pay particular attention to the time allotted for the respective activity;
- Engage in dialogue with only one part of the participants' group to the detriment of others outside of the discussion;
- Plan to implement too many (different) activities within a short time span;
- Direct the discussions purely on the basis of your own understanding of the subject. Reference should be made to the Judicial Analysis and cognisance taken of diverse points of view;
- Use only non-interactive professional development tools (e.g. lectures);
- Forget the importance of coffee breaks during the session.

7. Role of EASO

EASO is interested in continually developing and adapting the tools available for members of courts and tribunals. It would be useful for this purpose if the Judicial Trainer of the national meeting would be willing to provide some feedback. In particular, what aspects could be improved and what elements should be amended or avoided entirely? EASO will compile this feedback and use it to further shape the existing tools and to develop new ones.

8. Case examples/scenarios

Apart from providing Judicial Trainers with general guidance on organising professional development meetings at the national level, this note also provides practical support regarding different tools by suggesting examples of cases or scenarios illustrative of different matters discussed in the Judicial Analysis (Annex 2). These cases can

be used in a variety of ways, ranging from a quick way to illustrate a point that ought to be emphasised during a presentation to an extensive moot court exercise with multiple participants and a complex set of facts. Judicial Trainers are not obliged to make use of the examples provided in this section; rather, they should aim to develop cases or scenarios considering this note as well as the situation at national level. The case examples and scenarios should be adapted as required to better express a certain point in the analysis. The case examples and scenarios have all been developed in light of the learning outcomes to be achieved by the participants.

Annex 1 — Example questions for discussion by reference to the Judicial Analysis

- What is your role when applying Article 15(c) QD in relation to CJEU and ECtHR case-law?
- To what extent do your national courts and tribunals take into account decisions of national courts and tribunals in other Member States?
- How would you construe the concept of international armed conflict after *Diakité*?
- Please indicate some countries/part(s) of territories of countries (regions) where at present you consider there is a degree of indiscriminate violence that might arguably be of such a high level that an individual would face a real risk solely on account of his presence? Is there a general consensus in your country or at the level of your court that a certain country (or region) fulfils this condition? If not, why?
- Where only one armed group is confronting the general populace does this situation fall within the meaning of internal armed conflict?
- Should ‘collateral damage risk’ in the framework of indiscriminate violence be taken into consideration when assessing the application of Article 15(c) QD?
- According to your experience, which form of violence (general violence or targeted violence) is more common when granting subsidiary protection? For which countries? For which categories of persons?
- Do you agree with this statement: *‘The general threats to life that are purely a consequence of an armed conflict — for example, through a resulting deterioration in supply conditions — cannot be included in the assessment of the density of danger.’?*
- Does indiscriminate violence which affects civilians need to be directly caused by combatants participating in the conflict?
- What is your understanding of the term ‘civilian’ when considering who ought to be categorised as a non-combatant?
- Do you think that the term ‘civilian’ should exclude all members of the armed forces, reservists and police?
- Is membership of an armed group sufficient to exclude a person from civilian status? Please list possible indicators of civilian status.
- If someone was previously a civilian or combatant/fighter will that necessarily establish whether he/she will be (or be perceived to be) a civilian or combatant/fighter on return?
- In case of doubt whether a person is a civilian, how should that person be considered?
- Does an applicant who has been forcibly enlisted as a soldier/fighter thereby lose civilian status? Would this situation be any different in respect of child soldiers?
- How can an applicant achieve the ‘individualisation’ necessary to show that the threat is ‘individual’?
- Is the risk to ‘life or person’ confined to a real risk of suffering harm that violates non-derogable rights or does it extend to cover also important breaches of qualified rights of an applicant?
- Is the harm that could affect an applicant restricted to physical harm or could it also be psychological or mental? If the latter, to what extent?

- Do you use specific indicators to assess the level of violence? Which ones?
 - What assessment of the level of violence do you make in cases of the use of heavy weapons, artillery and air bombings?
 - What assessment of the existence of a high level of violence do you make in cases of the use of IEDs (Improvised Explosive Devices) and targeted assassinations?
 - Other indicators? Do you collect and use COI on the numbers of victims for your assessment? On IDPs? Socio-economic situation?
 - How useful do you find the non-exhaustive list of possible indicators set out in the Judicial Analysis (para. 2.2.4)?

- Which factors must be taken into account when deciding the location of an applicant’s home area as a destination of return?

- How do you apply the internal protection alternative in case of indiscriminate violence (only for Member States that apply the relevant provisions on internal protection alternative)?

Annex 2 — Suggested case examples/ scenarios for analysis by reference to the Judicial Analysis and the Decision Tree

Judicial Trainers are strongly encouraged to make use of practical case studies as part of their professional development meeting. The scenarios in this Annex are suggestions for possible case studies that might be used in this way. Prior to the training, the national Judicial Trainer should prepare outline answers, making sure to include reference to the Judicial Analysis. These answers will be useful to the judicial trainer in guiding the group discussions and should be provided to participants at the end of the session. Such answers should not necessarily aim to provide a definitive solution to the issues raised. They should, however, be drafted in full consideration of the information and approach to interpretation provided in the Judicial Analysis. Cognisance must also be taken of relevant matters of national law that may affect the decision-making process. Finally, participants should be encouraged to apply the methodology contained in the Decision Tree during these sessions.

Examples I-IV: simple scenarios highlighting specific issues

Example I. Issues addressed:

- The meaning of ‘armed conflict’ in light of *Diakité*.

Fantasia is highly unstable and statistics show that many civilians are being killed in riots, disturbances and localised violence. It is beset by riots and insurrections resulting in a very significant number of civilians being killed in the past 12 months: 30 000 out of a population of 30 000 000. However, almost all of the violence is in the form of spontaneous outbreaks and no armed group has a command structure or exhibits a minimum level of organisation.

Questions: Is there an armed conflict in terms of International Humanitarian Law? If no, following on from *Diakité*, is there an armed conflict in terms of Article 15(c) QD?

Reference: See section 1.2.1. ‘Internal armed conflict’ in the Judicial Analysis (pp. 10-12).

Example II. Issues addressed:

- To what extent the effects of targeted violence directed against the civilian population can engage Article 15(c) QD.

In the current conflict between Lisa and Rafa there have been reports of Lisa sporadically targeting mosques in Rafa which they believe to be used for terrorist purposes (i.e. containing caches of weapons).

Question: Under what conditions do you think that this situation would engage the application of Article 15(c) QD in the case of an asylum seeker from Rafa?

Reference: See section 1.3.4. ‘The role of targeted violence’ in the Judicial Analysis (p. 14).

Example III. Issues addressed

- The level of violence
- The connection between the conflict and fear of serious harm

Absalia and Bendalia which border each other, are both experiencing armed confrontations between government and insurgent armed groups. Both countries are similar in virtually every aspect e.g. size, geography, topography, population (approx. 10 000 000 in both cases), standard of living etc. and the statistics relating to the number of civilian casualties are the same, ca. 3 000. However, unlike in Absalia the nature of the violence experienced during the conflict in Bendalia is particularly brutal in the way that civilians are targeted and killed (e.g. routine beheadings), contrary to norms of international humanitarian law.

Question: Would you come to the same conclusion on Article 15(c) QD in respect of applicants from both countries?

Example IV. Issues addressed:

- Application of the sliding scale in assessing the level of violence

Ms Apple is a young woman from Mizango. She left the country to seek economic betterment. A few years before she had left she was raped by rebel soldiers in her home area. In addition, her parents were killed in an internal armed conflict and she has no family connections. In her home area, the level of violence is not exceptionally high but it can still be described as bad.

She does not qualify simply because she is a civilian but under the sliding scale her personal circumstances are:

- (i) *A woman*
- (ii) *No family*
- (iii) *Suffered in the past sexual violence from soldiers*

Task: Consider whether she may still then qualify and how the sliding scale may apply.

Reference: See section 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31) in the Judicial Analysis.

Examples V-XIII. — More complex scenarios highlighting multiple issues.

Example V. Issues addressed:

- Identifying instances of refugee protection in comparison with subsidiary protection;
- The real risk of persecution in internal armed conflict situation;
- The distinction between Article 15(a), (b) or (c) situations

In the independent state of Newland there is currently an internal armed conflict between State forces and an armed group. The armed group has recently gained control over half of the country. There are no reasonable possibilities for the civil population to move from the part controlled by the armed group to the other part under the authority of the State forces. The armed group represents an extremist religious point of view and the part of the territory they control has a population that is predominantly of another faith. There have been incidents of the larger population being forced to convert if personal religious affiliation is known or publicly exposed. In addition, men are obliged to fight for the armed group. If they refuse female members of their family are physically abused and are often killed. State authorities have been known to use drones to attack the armed group’s positions and several incidents have occurred when civilians have been killed or injured.

Anton is married to Barbara. Anton has recently converted to the majority religious group but he does not expose his religious affiliation in public. He has been summoned by the armed group to join them in the fighting but this is against his belief. Anton and Barbara fled the country and requested asylum in your country. Anton claims that he will be forced to join the armed group against his belief and that by refusing he will risk his life. Barbara claims to have been physically abused by the members of the armed group for no specific reason. Their home was destroyed during a drone attack. In the same incident, Anton’s parents were killed together with 100 other persons.

Questions: Which forms of international protection could be granted in this case? To whom? Why?

Reference: See the section in the Judicial Analysis dealing with the context of Article 15(c) QD in deciding applications for international protection (p. 8).

Example VI. Issues addressed:

- The role of different stakeholders in the assessment of the conflict in the country of origin;
- The meaning of ‘armed conflict’ in light of *Diakité* and how this is to be applied in practice;
- Specific indicators that may be used in assessing the level of violence;
- The distinction between targeted and indiscriminate violence;
- The assessment of the civilian status taking into consideration all particular circumstances that may occur in practice;
- The application of the *Elgafaji* test.

The State of Syldavia has known years of gradually increasing unrest leading to an uprising in the Southern region last year. The current situation in Syldavia is as follows:

Northern Syldavia (where the capital Syldavia City is located) remains under tight governmental control and is free of armed combat, though government buildings are the targets of frequent suicide attacks resulting in large numbers of collateral casualties.

Southern Syldavia is prey to intense fighting between rebel groups and the regular armed forces which lost control of several towns and cities in the region. The army is fighting back using aerial bombing on rebel cities causing wide destruction and mass displacement of populations. Rebel groups are equipped and funded by the neighbouring state of Borduria.

The Syldavia authorities made the southern region inaccessible to international organisations and NGOs. Media reports very high number of casualties, displaced persons and regular violations of basic human rights.

Questions:

Armed conflict

- In your Member State, who is entitled to assess whether there is an armed conflict in Syldavia? (e.g. court, COI unit, foreign affairs etc.)
- Do you have enough information here to make such an assessment?
- If so, would you find that there is an armed conflict in Syldavia?
- If so, would you consider that this armed conflict concerns the whole territory or parts of it?

Indiscriminate violence

- Do you have enough information to assess the level of violence in Syldavia?
- If not, what indicators are missing?
- Do you find that the situation in Syldavia meets the threshold of indiscriminate violence?
- Would you make a distinction between the situation in Northern and Southern Syldavia?

Civilian

Please consider if the applicants below would qualify as civilians under your interpretation of Article 15(c) QD:

- Diego comes from Southern Syldavia and has repeatedly refused to join the rebel groups but has occasionally agreed to shelter fighters;
- Trifon, resides in Northern Syldavia and is a member of the L.S.A., the political wing of the rebel insurrection. The L.S.A. was banned after the beginning of the uprising;
- Margarita resides in Syldavia City where she is a chief doctor at the military hospital.

Serious and individual threat

Please consider if the following applicants would qualify within the scope of Article 15(c) QD:

- Diego left Syldavia after the destruction of his village by the armed forces in retaliation for hosting some rebel fighters.
- Margarita left Syldavia after she lost her entire family in a suicide attack in Syldavia city;
- Trifon left Syldavia having been tortured by the state police for his political activities in Syldavia city, trying to raise awareness for the situation in the South;
- Zineddine left Syldavia after his shop, located in the Southern region, had been robbed repeatedly by local gangs.

Reference: See the following sections in the Judicial Analysis:

- 1.2. ‘Armed conflict’ (pp. 10-12);
- 1.3. ‘Indiscriminate violence’(pp. 12-14);
- 1.5. ‘Civilian’ (pp. 15-19);
- 1.6. ‘Serious and individual threat’ (pp. 19-21);
- 2.2. ‘Assessing the level of violence — a practical approach’ (pp. 26-29);
- 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31).

Example VII. Issues addressed:

- The distinction between targeted and indiscriminate violence;
- To what extent the effects of targeted violence directed against the civilian population can engage Article 15(c) QD.

Northland is at war with Southland. They share the same island that is 1 500 km away from the mainland. According to footage presented by a reputable news agency, Northland has successfully tested a chemical weapon in the past and its leader has publicly stated that he will not hesitate to use it if necessary. Southland has started using air bombing to force Northland to capitulate. They target public institutions, hospitals, schools and transport infrastructure. Some of the population in Northland living at the common border is seeking refuge in Southland and they have been accepted due to their common roots. Huy, who was a farmer in Northland and lived at the common border before leaving, is seeking international protection in your country. There is some evidence that Northland is going to use the chemical weapon in Southland and experts suggest that its effects could extend beyond its own territory at the border.

Questions:

- Do you think that situation in Northland would engage the application of Article 15(c) QD in Huy’s case?
- If not, how would the circumstances need to be different to reach this result?
- Would you agree with this statement: ‘Northland is facing targeted violence and is at risk of indiscriminate violence’?

Reference: See the following sections in the Judicial Analysis:

- 1.3.3. ‘Typical forms of indiscriminate violence in armed conflicts’ (p. 14);
- 1.3.4. ‘The role of targeted violence’ (p. 14);
- 2.2. ‘Assessing the level of violence — a practical approach’ (pp. 26-29);
- 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31).

Example VIII. Issues addressed:

- Compliance with the geographical scope in evaluation;
- The effects of the internal armed conflict in the light of Article 15(b) and (c) QD;
- The real risk of being exposed to serious harm.

In Nunia there is an armed conflict between the State and an armed group who has control over a part of the territory (the south). This results in indiscriminate violence in the central and southern part of the territory. The asylum applicant is a 33-year-old woman who comes from the northern part of the country. The State is using all the military and police forces from the north to fight the armed group in the centre and south. Consequently, armed gangs in the northern part of the country with no specific structural organisation have begun to prosper and the civil population is being largely exposed to violence (murders, sexual assaults, arson, destruction of property, etc.). Moreover, the gangs took control of the main supply sources and they distribute them arbitrarily to the population, mainly to children and elders. There is an international airport in the northern part of the country that is still operational.

Questions:

- Would you grant subsidiary protection based on Article 15(c) or Article 15(b) QD in this case?
- What if there is a strong commitment from the State to deploy armed and police forces in the northern part of the country in spite of the fact that the situation in the centre and the south is still very tense?

Reference: See Judicial Analysis section 1.8. ‘Geographical scope: country/area/region’ (pp. 22-25).

Example IX. Issues addressed:

- The level of violence
- The connection between the conflict and fear of serious harm.

The applicant Ahmed, applying for subsidiary protection status under Article 15(c) QD, is a 55-year-old male citizen of Lowland. He was born and lived in Lowland, River-Province before fleeing and arriving in an EU Member State. He was working as a taxi driver.

Lowland was dominated by a fundamentalist religious group, the Religious Fighters in Lowland (RFIL) for many years. They were pushed back by UN led forces in 2003 and lost control over the territory. Neither the United Nations Mission in Lowland (UNMIL) nor the recently installed government have (re-)gained full control over Lowland. Fighting between RFIL and foreign forces has never completely stopped.

Today Lowland has 28 000 000 inhabitants, 1 700 000 of them living in River-Province. Within the last three years 25 000 people have fled River-Province because of the deteriorating security situation. UNMIL reports 8 200 civilian casualties for 2013, including 2 750 deaths for Lowland. In 2012, 6 400 civilian casualties including 4 500 deaths were reported for Lowland. The casualties are the results of military fighting, bombings, suicide attacks and land mines used by RFIL.

Criminal attacks by RFIL and its supporters are rather common. They aim to destabilise the government and are to that extent highly successful. Police have more or less withdrawn from River-Province. Furthermore, hospitals and women at work have become RFIL’s targets. Many inhabitants of River-Province — including Ahmed — report a situation of fear and insecurity.

An NGO reports 1 900 incidents — without any further clarification — in context with the civilian population of River-Province for 2012 and 2 245 incidents for 2013.

Questions: Has the degree of indiscriminate violence characterising the conflict between RFIL and UN Forces reached such a high level that substantial grounds are shown for believing that a civilian returned to River-Province would face a real risk of being subject to threats to his/her life or person solely on account of his/her presence? If so, why?

Example X. Issues addressed:

- The level of violence
- The connection between the conflict and fear of serious harm

In Tarafa there is an armed conflict between the State and two armed groups (Stripes and Squares). The State army has been supported by international armed forces for seven years but they have decided to pull out within the next six months. In this context, the State will be using only airplanes to bomb the positions of the armed groups. These kinds of attacks often result in civilian casualties. Stripes is under the authority of a former State general and it is using weapons stolen from the State (including heavy artillery). Squares is a constellation of gangs dealing mainly with drug trafficking. They had an alliance in the past with Stripes but relations between the two groups have deteriorated. They use only light weapons but they outnumber the other group. Both groups share control of the northern part of the country. Their attacks are directed against the State forces. The civilian population from the central part of the country is heavily exposed to missile attacks and violent intrusions of the gangs from Squares. People who live in the southern part of the country, under State control, lack basic supplies due to the fact that they are located in an isolated mountainous area. The provisions can only be provided using the infrastructure from the central part of the country, which is seriously affected by the conflict. Due to the long confrontation, 23 % of the total population have been killed or injured and 29 % have been forced to move from the central and northern part to the south where there are shortages of supplies. In addition, a disease causing severe dehydration that could result to death or paralysis is affecting 12 % of the population living in the southern part of the country. Marius is an asylum seeker who lived in the southern part of the country but at the border between the central region and the southern part.

Questions: Would you grant Marius subsidiary protection based on Article 15(c) QD taking into account the general situation and the level of violence? Why?

Reference: See the following sections in the Judicial Analysis:

- 1.3.3. ‘Typical forms of indiscriminate violence in armed conflicts’ (p. 14);
- 2.2. ‘Assessing the level of violence — a practical approach’ (pp. 26-29);
- 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31).
- Affirmative, can serious harm be avoided by achieving internal protection in another part of the country?

Example XI. Issues addressed:

- The level of violence
- Compliance with geographical scope in the evaluation
- Internal protection and relocation alternative.

There is an indiscriminate conflict in some provinces in the independent state of Zergo. Fatima, a 22-year-old single female, comes from one of these provinces. According to COI reports, State authorities can only protect civilians in the capital city, Makul. The same COI indicates that single females are not permitted to work in Makul. Fatima has no other family members in Zergo except for a cousin who was married with a high ranked State official but they have divorced. The cousin lives in Makul, she is a citizen of a European country and she has been the President of a European NGO for many years in Makul.

Questions:

- Do you think that subsidiary protection can be denied based on the internal protection alternative?
- If her cousin would hire Fatima to work for the NGO would you factor that into your assessment of her application and to what extent?

Reference: See the following sections in the Judicial Analysis:

- 1.8. ‘Geographical scope: country/area/region’ (pp. 22-25);
- 2.2. ‘Assessing the level of violence — a practical approach’ (pp. 26-29);
- 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31);
- 2.4. ‘Geographical scope: country/area/region’ (pp. 31);
- 2.5. ‘Internal protection’ (pp. 32-33).

Example XII. Issues addressed:

- Identifying civilian status considering all particular circumstances that may occur in practice.

In the State of Torbola there is an internal armed conflict with widespread generalised violence but the level of the indiscriminate violence is not so high as to expose a civilian solely on account of his/her presence on the territory to threats to his/her life of person.

Enrico who is a doctor sympathetic to a national liberation guerrilla organisation involved in the conflict has been noted as saying that if returned to his country he will join them to assist the fighters by working as an 'army doctor'.

Question: Would Enrico be eligible for subsidiary protection based on Article 15(c) QD given his personal circumstances?

NB: In order to vary the exercise, it can be useful to alter slightly some of the facts, e.g. if he is not accorded a military rank or if the nature of his work is almost completely unrelated to military activities.

Reference: See the following sections in the Judicial Analysis:

- 2.3. 'Application of the sliding scale assessment' (pp. 29-31);
- 1.5. 'Civilian' (pp. 15-19).

Example XIII. Issues addressed:

- The serious and individual threat;
- The distinction between Article 15(b) and (c) QD cases.

The country of Zanzania can be said to be experiencing a State failure. One group, the Lions, is trying to gain control over the entire territory while another group, the Bears, has control over a part of the territory and fights for its independence. Masoud who is 50 years old lived in the territory controlled by the Bears where he had worked for 25 years as a civil engineer. According to the most recent COI reports, the Lions have been sponsored by neighbouring country Nukuma with heavy weapons, including long range missiles. The Lions have started to use the missiles against the Bears and the attacks have caused hundreds of deaths and injuries. Moreover, members of the Lions have often made incursions into the territory of the Bears. They mainly target people who are capable of fighting for this group. Masoud suffers from periodic panic attacks. The Bears is recruiting persons to fight against the Lions. There is information that people who oppose the recruitment are imprisoned. Some sources say the conditions in prisons are of a particularly poor standard with insufficient space, poor sanitation and hygiene and reports of regular incidents of brutality and arbitrary punishments from prison guards.

Questions:

- Do you think that Masoud's personal circumstances would make him eligible for protection on Article 15(c) QD grounds? From which perspective?
- If the answer is in the negative, would his personal situation fall within the ambit of Article 15(b) QD?

Reference: See the following sections in the Judicial Analysis:

- context of Article 15(c) in deciding applications for international protection (p. 8);
- 1.6. 'Serious and individual threat' (pp. 19-21).

Examples XIV-XVI. Complex scenarios highlighting a full range of issues**Example XIV. Issues addressed:**

General situation in High Tandu Region: Since 2003, an armed rebellion, which is rooted in the political and economic marginalisation of High Tandu Region, is being fought against Djambi government forces. It has generated widespread repression, violence against civilians, members of different ethnic groups, and scorched

earth policy. It has resulted in 200 000 deaths, 2 600 000 displaced persons and 200 000 refugees in the State of Woodland. Despite the signing of the High Tandu Peace Agreement in May 2006 and Doban for Peace in High Tandu Document, which was passed on 14 July 2011, the violence has persisted. The armed rebellion is composed mainly of three rebel movements: the Movement for Equal Rights (MER), the Army for the establishment of peace (AEP) and the Liberation Forces of Djambi (LFD). Their national policy statement programme intends to ensure greater equity in power-sharing and wealth between the centre and the periphery. The conflict between the centre and the periphery overlaps more localised conflicts between different tribes, predominantly related to land disputes or access and control of natural resources. The Djambi regime exploited tensions between tribes to rally the 'red' tribes in its fight against the rebel movements compounds 'black' tribes.

Widja militia, composed of 'red' tribes and armed by the regime, is used in ground operations to attack rebel-held areas. During the conflict in High Tandu Region, the Widja multiplied abuses against civilians (scorched earth policy, massacres, rapes etc.). The deteriorating economic situation is mainly due to the secession of West Djambi in 2011, which led to the loss for Djambi of $\frac{3}{4}$ of its oil production and half of its budget revenue. This shortfall is added to the considerable structural and cyclical economic problems that the country faces, resulting in higher prices for fuel and commodities. This has resulted in an increase in crime and tougher competition between communities for control over natural resources (arable land, minerals). Intercommunal clashes related to the control of natural resources have intensified in White Danil since the recession in mid-2012. They superseded the military conflict as the main cause of violence against civilians and displacement. A new outbreak of violence in High Tandu Region took place at the beginning of 2014. The economic situation is still poor, inter-tribal conflicts over natural resources have been exacerbated. Moreover, the security situation has continued to deteriorate because of attacks by armed groups and indiscriminate bombings perpetrated by government forces in the rebel areas, which have multiplied since the beginning of the year. Finally, the deployment of Frossa (a militia loyal to the government) in High Tandu Region has led to multiple abuses against civilians and their landed property and villages. The deteriorating security situation fosters the development of organised crime. The delivery of humanitarian aid is difficult because of the volatility of the security situation. The actions of the World Food Programme were affected several times by robberies and attacks in different parts of High Tandu Region.

Situation in Guimove region: In 2013 violent clashes occurred between tribes, sometimes joined by paramilitaries, linked to a dispute over control of a gold mine craft resulting in the displacement of 100 000 civilians. Six major communal clashes over natural resources, leading to clashes between government forces and armed movements and displacing 400 000 civilians were reported. Political rivalry between one of the main Widja militia leaders and the governor of the region led to multiple confrontations between their supporters in February and March 2014. The violence has killed an unknown number of victims and caused the displacement of about 50 000 people, the destruction and looting of more than 2 000 homes. March 2014 has been marked by clashes between rebel groups and the Djambi armed forces, displacing about 85 000 civilians. The clashes left 38 civilians dead and houses were burned. Also, the Frossa deployed since the beginning of 2014, has carried out attacks against forty cities. 25 000 people were forced to flee violence and abuses by the Frossa (rape, looting, burned homes etc.). Between January and June 2014, more than 51 500 new IDPs were registered in the Guimove camp and over 23 700 others made their way to nearby regions. The World Food Programme was especially targeted by attacks at the beginning of 2014, jeopardising the delivery of humanitarian aid. Warehouses were broken into on three occasions in two months (February and March 2014). Moreover the WFP endured two burglary attempts. Several attacks were also noticed.

Information on Goba ethnic group: Goba, a black tribe, predominantly lives in white Danil region. A minority lives in the capital of Djambi, where they suffer discrimination because of their geographical origin. Members of the Goba community, which dissociated from the oldest ethnic groups in High Tandu Region, didn't join the rebel movements. Consequently, they are not prime targets for abuses by government forces and Widja militias associated.

The application: The applicant comes from the State of Djambi, of which he is a national. He says he is a native of Guimove department in High Tandu Region. He belongs to the Goba ethnic group. He is 23 years old. He lives with his family and is a shepherd. On 12 November 2006, following an attack on his village by the Djambi army, assisted by Widja militiamen, he fled to the refugee camp of Abu Abu. But, following a further attack on 8 February 2008 on Abu Abu, he had to leave. He fled Djambi and sought refuge in the State of Faso on 12 January 2013 after crossing several countries. He lost track of his family and remains without news since then.

Questions:

- Would you grant the applicant international protection? On what basis? The Geneva Convention 1951? On what conventional grounds? Or does his claim come within the Article 15 QD?
- Can the applicant be described as a civilian?
- Can the situation in High Tandu Region be qualified as an internal armed conflict within the meaning of the CJEU case law?
- Can you qualify the situation of generalised violence in this region? Who are the authors of persecutions, violence etc.? What about the situation in Guimove department (generalised violence falling within the field of Article 15 of the QD)?
- How would you assess the level of violence in the Guimove department? What indicators can you use to assess the level of violence?

Example XV. Issues addressed:

- Distinction between a Refugee Convention case and a subsidiary protection case
- Application of Article 15(c)QD in relation to Article 3 ECHR cases
- Real risk
- Balance between the concepts of ‘serious and individual threat’ and ‘level of indiscriminate violence’ (the sliding scale)
- Difference between indiscriminate and targeted violence.

Gaga-Land was dominated by a fundamentalist religious group, the Religious Fighters in Gaga-Land (RFIG) for many years. In 2011 members of the military wing (MSP) of the Secularist Party (SP) started a revolt that resulted in the loss of RFIG’s control over Bambu-Province. Fighting with heavy weaponry between RFIG and SP supporters started in January 2011 and has never completely stopped. Neither the United Nations Mission in Gaga-Land (UNMIG) nor the MSP nor RFIG have (re-)gained full control over Bambu-Province. RFIG have control over the rest of the territory of Gaga-Land. Today Gaga-land has 10 000 000 inhabitants, 500 000 of them living in Bambu-Province. Within the last three years 25 000 people have fled Bambu-Province because of a deteriorating security situation. UNMIG reports 4 000 civilian casualties for 2013, including 1 200 deaths for Gaga-Land. In 2012, 3 000 civilian casualties including 2 000 deaths were reported for Gaga-Land. The casualties are the results of military fighting, bombings, suicide attacks and land mines used by RFIG and the MSP.

Criminal attacks by RFIG and its supporters are rather common. They aim to hit (especially female) fighters of the MSP as well as politicians of the SP. 40 members of SP were killed after they ignored warnings by RFIG and its supporters. UNMIG has more or less withdrawn from Bambu-Province and cannot ensure security in this region. Furthermore, hospitals and women at work have become RFIG’s targets. Many inhabitants of Bambu-Province — including Andrew — report a situation of fear and insecurity. Former inhabitants of Bambu-Province living abroad cannot return to other areas of Gaga-Land but to Bambu-Province. An NGO reports 1 900 incidents in context with the civilian population of Bambu-Province for 2013 and 2 245 incidents for 2014 (end of summer).

The applicant Andrew applies for subsidiary protection under Article 15(c) QD. Andrew decided to leave Gaga-Land because of the security situation He is a 55-year-old male citizen of Gaga-Land. He was born and lived in Gaga-Land, Bambu-Province before fleeing Gaga-Land and arriving in an EU Member State. He was working as a taxi driver.

The second applicant, Sara, is a 29-year-old female citizen of Gaga-Land, Bambu-Province. She is the treasurer of the SP. Sara was the victim of two physical attacks. The unknown criminals threatened to kill her if she did not refrain from actively supporting SP. Thus she decided to leave the country.

Questions:

- Would you grant international protection to either Andrew or Sara or both? On what basis? What personal circumstances support the application?
- Would you consider the situation in Gaga-Land to be an internal armed conflict within the meaning of the CJEU case law?

- Can you qualify the situation of generalised violence in Gaga-Land? What indicators do you use to assess the level of violence? What is the level of violence?
- Is internal protection a viable alternative to granting protection status?

Example XVI. Issues addressed:

- Distinction between a Refugee Convention case and subsidiary protection case
- Application of Article 15(c)QD in relation to Article 3 ECHR cases
- Real risk

Balance between the concepts of ‘serious and individual threat’ and ‘level of indiscriminate violence’ (the sliding scale)

- Difference between indiscriminate and targeted violence

Homeland, an independent State, is a small landlocked country with a population of 500 000. The population is predominantly made up of three tribes, the Blues and the Greens each with about 230 000 members and the minority Purples. The capital city, Greentown, is in the west and mainly occupied by Greens. The second city, Bluetown is in the east and mainly populated by Blues. The Purples are a pastoral people generally farming in the fertile central valley although with urbanisation of the main cities many have migrated both east and west.

For many years Homeland was ruled by General Gusto the former head of the armed forces who seized power in a military coup. Under the General’s command the rule of law prevailed and his ‘iron first’ policies ensured that dissidents and criminals were not tolerated. Any expression of dissent was put down swiftly and brutally. The Blues and Greens, despite having a history of conflict, lived together peacefully. The country prospered although there were numerous allegations of human rights abuses.

In 2013 General Gusto was forced from power following an invasion by forces from the neighbouring country, Awayland, assisted by Western logistics. The Awayland forces quickly withdrew and in April 2014 Homeland held its first democratic elections for many years. The Azure party, appealing mostly to the Blue tribe, won. It very quickly became clear that the new government were favouring the Blue Tribe over the Green and Purple with all the senior government positions going to Blues and government contracts being awarded to Blue dominated companies. Animosity between Blues and Greens, kept under control for so long by the dictatorial control of General Gusto, reignited and what started as small scale confrontations quickly escalated into more violent clashes.

By June 2014 both the Blues and the Greens had acquired heavy weaponry, some taken from the 2013 invasion, more from unknown sources. The quantity of weaponry available to each side is unclear. Both sides appear to have retreated to their traditional lands and have been shelling each other using medium range artillery. There have also been sporadic attempts by either side to advance on the other’s land. So far, these attempts have been rebuffed.

The Purple farmland forms a natural buffer between the 2 sides. Unfortunately the artillery fire goes across this and inevitably some shells fall short. Further the sporadic invasion attempts have affected the Purples because the fire from the defending forces resisting invasion is directed at the opposing forces as they cross the Purple land. There have been significant Purple casualties. In August 2014 there were reports of more than 100 Purples being killed or seriously injured by misdirected shelling. In early September there were reports of Purple casualties in separate incidents that may have been as high as 1 000. Many Purples have started to flee into the neighbouring Green or Blue lands. The Purples who do so are not being deliberately harmed by either side but they have no access to shelter, work or social services.

Adam is a 35-year-old citizen of Homeland and is from the Purple tribe. Until September 2014 he lived in the central area of Homeland with his wife and two children aged 10 and 7. He owned a small farm and was a reservist in the local defence force although he had not been called upon to do anything in this capacity other than take part in exercises during General Gusto’s regime. In September 2014 a misguided shell hit Adam’s farmhouse. His wife was killed. Three days later Adam took his children to his parents’ house a short distance away. He said that he was going to find somewhere safe to live and would get them to join him as soon as he succeeded. He withdrew all of his savings from a local bank (about USD 2 000) and travelled to Greentown airport where he bought a ticket for Euroland, the only European country not requiring prior entry clearance/ visa for Homeland citizens. On arrival Adam claimed international protection.

Adam's claim is refused by the primary decision-maker. The refusal notice says that Adam can return to his home. Although flights to Greentown have recently been suspended due to a perceived danger to aircraft there are still daily flights to Bluetown. Adam can go back to his home because although there continue to be many reported incidents of civilian deaths of members of the Purple tribe, the numbers killed or injured are not so great as to evidence individual threat to all members of the tribe. Casualties in October 2014 are thought to be in the region of 2 500 killed or injured. In any event as a member of the defence forces Adam is not a civilian. Finally, if Adam chooses not to return to his home it is not unreasonable to expect him to live in Bluetown where members of the Purple tribe are not endangered.

Adam appeals/request judicial review.

Questions with suggested possible answers (please note that the suggested possible answers are provided here as a guide to Judicial Trainers and to illustrate how such answers might be drafted. They are in no way definitive nor do they purport to provide any interpretation, binding or otherwise, of the legal situation):

– Does this claim engage the Refugee Convention?

See Judicial Analysis, Preface; Decision Tree A: It is imperative to start with a consideration of the Refugee Convention before any examination of entitlement to subsidiary protection. If the Appellant is a refugee within the definition of the Convention not only does he not need subsidiary protection he is not entitled to it (see Article 2(f) QD). In this case it does not appear that Adam falls within the provisions of the Refugee Convention. His fear is not of persecution but of serious harm, he does not suggest that he is being directly targeted, his fear is not based upon a Convention reason.

– If not, what other forms of international protection may be engaged?

Subsidiary protection under Article 15 of the QD.

– Is there an internal armed conflict?

See paragraph 1.2 of the Judicial Analysis; Decision Tree B1: Where the state's armed forces confront one or more armed groups or if two or more armed groups confront each other an internal armed conflict exists (*Diakité*). In this example the state is dominated by the Blues and there is armed confrontation between the Blues and the Greens. Both sides have heavy weaponry. It is not completely clear from the example whether the Blues can be described as 'the state's armed forces' but, even if they can not, there are two armed groups (the Blues and the Greens) confronting each other. This would seem to be sufficient to show that an internal armed conflict exists.

– Is the intensity of the conflict sufficient to engage Article 15(c) QD?

See paragraphs 1.2, 1.3 and 2.2 of the Judicial Analysis, Decision Tree B2: The QD aims to offer subsidiary protection to those civilians who are suffering from the consequences of an armed conflict so indiscriminate violence must be interpreted in a broad way with a practical approach. In this example there is little information about the intensity of the conflict other than that both sides are shelling each other with medium range weaponry and there are occasional incursions by the one side to the other side's land. Looking at the criteria in AM and AM (Judicial Analysis 2.2.1) the parties to the violence appear to be unconcerned about civilian casualties with the effect on the Purples being collateral damage. The numbers of Purple casualties, 1,000 in September rising to 2,500 in October out of a total population of 40,000 seem high. Arguably this is sufficient to engage Article 15(c).

– Is there a serious and individual threat in Adam's home area?

See paragraph 1.8 and 2.4 of the Judicial Analysis; Decision Tree C: Consideration of Article 15(c) requires an analysis of the geographical scope of the conflict. In this example the conflict may cover both the Blue and the Green land but the area affected by indiscriminate violence is the Purple's home area. If serious and individual threat has been found (see above) then the threat is in his home area.

– If so, is it reasonable to expect him to relocate?

See Judicial Analysis paragraphs 1.8.4 and 2.5; Decision Tree C: If there is part of the country where an applicant for international protection will be safe from serious harm and he can travel or be admitted to that part can he reasonably be expected to settle there? In this case there is no suggestion that Adam is in danger in Bluetown and that is the proposed destination of return so it appears that he can get there. The only question is where it is reasonable to expect him to settle there. He will have no access to shelter, work or social services. It may also be argued on his behalf that it is unreasonable for him to settle in Bluetown because to bring his children to join him there with no access to shelter and social services would be unacceptable.

– Is Adam a civilian?

See Judicial Analysis 1.5. To qualify for 15(c) protection an applicant must be a civilian. It does not appear that the approach to this question should be based on IHL. Indicators can be found in the Judicial Analysis at 1.5.7. Adam is a reservist, however he has never been called upon other than in the past for general training and he is not a party to the conflict giving rise to his fear. He has never taken up arms. It seems unlikely that he could be excluded because of lack of civilian status.

Reference (for XIV-XVI): See the following sections in the Judicial Analysis:

- Context of Article 15(c) QD in deciding applications for international protection (p. 8);
- 1.3.3. ‘Typical forms of indiscriminate violence in armed conflicts’ (p. 14);
- 1.3.4. ‘The role of targeted violence’ (p. 14);
- 1.8. ‘Geographical scope: country/area/region’ (pp. 22-25);
- 2.2. ‘Assessing the level of violence — a practical approach’ (pp. 26-29);
- 2.3. ‘Application of the sliding scale assessment’ (pp. 29-31);
- 2.4. ‘Geographical scope: country/area/region’ (p. 31);
- 2.5. ‘Internal protection’ (pp. 32-33).

Annex 3 — Moot court case example

****This moot court case was prepared by a working group composed of members of IARLJ, AEAJ and UNHCR, together with EASO representatives on the occasion of the EASO advanced workshop on Article 15(c) QD held on 6 December 2013.***

A. Case description

The appellant is a 56-year-old citizen of Discordia. His home area is the district of Surubi. Surubi is located 150 km east of the capital, Capitalia. The appellant's ethnic identity is that of the majority of the government currently in power. He worked as a truck driver in the city of Capitalia since he completed his basic education. During these years, the appellant commuted between his residence in Surubi and Capitalia, where his business and some of his relatives were based. The appellant's wife and granddaughter lived in the appellant's family residence in Surubi until their departure from the country.

By the end of 2009, the appellant was called by the army and deployed to serve as a guard in a military facility near Surubi. In the summer of 2010, the appellant fell ill with bad bronchitis. As a result, he was informally released from his position as a guard under the condition that he would remain on call to resume his duty if needed. The appellant took this opportunity to leave the country with his wife and granddaughter, both of whom are currently in Member State Safeland with him.

The appellant arrived in Safeland on 3 August 2010. He submitted an application for international protection shortly thereafter but, on 28 November 2012, his application was rejected. The appellant submitted an appeal which was dismissed by a first-instance judge on refugee, humanitarian protection and human rights grounds.

The appellant successfully applied for reconsideration based on the allegation that Discordia is affected by a conflict characterised by such a high level of violence that it would be unsafe for him and his family to return. On his allegations, the appellant noted that he had fled the country accompanied by his seven-year-old granddaughter who had been living with him and his wife since the death of her parents in April 2008 and for whom it would be particularly dangerous to return.

At the reconsideration hearing, a second-instance judge sitting alone found that the first-instance judge had made a material error of law. That is, that when he considered the appellant's application for international protection, he did not deal with Article 15(c) of the Qualification Directive. In other words he did not consider whether the appellant would be at real risk of serious harm as the result 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'.

As a result, the case was set down for a further hearing limited to a request to evaluate grounds for the applicability of Article 2(e) in relation to Article 15(c) of the Qualification Directive to the case of the appellant. It was agreed by the parties and settled by the Court that the only relevant facts about the appellant's personal circumstances were that:

- (i) He is a 56-year-old national of Discordia;
- (ii) His home area is Surubi;
- (iii) His tribal identity is the same as that of the majority of the government in power;
- (iv) He has a wife and granddaughter who left Discordia with him;
- (v) He was up until a year ago a soldier working as a guard in a military facility until released on health grounds subject to recall;
- (vi) He has relatives in Capitalia.

B. Additional considerations

The first instance judge found no reason to consider that, during his time with the army, the appellant was in any way involved in acts that would give rise to the application of an exclusion clause as provided for in Article 17 of the Qualification Directive.

The appellant has not submitted any further evidence relating to his personal circumstances and he is precluded by the rules of the Moot Court from seeking to do so now. Nor has the appellant submitted any evidence relating

to the country conditions in Discordia since the time of his hearing before the first-instance judge. The Government of Member State Safeland has, however, submitted a COI report on the security situation in Discordia.

C. Relevant legislation

The following provisions of the Qualification Directive are of particular relevance to the evaluation of the case:

Recital 10

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

Recital 26

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.

Article 2 — Definitions

For the purposes of this Directive:

e) ‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country;

Article 15 — Serious harm

Serious harm consists of:

- a. death penalty or execution; or
- b. torture or inhuman or degrading treatment or punishment of an applicant in the country or origin; or
- c. serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 4 — Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.
2. The elements referred to in paragraph 1 consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
 - a. all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
 - b. the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
 - c. the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
 - d. whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

- e. whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.
4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
 5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:
 - a. the applicant has made a genuine effort to substantiate his application;
 - b. all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
 - c. the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
 - d. the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
 - e. the general credibility of the applicant has been established.

Article 7 — Actors of protection

1. Protection against persecution or serious harm can only be provided by:
 - a. the State; or
 - b. parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;
 - c. provided they are willing and able to offer protection in accordance with paragraph 2.
2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

Article 8

1. As part of the application for internal protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

D. COI report on Discordia: General security situation

Historic introduction

Discordia is a mountainous Islamic country divided into four regions and inhabited by approximately 28 000 000 people. The southern desert and mountains (8 000 000 people) are inhabited by Discordian tribes and traditionally saw power struggles between the tribal affiliations. The eastern mountains (4 000 000 people) are inhabited by Discordian tribes and different ethnic groups, based in valleys and high plains in the mountains. The central highlands (8 000 000 people), including the capital city of Capitalia (4 000 000 persons), have always been the centre of government power, but this often did not reach much further than that. In the north (6 000 000 people), several Discordian tribes live together with large groups of nationals from other states.

In 1996, an Islamic political party, called Al Talibab, took power in Discordia and introduced a strict governance based on the Sharia. In 2002, a coalition of international troops and local opposition forces ousted the extremist Al Talibab regime. As from 2003, the Al Talibab factions regrouped and reorganised forces in the south and the east of the country. They relied on strong tribal ties and used the vast and mountainous countryside to start an armed insurgency against the new government, attacking government positions, buildings and forces in several areas in the south and the east. The government and its international allies struck back by conducting several military operations and searches in villages and houses in areas where insurgent activity was noticed.

In 2009, the Al Talibab forces gained control over large areas in the south and the east. They managed to conduct complex attacks in Capitalia, the capital of Discordia, using explosives (IEDs) and Small Arms Fire (SAF). In Discordia in 2009, 2 412 civilians died due to the conflict and another 3 566 were injured.

As from 2009, the insurgents managed to destabilise areas in all parts of the country, using mortars, IEDs and direct attacks on towns and rural areas. This evoked more military reactions from the side of the government, using air power, artillery fire and quickly executed sweep operations using heavy equipment. The civilian death toll quickly increased and the insurgency gained more support among the population, partially because of government failure and high numbers of casualties resulting from the governments' military operations and air bombings. In 2010, 2 777 civilians were reported dead and another 4 344 injured due to the conflict.

In 2011, sources reported 3 021 civilian deaths and more than 4 507 injured. The numbers for 2012 decreased slightly. In the first six months of 2013, 800 civilians were reportedly killed and 1 350 injured, most of them in the southern region, where the fighting is the heaviest.

The present report has been drafted to facilitate the resolution of the case in the context of EASO's advanced workshop. It contains information that would otherwise be provided by international organizations such as UNHCR, governmental agencies such as the US Department of State or civil society organizations such as Human Rights Watch or Amnesty International.

Current situation in the Centre of Discordia

- International presence:

A number of international/foreign actors are currently operating in the central part of the country with the consent of the Discordian coalition Government. These actors include several UN Agencies and NGOs engaged in relief, humanitarian and capacity building activities throughout the country as well as a number of foreign embassies. Under existing agreements the international forces are due to leave Discordia in 2015 although they will continue to provide support with training of the government's army and financial aid for both military and non-military projects.

General situation

Despite the efforts of the international community, corruption remains widespread, particularly in the capital and its surrounding districts. The central part of the country hosts the highest number of IDPs, who mostly concentrate in two large settlements in the outskirts of Capitalia. Approximately one third of the population has been displaced since 2007, and at least 500 000 remain in displacement.

There were reports that insurgent groups and criminals were responsible for disappearances and abductions. The law prohibits arbitrary arrest or detention; however, both remained serious problems. Many citizens were detained without enjoying essential procedural guarantees. According to NGOs, law enforcement officers continued to arbitrarily detain citizens without clear legal authority and due process. Local law enforcement officials were reportedly detaining persons on charges not provided for in the penal code and used their official status to resolve petty disputes.

Three ministries have responsibility both in law and in practice for providing security in the country. The Ministry of the Interior (MOI) has primary responsibility for internal order but has increasingly been engaged in fighting the insurgency. The Army, under the Ministry of Defence, is responsible for external security. The Ministry of Information has responsibility for investigating cases of national security and also functions as an intelligence agency. In the areas over which it exercises control, the government imposes compulsory military service. By early 2013, reports estimated that there were approximately 200 000 troops in the Discordian army, whereas 85 000 international troops remained in the country.

There were reports of official impunity and a lack of accountability throughout the year. Observers believed that the MOI personnel were largely unaware of their responsibilities and defendants' rights under the law. Accountability of officials for torture and abuse was weak, not transparent, and rarely enforced. There was limited independent, judicial, or external oversight of the MOI as institutions, and of crimes or misconduct committed by their officials, including torture and abuse.

The international community worked with the government to develop and offer awareness and police training programs. In addition to core policing skills and internal investigation mechanisms to curb security force corruption and abuses, these programs emphasized law enforcement, the constitution, values and ethics, professional development, the prevention of domestic violence, and fundamental standards of human rights.

Nevertheless, human rights problems persisted; observers criticized the inadequate preparation and lack of sensitivity of local security forces. Human rights institutions expressed concerns about the limited oversight and accountability that existed for security institutions, although the Ministry of the Interior took some measures at the end of the year to increase accountability. For example, the MOI worked with the International Committee for the Red Cross (ICRC) to increase human rights training for new recruits. Some third countries have refrained from returning citizens to Discordia, while others have returned citizens to the capital. No returns have so far taken place to other parts of the country.

NGOs and human rights activists noted that societal violence, especially against women, was widespread; in many cases the police did not prevent or respond to the violence and in some cases arrested women who reported crimes committed against them, such as rape.

The socioeconomic conditions in the country remain poor, with high rates of child-infant mortality.

Capitalia:

In the past six months there have been three large scale insurgent attacks on governmental buildings in the government quarter. Insurgents operated in groups of 7 to 15 attackers and used rockets and small arms. During these fights, a total of 3 civilians were killed and 11 wounded. 23 insurgents and 6 government troops were reportedly killed.

On the three major roads leading in and out the city, occasional IED explosions happened. The insurgents preferably use remote controlled IEDs to target government vehicles or convoys. However, on the busy roads, the explosions also caused damage to civilian targets. Recently, the government became able to detect remote signals and this caused a shift towards the use of victim-initiated IEDs, which are much more indiscriminate by nature. Also, two attacks on international convoys with rockets and SAF took place in the capital city on the highway to the north. In all these events, 7 civilians were killed and 22 wounded during the past six months.

In the civilian quarters of the capital, the situation remained relatively calm over the past six months, whereas in the previous reporting period 36 violent actions were reported. These involved suicide attacks in market places and small arms fire and resulted in the killing of over 70 civilians. In the past six months, only six violent actions were reported, injuring 25 civilians.

The international airport on the outskirts of the capital remains under regular mortar and rocket fire. Due to the inaccuracy of the weapons used, there has hardly been any damage. It happens that rockets hit neighbouring civilian quarters, but no victims were reported in the past six months.

Criminal activities including abduction and theft remain a threat in all areas of the capital.

Capitalia's surrounding areas:

In the surrounding areas and towns, severe clashes are going on between the government and the insurgents, but the latter have been pushed back and military activities are limited now to three zones. In most areas, violent activities were conducted by way of IED explosions, or targeted killings. In the past six months 24 civilians have been reported killed and 150 injured, of which respectively, 8 and 61 by IEDs, 2 and 80 by air bombings, and 14 were killed by targeted killings. The government reported 600 insurgents killed or captured and 11 casualties on the government's side.

One mountainous district 150 km east of the capital, Surubi, can only be reached via the highway leading through the central valley. Although the district is relatively calm, frequent attacks and IED explosions take place on the highway, threatening also civilian vehicles.

As the government is focusing its efforts on the three remaining insurgent zones, criminal groups have freedom to operate in most of the other areas. Criminals threaten civilians and impose illegal taxes. Cases of rape have been reported. They also abduct people for ransom.

Out of the 13 abduction cases reported in the centre in the past six months, 11 were foreign staff members of international organisations, a preferred target for the insurgents because of the potential funding for ransom.

Due to the violence and insecurity, it has been impossible for several years to supply all areas of the centre with basic needs, such as medicines, food, etc. The complete region, except for the capital, suffers severe food insecurity

and there is no practical access to healthcare. The few resources and supplies there are, are a target for local power brokers and criminal groups, who try to benefit from the situation of anarchy and government collapse.

Given the current situation in the country, and the limited media coverage, all available sources agree in questioning the reliability of data, particularly on the current situation in the country, and accept that there may be a degree of underreporting.

E. UNHCR eligibility guidelines

for assessing the international protection needs of asylum-seekers from Discordia

[Excerpt] ⁽²⁾ United Nations High Commissioner for Refugees (UNHCR)

Date:

⁽²⁾ For the purpose of the moot court it is assumed that the country of origin information usually provided as part of the eligibility guidelines is similar to the one provided as a background to the case.

NOTE

UNHCR Eligibility Guidelines are issued by the Office to assist decision-makers, including UNHCR staff, Governments and private practitioners, in assessing the international protection needs of asylum-seekers. They are legal interpretations of the refugee criteria in respect of specific profiles on the basis of social, economic, security, human rights and humanitarian conditions in the country/territory of origin concerned. The pertinent international protection needs are analysed in detail, and recommendations made as to how the applications in question relate to the relevant principles and criteria of international refugee law as per, notably, the UNHCR Statute, the 1951 Refugee Convention and its 1967 Protocol, and relevant regional instruments such as the Cartagena Declaration, the 1969 OAU Convention and the EU Qualification Directive. The recommendations may also touch upon, as relevant, complementary or subsidiary protection regimes.

UNHCR issues Eligibility Guidelines to promote the accurate interpretation and application of the above-mentioned refugee criteria in line with its supervisory responsibility as contained in paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention and Article II of its 1967 Protocol and based on the expertise it has developed over the years in matters related to eligibility and refugee status determination. It is hoped that the guidance and information contained in the Guidelines will be considered carefully by the authorities and the judiciary in reaching decisions on asylum applications. The Guidelines are based on in-depth research, information provided by UNHCR's global network of field offices and material from independent country specialists, researchers and other sources, rigorously reviewed for reliability. The Guidelines are posted on UNHCR's Refworld website at <http://www.refworld.org>.

Eligibility for Subsidiary Protection under the EU Qualification Directive

Discordians who seek international protection in Member States of the European Union and who are found not to be refugees under the 1951 Convention may qualify for subsidiary protection under Article 15 of the 2011 Qualification Directive, if there are substantial grounds for believing that they would face a real risk of serious harm in Discordia⁽³⁾. In light of the information presented in Section II.C of these Guidelines, applicants may, depending on the individual circumstances of the case, be in need of subsidiary protection under Article 15(a) or Article 15(b) on the grounds of a real risk of the relevant forms of serious harm (death penalty⁽⁴⁾ or execution; or torture or inhuman or degrading treatment or punishment), either at the hands of the State or its agents, or at the hands of AGEs⁽⁵⁾.

Equally, in light of the fact that Discordia continues to be affected by a non-international armed conflict and in light of the country of origin information, applicants originating from or previously residing in conflict-affected areas may, depending on the individual circumstances of the case, be in need of subsidiary protection under Article 15(c) on the grounds of a serious and individual threat to their life or person by reason of indiscriminate violence.

In the context of the armed conflict in Discordia, factors to be taken into account to assess the threat to the life or person of an applicant by reason of indiscriminate violence in a particular part of the country include the number of civilian casualties, the number of security incidents, as well as the existence of serious violations of international humanitarian law which constitute threats to life or physical integrity. Such considerations are not, however, limited to the direct impact of the violence, but also encompass the consequences of violence that are more long-term and indirect, including the impact of the conflict on the human rights situation and the extent to which the conflict impedes the ability of the State to protect human rights. In the context of the conflict in Discordia, relevant factors in this respect are (i) the control over civilian populations by AGEs, including through the imposition of parallel justice structures and the meting out of illegal punishments, as well as by means of threats and intimidation of civilians, restrictions on freedom of movement, and the use of extortion and illegal taxation;

⁽³⁾ Serious harm for the purposes of the Qualification Directive is defined as (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. European Union, *Directive 2011/95/EU 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 granted (recast)*, 13 December 2011, <http://www.refworld.org/docid/4f06fa5e2.html>, Article 2(f), Article 15.

⁽⁴⁾ Under Article 24 of Discordia's Penal Code, the death penalty may be imposed for felony crimes. Penal Code [Discordia], N° 1990, 22 September 1986, <http://www.refworld.org/docid/4c58395a2.html>. In November 2012, 14 individuals convicted of serious crimes were executed. United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report — Discordia*, 15 April 2013, <http://www.refworld.org/docid/516fb7d14f.html>; New York Times, *Discordia Executes Six in Gesture on Al Talibab*, 21 November 2012, <http://www.nytimes.com/2012/11/22/world/asia/Discordian-suicide-bomber-kills-3-near-usembassy.html>. Under Article 1 of the Penal Code, those found guilty of hudood crimes are to be punished in accordance with the principles of Hanafi jurisprudence of Sharia law; hudood punishments include execution and stoning to death. Karim Habab, *Basics of Discordian Law and Criminal Justice*, undated, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/343976/publicationFile/3727/Posilei-LegalManual.pdf>.

⁽⁵⁾ It should be noted that where applicants face a real risk of such treatment for reason of a 1951 Convention ground, they should be accorded refugee status under the Convention (unless they are to be excluded from the benefit of protection under the Refugee Convention under Article 1.F); only where there is no nexus between the risk of serious harm and one of the Convention grounds should the applicant be accorded subsidiary protection.

(ii) forced recruitment; (iii) the impact of violence and insecurity on the humanitarian situation as manifested by food insecurity, poverty and the destruction of livelihoods; (iv) increasing levels of organized crime and the ability of warlords and corrupt government officials to operate with impunity in government-controlled areas; (v) systematic constraints on access to education or basic healthcare as a result of insecurity; and (vi) systematic constraints on participation in public life, including in particular for women ⁽⁶⁾.

These factors, either alone or cumulatively, may be found to give rise to a situation in a particular part of Discordia that is sufficiently serious to engage Article 15(c) without the need for the applicant to demonstrate individual factors or circumstances increasing the risk of harm ⁽⁷⁾. Where, after all relevant evidence has been considered, this is found not to be the case in the part of Discordia from which the applicant originates, it falls to be considered whether the applicant's individual characteristics are such as to reveal specific vulnerabilities which, combined with the nature and the extent of the violence, give rise to a serious and individual threat to the applicant's life or person.

⁽⁶⁾ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, <http://www.refworld.org/docid/50d32e5e2.html>, paras 10-12. See also Cordesman, A. H. (Center for Strategic and International Studies), *Coalition, ANSF, and Discordian Casualties in the Discordian Conflict from 2001 through August 2012*, 4 September 2012, http://csis.org/files/publication/120904_Discordian_Iraq_Casualties.pdf, pp. 3, 6, 7. See also OCHA, *Discordia Common Humanitarian Action Plan 2013*, 26 December 2012, <http://www.refworld.org/docid/5118bc382.html>, p. 10.

⁽⁷⁾ See Court of Justice of the European Union, *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, 17 February 2009, <http://www.refworld.org/docid/499aeee52.html>, where the Court of Justice of the European Union held (at para. 43) that the existence of a serious and individual threat to the life or person of an applicant 'can exceptionally be considered to be established 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 that threat.'

F. Working groups division template

— Moot Court Session—

Group A — Panel of Judges

Judicial Trainer(s):

Advocate General (if any):

Participants:

Group B — The State

Judicial Trainer(s):

Participants:

Group C — The Appellant

Judicial Trainer(s):

Participants:

Group D — Third party

Judicial Trainer(s):

Participants:

G. Example of conclusions of the judge rapporteur

Moot Court sitting at the Offices of EASO on 6 December 2013

Case MC-1/13 The Appellant

v

Safeland Refugee Commissioner

The issue before the Court

This is an appeal by leave from the decision of the first instance judge on the application for international protection of the Appellant (the Appellant), made on 28 November 2012, on the grounds that he erred in law in dismissing the claim for international protection of the Appellant in that he failed to consider whether the Appellant was at real risk of serious harm as defined in Article 15(c) of Directive 2011/95/EU.

This Directive comes fully into effect on 22 December 2013 and has therefore been adopted rather than the previous Qualification Directive which it replaces for all Member States other than Denmark, Ireland and the United Kingdom but there is no difference between the relevant provisions of the original and recast QD for the purposes of the issues (save in Articles 7 and 8 going to issues of actors of protection and internal protection which will be considered later as appropriate).

The sole issue referred to the Court is whether the Appellant is a person eligible for subsidiary protection pursuant to Article 2(f) of (the Recast QD) in that substantial grounds have been shown for believing that, if returned to his country of origin, he would suffer a real risk of suffering serious harm as defined in Article 15(c) of the Recast QD.

Article 15 provides that serious harm consists (inter alia) of:

‘(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

At the hearing from which this appeal arises, the Court at first instance determined sequentially that the Appellant did not qualify for recognition as a refugee under the terms of the Recast QD nor to subsidiary protection status on the basis of serious harm feared under the terms of Article 15(a) or (b) of the Recast QD. Those conclusions are not challenged before the Court. The first instance Court found no basis for exclusion of the Appellant from protection under Article 17 of the Recast QD.

The factual basis of the Appellant’s claim

It is common ground that the only accepted facts relevant to the personal history of the Appellant are:

- a. That he is a 56-year-old-citizen of Discordia, originally from the district of Surubi in the central highland area of Discordia, and of the same ethnic group as that of the majority of the government; he arrived in Safeland on 3 August 2010, accompanied by his wife and granddaughter, and, shortly after arrival, submitted a claim for international protection.
- b. Surubi is 150 km from Capitalia, the capital city of Discordia, also situated in the central highland area.
- c. Since completing his basic education the Appellant has worked as a truck driver in the capital, commuting between there and his home in Surubi, where he lived with his wife and granddaughter; she has lived with him and his wife since the death of her parents in April 2008.
- d. The Appellant has relatives who are settled in Capitalia.
- e. In late 2009 the Appellant was called up by the Discordian army and deployed to serve as a guard in a military facility near Surubi. In the summer of 2010, the Appellant fell ill with bronchitis and, as a result, he was informally released from his position as a guard on condition that he would remain on call to resume his duty if required.
- f. Shortly after this, he left Discordia with his wife and granddaughter (then aged seven), arriving in Safeland on 3 August 2010 as noted above, and claiming international protection.

- g. His wife and granddaughter continue to live with him in Safeland and he alleges that it would be particularly dangerous for his granddaughter to return to Discordia although he has provided no evidence as to why this should be so.
- h. Otherwise there are no personal characteristics which might increase the potential danger to him over and above that applicable to other civilians in Discordia.

Recommendations to the Court

My report and recommendations to the Court are set out below under the following principal headings:

- A. The approach to assessment of evidence pursuant to Article 4 Recast QD
- B. The methodology of assessment of relevant COI evidence
- C. The indicia relevant to the existence of a state of armed conflict under Article 15(c)
- D. The Jurisprudential Background to the interpretation of Article 15(c)
 - i. The meaning of Article 15(c) within the context of subsidiary protection — *Elgafaji*
 - ii. The interpretation of ‘armed conflict’ in Article 15(c) — *Diakite*
 - iii. Other relevant national jurisprudence in relation to the application of *Elgafaji and Diakite*
- E. The area of the country of origin where the assessment of a state of armed conflict is applicable.
- F. Considerations relevant to internal protection
- G. The effect of the applicant’s personal history on the assessment of Article 15(c) risk
- H. Consideration of issues of exclusion from protection pursuant to Article 17 Recast QD

A. The approach to assessment of evidence pursuant to Article 4 Recast QD

1. In order to decide this appeal it is necessary to assess the evidence in conformity with the two-stage test set out in Article 4 of the Recast QD. In Case C-277/11 MM, 22 November 2012 the CJEU held that Article 4(1) of Directive 2004/83 concerns applications for international protection (which encompasses both refugee protection and subsidiary protection) and, as it is clear from its title, it relates to the ‘assessment of facts and circumstances’. At paragraph 64 the Court said:

‘That ‘assessment’ takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.’

2. The principles laid down in MM apply equally to appeals under the Recast QD.
3. In this case all the factual circumstances relating to the Appellant’s *personal* circumstances have already been established as set out above. The only factual circumstances which have not been established relate to the *general security situation* in Discordia and in the Appellant’s home area in relation to the sole legal question before the Moot Court which is confined to the applicability of Article 15(c).

B. The methodology of assessment of relevant COI evidence

1. The judgment in MM (*op. cit.*) makes it clear that the assessment of relevant COI forms part of the first stage of assessment but there has in the past been uncertainty as to what is the scope of the duty on the State party in the provision of relevant evidence as part of that assessment. This is expressed in the second sentence of Article 4.1 in the following terms:

‘In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.’

2. The views of the CJEU, although not incorporated into their formal conclusions, have now been clearly set out in MM as follows:

'65. Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.

66. This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.

67. Moreover, the interpretation set out in the previous paragraph finds support in Article 8(2)(b) of Directive 2005/85, pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited.'

C. The indicia relevant to the existence of a state of armed conflict under Article 15(c)

1. Given that what the Court is engaged upon in this case is assessing evidence relevant to the nature and extent of violence in the relevant country of origin (in this case Discordia), it is incumbent upon the Moot Court first to identify relevant indices so as to help itself evaluate this question.
2. Except for what the CJEU has said in *Elgafaji* and Advocate General Mengozzi has said in *Aboubacar Diakite v Commissaire general aux refugies et aux apatrides, Case C-285/12*, in his Opinion delivered on 18 July 2013 on the limited issue of the meaning of the term 'armed conflict', the Moot Court has little help from the CJEU although in *Elgafaji* it made clear at paragraph 41 and elsewhere that it is for the national fact-finding court to assess the situation and make findings on it.
3. Helpfully we can glean from decisions of the national courts and tribunals of the Member States on Article 15(c) cases (and the Strasbourg Court dealing with armed conflict cases) that there is a broad recognition that (i) as with the inquiry into refugee eligibility and Article 3 ECHR, the approach must be a holistic, inclusive one that takes into account a wide range of factors or indicia; (ii) the following matters/indicia are among those of particular relevance (they cannot be taken as an exhaustive list).

a. Parties to the conflict

In order to make an assessment of the nature and levels of the violence it is relevant to identify who are the parties to the conflict and their relative military strengths in terms of numbers of soldiers/fighters and organisation and infrastructure.

b. Geographical scope and spread of the violence

It is clear from paragraph 40 of *Elgafaji* that it is legitimate to take into account the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive.

c. Levels of violence

As was said by the German Federal Administrative Court in BVerwG 10 C 4.09 and the UK Upper Tribunal in *HM and others (Article 15(c)) Iraq [2012] UKUT 00409 (IAC)* it is necessary to have regard to the situation of violence both in quantitative and qualitative terms. Although stated by the Strasbourg Court in relation to Article 3 ECHR only, I would suggest that what it said in *Sufi and Elmi v UK [Application Nos 8319/07 and 11449/07 of 28 June 2011]* at paragraph 241 has utility by analogy when analysing Article 15(c). The Court noted that hitherto it had not provided any further guidance on how the intensity of a conflict is to be assessed but wanted now to rectify that:

'... the Court recalls that the Asylum and Immigration Tribunal had to conduct a similar assessment in AM and AM (Somalia) (cited above), and in doing so it identified the following criteria: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting.

While these criteria are not to be seen as an exhaustive list to be applied in all future cases, in the context of the present case the Court considers that they form an appropriate yardstick by which to assess the level of violence in Mogadishu.’(emphasis added).

Whilst it may go too far to say that the quantitative indicia are primary, it is clear that facts and figures about incidents of violence and the type of violence involved is highly germane to the assessment of levels and thresholds. Regarding what I shall for convenience call the metric of physical attacks (causing deaths or injuries), it will assist the Moot Court to look at what available COI says about: (a) civilian casualties (ideally also within that category the number of targeted attacks on civilians); and (b) Combatant casualties; by analogy with the view of the Strasbourg Court in *Sufi and Elmi*, it is also necessary in order to analyse and evaluate the intensity of the violence to have regard, inter alia, to the extent to which the violence is said to affect civilians disproportionately.

d. Comparison with other conflicts

Where there is data relating to this, it may be of assistance to the Moot Court to know how the levels of violence compare with other well-known armed conflict-affected countries, although such levels must be analysed in qualitative as well as quantitative terms, so as to include to what extent different conflicts in particular countries disproportionately harm civilians (see again *Sufi and Elmi*).

e. State protection/effectiveness

Clearly it is relevant to assessment of thresholds of violence to have regard to the ability of the state authorities to protect its citizens against violence. Article 7 of the QD makes clear that if there is effective protection against acts of serious harm, then a person cannot qualify for subsidiary protection any more than they can qualify for refugee protection.

f. Levels of corruption

Evidence about levels of corruption in the country is also relevant to protection.

g. Population displacement

One significant indication of the severity of a situation of conflict is whether the population feels able to remain living in their home areas or the extent to which they do not and the causes of any displacement.

h. Socio-economic conditions

It is widely accepted that poor socioeconomic conditions can worsen situations of violence or affect their nature and intensity. Information about the extent of foreign aid and of the aid and humanitarian agencies present in the country is relevant.

i. Provincial/local level

It is clear from paragraph 40 of *Elgafaji* that assessment must focus on an applicant’s home area. Ideally information relating to all the above metrics should also be given in relation to the relevant a home area and/or proposed internal relocation alternatives.

j. Safety of internal travel

If internal relocation is in point (see below), then normally safety of internal travel would be relevant (as it goes to the Article 8 requirement of accessibility). But in this case we know that returns from all European states (including Safeland) are made to the major city in Discordia.

In the case of the Appellant his home area is outside the main city and hence in order to decide whether he can access to his home area it is necessary in this context to assess the safety of internal travel.

k. UNHCR position

The recitals of the recast QD and Article 7 make clear that it is incumbent on decision-makers, including the Moot Court, to have regard to COI from UNHCR. Although UNHCR’s Eligibility Guidelines are not pure COI, it would appear that it is essential to have regard to what is UNHCR’s own assessment of the Article 15(c) situation — if there is one. However, it remains a matter for the Court to assess the Article 15(c) situation for itself and in relation to that task UNHCR Guidelines are only part of the picture.

D. The Jurisprudential Background to the interpretation of Article 15(c)

The meaning of Article 15(c) within the context of subsidiary protection — *Elgafaji*

1. This issue was considered by the CJEU in the case of *Elgafaji v Staatsecretaris van Justitie* C- 465/07. The conclusions of the Court were as follows:

‘Article 15(c) of 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, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

– the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

– the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred 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 that threat.’

2. An analysis of the approach of the Court is set out in the Annex to this Report.
3. It is suggested that the proper approach by the Court is to consider, in the light of the COI material before it:
 - i. Whether by reference to the indicia relevant to situations of violence (see above) there exists in the Appellant’s home area or any possible area of relocation a state of international or internal armed conflict;
 - ii. If yes, whether it is characterised by indiscriminate violence in that home area;
 - iii. If yes, whether the Appellant is a civilian;
 - iv. If yes, whether the level of indiscriminate violence is such that by reason of his or her mere presence in that area there are substantial grounds for believing that a civilian there would be exposed to serious threat to life or person.
 - v. If each of those questions is answered in the affirmative, then the Appellant is in the exceptional position posited in the second ruling in *Elgafaji* and has established that there are substantial grounds for believing he would face serious harm in his home area.
 - vi. If, however, the position of civilians in the relevant area of the Appellant’s country of origin is not such that his mere presence would be sufficient to engage Article 15(c), further consideration will then have to be given as to whether his personal circumstances are such that a lower level of indiscriminate violence would nevertheless expose him to serious harm under Article 15(c) — the *Elgafaji* ‘sliding-scale’. This will be considered further below at G.
 - vii. Assuming the Appellant can establish substantial grounds for believing he would face a real risk of suffering serious harm in his home area (either by virtue of being a civilian or under the *Elgafaji* ‘sliding-scale’), then (assuming *Safeland* applies Article 8 of the QD), he can still qualify for subsidiary protection status only if the COI evidence adduced in accordance with the mandatory provisions of Article 8.2, taking into account his personal circumstances, shows that there are no safe parts in his country or that it is unreasonable to expect him to seek internal protection in such a safe part of his country. (See further at F below)

The interpretation of ‘armed conflict’ in Article 15(c) — *Diakite*

1. The question of whether the phrase ‘in situations of international or internal armed conflict’ is to be interpreted in accordance with International Humanitarian Law (IHL) has been referred to the CJEU in the case of *Aboubacar Diakite v Commissaire General aux refuges et aux apatrides* C-285/12.
2. The Court has not yet issued its judgment but the conclusions of the Advocate General, Mr Paolo Mengozzi, were presented on 18 July 2013. His recommendations to the Court are as follows:

'Article 15(c) of the Directive 2004/83/EC ... read in conjunction with Article 2(e) thereof must be interpreted as meaning:

- *the existence of serious and individual threat to life and person of the applicant ... is not subject to the condition that the situation in his country of origin, or in the case of a stateless person, in the country of his or her former habitual residence, is characterised as an internal armed conflict pursuant to IHL and, in particular, Article 3 common to the four conventions of Geneva of 12 August 1949...*
 - *the existence of such threats must be ascertained by reference to the degree of indiscriminate violence which characterises the situation in the country of origin or former habitual residence, as the case may be, at the moment of determination of the claim for subsidiary protection.'* [My translation from the original French]
3. A fuller summary of the Advocate General's Conclusions appears in the Annex to this report.
 4. Whilst members of the Court may have concerns about the implications for international protection jurisprudence of Advocate General Mengozzi's advocacy of 'an autonomous approach' (which appears to favour EU decision-makers working outside the framework of international law which treats IHL as *lex specialis*) it is safest to assume that the Court will agree with the recommendations of the Advocate General in *Diakite* in relation to the interpretation of the phrase '*internal armed conflict*' in Article 15(c) Recast QD and I accordingly suggest that the Moot Court proceed on this basis.
 5. I note, however, that there has been no consideration of the interpretation of '*armed conflict*' where it is international in nature. The Advocate General does not exclude the potential relevance of certain concepts under IHL as an aid to interpretation but makes the point that they are interpreted too strictly under IHL to fulfill the humanitarian purpose of Article 15(c) serious harm. It seems to me that it remains arguable that in the context of identifying international armed conflicts the provisions of IHL as to the characteristics of the parties to such a conflict may have greater relevance as an aid to the interpretation of the meaning of Article 15(c), albeit that the interpretation of the Recast QD (at least according to Advocate General Mengozzi) must remain autonomous.
 6. In many conflicts, however, foreign insurgents are now present independently of the presence of national forces pursuant to the formal declaration of war which characterises a state of war between states. An obvious example is the current conflict in Syria. If the COI for Discordia supports the presence of foreign insurgents as a constituent element in a state of armed conflict existing there, I would recommend to the Court that this be considered either as a part of a state of internal armed conflict following the autonomous interpretation recommended in *Diakite* or, if such insurgents form a major element in the conflict, as a further example of the importance of the autonomous approach to interpretation of the QD provisions reflecting that the recognition of international protection needs is based on the nature and level of the proscribed harm. But that is not to say that IHL norms may not assist national judges if considered by analogy.

Other relevant national jurisprudence in relation to the application of *Elgafaji* and *Diakite*

1. The Advocate General makes reference to relevant practice in the United Kingdom and the Netherlands. I draw the Court's attention to the UK decision of *HM and Others v Secretary of State for the Home Department* [2010] UKUT 331 (IAC) where the application of Article 15(c) was considered. A detailed analysis of the conclusions is set out in the Annex below.
2. I have considered *HM and Others* in some detail and drawn upon it in identifying indicia of a state of armed conflict (see above) not because there are not many points which are common to the approach in other Member States' national jurisdictions but because it is the most fully developed analysis known to me of the appropriate methodology of application of the rulings of the CJEU in *Elgafaji* and also appears to be consonant with the reasoning of the Advocate General in *Diakite*. For those reasons, I would recommend it to the Court as defining the approach to assessment of the existence of a state of armed conflict within the meaning of Article 15(c), and the level of indiscriminate violence to which it has given rise in order to ensure the application of the CJEU jurisprudence relative to Article 15(c) international protection claims.

E. The area of the country of origin where the assessment of a state of armed conflict is applicable.

1. In the present case, given the Appellant's accepted personal history it is suggested that this will comprise Surubi where he lived, the capital of Discordia where he worked and the country in between those two areas through which he had to travel on a regular basis, all of which lie in the central highland area of the country.

2. If the Appellant is not at risk by reason of armed conflict in those geographical areas then his claim must in any event fail under Article 15(c). If, however, such a risk exists for him in his home area (Surubi), the Court must consider what is the situation in other parts of the country where he might be able to access internal protection starting with the capital, Capitalia, which is known to be the point to which he will be returned if his appeal fails.

3. This was reflected by the CJEU in *Elgafaji* at [40], with reference to recital 26:

'Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

F. Considerations relevant to internal protection

1. The issue of internal protection arises in respect of all claims to international protection pursuant to the Recast QD ⁽⁸⁾ once it is concluded that the claimant succeeds in his claim for international protection in relation to the applicant's home area in his country of origin.

2. Article 8 Recast QD is concerned with issues of internal protection in respect of which it provides as follows:

'1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

- a. has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or*
- b. has access to protection against persecution or serious harm as defined in Article 7, and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.*

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.'

3. It is to be noted that the requirements of Article 8 of the Recast QD differ in certain respects from the equivalent provision in the previous QD in that the alternative in Article 8(1)(b) is additional as is the requirement that the claimant *'can safely and legally travel to and gain admittance to that part of the country'*. This replaces the former provision (Article 8.3), which was controversial as to its meaning, that internal protection could be found to be available *notwithstanding technical obstacles to return to the country of origin'*. The amendments have made it clear that both the journey to the safe area and the access to it are to be both safe and lawful — issues in respect of which the Member State will be required to obtain relevant evidence as appears at paragraph 4 below, including evidence as to the need to comply with any residence requirements imposed within the safe area on those seeking to access it for the purpose of settlement there (see paragraph 4 below). It is arguable that it also means that a current inability of the host state lawfully to return the claimant to such a safe part of his or her country, will mean that the requirements of Article 8 cannot be met and result in the allowing of the claim.

4. The former requirement that the claimant *'can reasonably be expected to stay'* there has been changed by substitution of the word *'settle'* for *'stay'* implying that a greater degree of permanence is required for internal protection, including at least the ability to comply with any residence requirements there as noted above.

5. Further the extent of the enquiry to be undertaken has been clarified by the addition of the reference to Article 4 and the mandatory requirement for the Member State to obtain relevant up-to-date COI evidence.

⁽⁸⁾ The Recast QD does not bind Denmark, Ireland or the UK although the former QD binds the latter two.

This latter requirement does not form part of the express provisions of Article 4 which do not directly impose any obligation on the Member State to provide evidence (but see the reference to *MM* (op. cit.) above). The case for imposing the evidential burden on the Member State is clearly more appropriate in cases where internal protection is in issue because it has already been accepted that the claimant would be at risk in his home area and it is for the State to demonstrate that he can nevertheless be both safely and reasonably returned to the country of origin. It is suggested that the COI evidence must extend to the issue of reasonableness also since it is for the State to show that it is reasonable to expect the claimant to settle in the safe area. Although the concept of shifting burdens of proof is not, I suggest, helpful in general in the assessment of the applicant's case where the duty on the state is expressed simply as one of cooperation (Article 4.1), it may nevertheless be the appropriate approach where the State relies on internal protection as an answer to the claim for international protection.

6. Article 8 refers to the access to protection as defined in Article 7 of the Recast QD which is concerned with the identification of 'actors of protection' and the scope of their duty to their citizens. In this context, it is therefore also necessary to consider the provisions of that Article which provides as follows:

'1. Protection against persecution or serious harm can only be provided by:

a. The State; or

b. parties or organisations, including international organisations, controlling the State or a substantial part of the State,

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm inter alia by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any relevant guidance which may be provided in relevant Union acts.'

7. There are again important differences from the equivalent Article in the previous QD which have arguably clarified the concept of who qualify as actors of protection. First, Article 8.1 now states unequivocally that only those identified in sub-paragraphs (a) and (b) can be regarded as actors of protection and the proviso that such actors '*are willing and able to offer relevant protection*' is also new. These points are of particular importance where protection is sought under Article 15(c) and may be difficult, if not impossible, to demonstrate in areas where there is an armed conflict characterised by indiscriminate violence. However, by analogy with Article 9's reliance on Article 15 of the ECHR (which entitles states to derogate from a range of human rights guarantees in situation of war or public emergency affecting the life of a nation, it may be that in a situation of armed conflict a state can only be expected to protect its citizens against violations of non-derogable human rights.
8. Secondly, the opening sentence of Article 7.2 makes it clear, following ECtHR jurisprudence, that the protection offered by the relevant actor must be '*effective and of a non-temporary nature*'. Again, this provision will be of particular relevance in the consideration of Article 15(c) claims both in relation to the home area and internal protection issues where there is a generalised armed conflict, albeit of differing intensity, in the country of origin.
9. On the issue of internal protection, it is accordingly my recommendation to the Court that it is for the State to provide un rebutted evidence that there exist in Discordia an identified area or areas where the Appellant may safely and legally travel and gain admittance and where he will not only have no well-founded fear of persecution or be at real risk of serious harm under Article 15, but where it will also be reasonable to expect him to settle.

G. The effect of the Appellant’s personal history on the assessment of Article 15(c) risk

1. As previously noted, this will be of relevance only if the situation of indiscriminate violence in the Appellant’s home area is not such that his mere presence as a civilian will expose him to real risk of Article 15(c) harm by reason of the level of indiscriminate violence.
2. The first issue which arises on the facts is whether, having regard to his past military service as a guard for the government forces (albeit of short duration but taking place in the period immediately prior to his leaving Discordia) and his current military service situation, he is a civilian at the date of the current hearing. If not, it will be fatal to his claim because Article 15(c) protection applies only to civilians and not to combatants.
3. I note that the Court is required to proceed only upon the basis of the agreed facts as to the Appellant’s personal circumstances set out at the beginning of these Conclusions and is precluded from receiving further or supplementary evidence in that respect. It is, therefore, relevant to note that his release from his military duties was informal only, based upon his illness, and on condition that he would remain on call to resume his military service if called upon to do so. There is nothing to suggest that his military duties were not full-time in nature.
4. The Court will need to consider whether on those facts, an informal release from military duty can be regarded as having any effect under the laws of Discordia relating to the obligations of citizens to perform military service. It may be that the Appellant is still a serving soldier as at the date of his departure, either by reason of the informality of his release from duty or because he then was and presumably remains subject to recall at any time the government chooses to recall him. The Court will no doubt wish to consider whether the COI evidence assists as to the current policy of the government of Discordia in relation to the recall of reservists. If on return he would under the current policy be required to serve in the government forces then it is arguable that he is in any event outwith the scope of Article 15(c) protection.
5. If, however, there is no evidence of any such policy of recall of reservists, the question is simply whether past service combined with the informality of release which leaves him, at best, remaining on the reserve list, prevents him from qualifying as a civilian under that Article.
6. There appears to be little case-law to assist. In *ZQ (serving soldier) Iraq CG [2009] UKAIT 00048* it was held that a serving soldier could not by definition qualify for Article 15(c) protection as this was confined to civilians. In *Council for Alien Litigation, 17 August 2007, Nr 1.244 — Iraq*, the Belgian CALL held that, by analogy with Article 50 of the first additional Protocol to the Geneva Convention of 1949 relating to the Protection of Victims of International Armed Conflicts, in case of doubt as to an applicant’s status, that person should be considered as a civilian. That decision was prior to the CJEU ruling in *Elgafaji*, but there is nothing inherently wrong in law in drawing an analogy with IHL where appropriate and, in that case, the basis of the decision reflected the broad humanitarian thrust of Article 15(c) protection in accordance with the later CJEU approach.
7. It is clear on the facts that the Appellant was not actually carrying out any military duties at the time he left Discordia and had not been doing so since his informal discharge shortly before by reason of ill health. Unless there is clear COI evidence that on return he would immediately be subject to recall to active service in the government forces, the issue for the Court is whether he had regained civilian status in practical terms before leaving. It does not seem to me that if the answer is in the negative, there can be any basis on which to seek to grade the nature of the military service so as to categorise some as combatants and others as carrying out non-combat roles. I would recommend to the Court that if a claimant is in military service, he is outwith the protection of Article 15(c). If, however, on the facts, it is considered that the military service may arguably have ceased and civilian status been regained, the Court may consider that the proper approach would be to resolve any doubt on the matter in his favour in accordance with the Belgian approach.
8. Assuming that he is now to be regarded as a civilian as at the date of decision, there is the further issue of whether on the COI evidence, his former comparatively recent service in the government forces may result in an enhanced risk although, if it does, it is difficult to see how it could be categorized as ‘indiscriminate’. If, however, there is COI evidence of a deliberate policy of targeting civilians who are former members of the government forces, it is a factor which could lead to an enhanced personal risk in a state of general unrest so that, applying the ‘sliding scale’ principle propounded in *Elgafaji*, a lesser level of indiscriminate violence might be relevant to consideration of the Appellant’s position.
9. The second issue arises from his work as a lorry driver, based in the capital of Discordia but also involved in regular travel to and from his home town of Surubi some distance away. Whether a person so engaged

is at any enhanced risk over and above that of the ordinary civilian is again a matter which will turn on the COI evidence before the Court.

10. The proper sphere of application of the ‘sliding scale’ principle is not a simple issue. On an individual basis, it may be that the degree of necessity of relevant characteristics will be relevant, and in matters where this does not go to issues which are recognised as fundamental to an applicant’s identity (e.g. religion, politics, sexual orientation), be decisive. The issue was considered in principle by the German Federal Administrative Court (reported as *ZG v The Federal Republic of Germany* at p. 113-131 IRLJ, Vol. 23, N° 1, March 2011) where the Court said this at paragraph 33:

‘If there are no personal circumstances increasing risk, an especially high level of indiscriminate violence is necessary; if personal circumstances increasing risk are present, a lower level of indiscriminate violence will suffice. These factors that increase risk primarily include those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example because he is forced by reason of his profession — e.g. as a physician or journalist — to spend time near the source of danger ...’

11. In the case of the Appellant, it may be that he had been unable to continue to follow his occupation as a lorry-driver from the time that he was called up for military service but, prior to his departure, he had been informally discharged from such service, and it is reasonable to assume that he would have returned to his former occupation in order to support himself and his dependants once fit to do so if he had not chosen to leave Discordia. It follows that if his occupation is to be considered as a potential risk factor in relation to Article 15(c) serious harm, the Court would need to take into account that this would inevitably expose him to frequent travel in the area between the capital and his home as well as any risk factor which arose simply from the carrying out of that work. It might be a factor leading to enhanced personal risk to those in such circumstances according to COI evidence. If so, the Court would be required to consider how it should be reflected in applying the ‘sliding scale’ principle to assessment of risk pursuant to the rulings in *Elgafaji*. What remains to be considered — and it is difficult to do so on an hypothetical basis — is the degree to which such personal circumstances should be taken into account even when simply a matter of choice on the part of an applicant as opposed to necessity. It may arguably be that an assessment similar to that applied to the reasonableness of seeking internal protection would be an appropriate approach when assessing the appropriateness of the impact of such personal circumstances.

H. Consideration of issues of exclusion from protection pursuant to Article 17 Recast QD

1. The consideration of whether an applicant may be excluded from protection under Article 17.1 is, I would suggest, a matter which the Court is bound to take into account, whether or not it is specifically raised by either party. This is because Article 17.1 makes the mandatory provision that, where there are ‘*serious reasons for considering*’ that any of the provisions of Article 17.1(a) to (d) apply to an applicant, that applicant is ‘*excluded from being eligible for subsidiary protection*’. This may be contrasted with the situation under Article 17.3 where the Member State has a permissive right of exclusion so that in that case it is for the Member State to raise the issue specifically.
2. On the facts of the present case, there is nothing to suggest that there are serious reasons for believing that the Appellant has committed any act in breach of the provisions of Article 17.1. It was also an issue which had already been considered and discounted by the first instance court.

Annex

Analysis of Jurisprudential Background

Elgafaji — Brief summary of the Court’s reasoning

1. Considering the question of whether Article 15(c) was to be interpreted as offering supplementary protection beyond that comprised in Article 3 European Convention on Human Rights 1950 (ECHR), the Court noted that Article 15(b) QD (Directive 2004/83/EC), [which is reproduced in Article 15(b) Recast QD], corresponded in essence to Article 3 ECHR [paragraph 28].
2. By contrast Article 15(c) QD [reproduced in Article 15(c) Recast QD] differs in content from Article 3 ECHR so that its interpretation *‘must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR’* [ibid].
3. In comparing the three types of harm defined in Article 15 QD, the Court noted that whereas under Articles 15(a) and (b), the applicant for subsidiary protection was specifically exposed to risk of a particular type of harm, the harm defined in Article 15(c) was a more general risk of harm, namely a *‘serious and individual threat to ... life or person’* so that the emphasis was on the threat of harm rather than specific acts of violence, in a situation of *‘international or internal armed conflict’* where the threat was of *‘indiscriminate violence’*. The use of the term *‘indiscriminate violence’* implied that *‘it may extend to people irrespective of their personal circumstances’*. It followed that the requirement that the threat be *‘individual’* must be interpreted *‘as covering 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 ... would ... solely on account of his presence... face a real risk of being subject to the serious threat referred to in Article 15(c) ...’*. The wording of Recital 26 QD [now Recital 35 Recast QD] 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’* does not invalidate such an interpretation of Article 15(c) because the use of the word *‘normally’* permits the *‘possibility of an exceptional 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’* [paragraphs 31 to 37 ibid].
4. The CJEU further considered the issue of the degree of individualisation of the threat required by Article 15(c). It concluded that it was appropriate to apply a sliding scale of relevant indiscriminate violence from the situation posited that such a threat was so great that mere return to the affected part of the country of origin would be sufficient to engage Article 15(c) serious harm so as to extend the scope of such protection to reflect 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’* [paragraphs 38 and 39 ibid].
5. It follows, accordingly, that the notion of *‘serious harm’* under Article 15(c) is different in its scope from the concept of serious harm under Article 15(b) in two important respects, namely: that it does not require a claimant to show that he is *‘specifically targeted by reason of factors particular to his personal circumstances’* (the first ruling) and that *‘the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place ... reaches such a high level that a civilian ... would, solely on account of his presence ... face a real risk of being subject to that threat’* (the second ruling).

Diakite — Brief summary of Advocate General Mengozzi’s reasons

1. The referred questions may be summarised as follows:
 - i. Should Article 15(c) be interpreted in the sense that this provision provides protection only in a situation of *‘internal armed conflict’* as interpreted by international humanitarian law, with particular reference to Article 3 common to the four Geneva Conventions of August 12, 1949? (2)
 - ii. If so, what are the criteria required to demonstrate the existence of an internal armed conflict?
2. The conclusions of the Advocate General may be summarised as follows:

- a. Save for the Appellant and the UK, who advocated an autonomous interpretation of the provisions of the Article, all other interested parties put forward an interpretation which, whilst autonomous to varying degrees, was still required to have regard to the provisions of IHL (paragraph 18).
- b. Whilst the wording adopted in Article 15(c) was in similar terms to that used in IHL instruments, that was not sufficient to require that they be given the same interpretation in Article 15(c). IHL was originally concerned with international armed conflicts and the code of conduct applicable to the parties to such conflicts. It was later extended to internal armed conflicts exhibiting similar characteristics with the intention that it should not apply to all forms of insurrection, rebellion, anarchy, disintegration of State power or simple banditry. Thus, for example, situations of conflict between rival non-state factions are excluded from the IHL definition. The IHL definitions and their interpretation in terms of internal armed conflict have become associated also with the penal consequences under International Criminal Law of the conduct of the parties to the conflict. The definitions are, in summary, in response to the specific objectives of IHL as a branch of international law and foreign to the regime of individual subsidiary protection under the Recast QD (paragraphs 29 to 55).
- c. The purpose of the Qualification Directive is to ensure that Member States apply common criteria to identify those who have real need of international protection, the provisions for refugee status and subsidiary protection being distinct elements closely tied to the concept of international protection. In combination with the protection afforded by Directive 2001/55/EC in cases of mass influx requiring provision of temporary protection, they make up a system which enables all those who cannot obtain protection in their country of origin to invoke international protection within the EU. This complies with the provision of Article 78.1 TFEU that:

'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. ...'

As part of this system subsidiary protection requires, pursuant to Article 2(f) Recast QD, the grant of international protection to those who do not qualify as refugees but who would be subject to the real risk of suffering a violation of their fundamental rights if *refouled*. It is clear from the *travaux préparatoires* that the notion of subsidiary protection is derived from the international instruments concerned with human rights. It is equally clear that the purpose has always been to include among the categories benefitting from the subsidiary protection provisions those who cannot return to their country of origin by reason of the situation of generalised violence and insecurity which exists there.

Such inclusion, on the one hand, serves to complete the regime under the Temporary Influx Directive 2001/55/EC by ensuring a remedy for those outside the case of mass influx and, on the other hand, gives effect to the ECtHR jurisprudence under which expulsion to a country is proscribed where there exists an elevated level of insecurity and/or violence which may be categorised as inhuman or degrading treatment in the sense of Article 3 ECHR (paragraphs 56 to 65).

- d. The provisions of IHL are not referred to anywhere in the Qualification Directives and, even though they may have been mentioned by the EC in the exposition of the motives underlying the provisions of Article 15(c), the proposal to make such a specific reference was removed from the draft directive. It follows that no inference can be drawn from the QDs that the concept of '*internal armed conflict*' in Article 15(c) can be aligned with that of non-international armed conflict in IHL (paragraphs 73 to 77).
- e. As to the first question, the Advocate General accordingly concluded that following the autonomous interpretation of Article 15(c) required by the decision in *Elgafaji*, and for the reasons rehearsed above, his recommendation to the CJEU was to confirm that Article 15(c) was to be interpreted autonomously to establish the existence of an internal armed conflict, and not by reference to the similar provisions of IHL. The existence of a serious and individual threat is to be measured by the degree of indiscriminate violence characterising the situation existing in the country of origin.
- f. Turning to the second question of how then the existence of a state of internal armed conflict was to be determined, the Advocate General said that the principal criterion was the need of the claimant for protection, having regard to the fact that the system of international protection was based on the concept of protection of fundamental rights and that the CEAS requirement of the creation of a '*common area of protection and solidarity*' required an interpretation and application which preserved the flexibility of the system (paragraphs 81 to 85).
- g. In order to establish the existence of protection needs, the elements set out at Article 4.3 Recast QD, reflecting both the COI evidence and the evidence relevant to the claimant's personal situation would need to be considered. Such consideration was contrary to a requirement to apply fixed criteria in assessing the existence of an internal armed conflict.
- h. His answer to the second question was limited to general indications of appropriate methodology.

- i. In the context of Article 15(c), the concepts of ‘*indiscriminate violence*’ and ‘*armed conflict*’ were closely linked, the second serving to define the scope of the first. In contrast to the provisions of IHL (where the existence of internal or international armed conflict determined of itself the application of the protection regime), it is the risk run by the claimant by reason of the situation of indiscriminate violence which is determinative of the application of Article 15(c). Accordingly the issue of the intensity of violence and the risk which stemmed from it is more central to the issue of protection needs than identifying the acts which had given rise to the situation of generalised violence in the claimant’s country of origin.
- j. It was therefore no answer to the protection claim that the situation of conflict in that country did not meet the IHL criteria. Thus the application of Article 15(c) could not be considered automatically excluded on the basis, for example, that the armed violence was unilateral, a lack of IHL organisational or territorial control requirements on the part of the belligerents, the failure of government forces to intervene in the conflict, lack of ‘prolonged conflict’ in the IHL sense, that the conflict was entering into its final phase or was becoming less severe or would, under IHL, be categorised as internal tensions or troubles. All these situations were capable of engaging Article 15(c) provided the indiscriminate violence, at the date of decision of the claim, was of such a level as to create a real risk to the claimant’s life or person in case of *refoulement*.
- k. The requirement at paragraph 39 of the judgment in *Elgafaji* required the individual position of the claimant to be reflected on the basis that the more the risk was individualised, the less the level of indiscriminate violence which would be required to engage Article 15(c).

HM and Others v SSHD [2010] — Conclusions of the UKUT (IAC) as to the application of Elgafaji

1. In *HM and Others v Secretary of State for the Home Department* [2010] UKUT 331 (IAC) the following conclusions were reached, applying the ratio of the decision in *Elgafaji* and the later UK case of *QD (Iraq) [2009] EWCA Civ 620*:
 - i. an attempt to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict ... is not a helpful exercise in the context of Article 15(c) nor does it reflect the purposes of the Directive ... The judgment of the ECJ in *Elgafaji* indicates that the scope of protection in this part of the Article is a broad one at least during such time as the conflict is intense and the risks to civilians greater. (paragraph 73)
 - ii. Whilst there are important differences between targeted and non-targeted attacks ... civilians can be adversely affected by violence whatever its source.
 - iii. ... attempts to subtract certain types of violence can lead to a futile exercise in analysing statistics of deaths and casualties which fails to take into account common problems such as underreporting. (paragraph 75)
 - iv. ... Article 15(c) [is concerned] not just with threats to life but also to person; ... the term ‘life or person’ must extend to significant physical injuries, serious mental traumas and serious threats to bodily integrity. That has significance for the type of evidence relevant to establishing whether Article 15(c) is engaged. Such evidence cannot be confined to the numbers of casualties. (paragraph 76)
 - v. Once freed from the constraints of a requirement to evaluate whether the indiscriminate violence is a breach of IHL or otherwise legitimate in armed conflict ... the true purpose and scope of Article 15(c) [does not require] some precise assessment of the intentions or culpability of the actors to the conflict. Nor ... ordinarily would [it] be consistent with the broad approach enjoined by the ECJ in *Elgafaji* to adopt a non-inclusive approach when assessing the level and extent of indiscriminate violence. (paragraph 77)
 - vi. ... in the context of Article 15(c) the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause (paragraph 78). Article 15(c) requires there to be a sufficient causal nexus between the violence and the conflict; an operative cause that is not too remote. In that context ... general criminality that caused harm of the necessary degree of seriousness could be a consequence of armed conflict where normal law and order provisions are significantly disrupted. (paragraph 79)
 - vii. ... the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim. As the French Conseil d’État observed in *Baskarathas*, it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order. (paragraph 80)

- viii. The immigration judge [IJ] in finding the facts and reaching a conclusion is not passing any form of judgment on the legitimacy of the actions of the parties to the conflict whether international, national or regional. If there is a serious risk of injury and death to civilians in the location by reason of the fact that the armed conflict is being fought out in areas where civilians happen to be, that is a sufficient reason not to return them to war zones until that risk has decreased to the point where it is no longer real or substantial. (paragraph 81)
- ix. There must be a serious threat of real harm, but if the return in question is at a time when there is real harm being perpetrated on a very substantial number of civilians in the country in question, that harm is taking place in cities or provinces to which the Appellant is expected to return and there is no readily accessible internal safe haven predictably free of such harm where it would be reasonable to expect the appellant to go as an alternative, then the IJ would be entitled to find the conditions for protection made out. What cannot be required is a clear prediction of when a particular individual will become the victim of indiscriminate harm. All that is necessary is that there are substantial grounds for considering that there exists a serious threat of the real harm. (paragraph 82)
- x. There are clearly considerable overlaps between refugee status, the protection afforded by Articles 2 and 3 ECHR and that afforded against the serious harm in Article 15(a), (b), and (c), but there are also differences at least in emphasis. Whilst in *NA v UK* [Application No 25904/07] the ECtHR recognised at [115-117] that in exceptional cases of generalised violence Article 3 protection may be available, the essential concept was based on personalised individual risk, and only in the most extreme cases would it extend to risk of ill treatment on a more general basis. Thus Article 3 has broadened so that it can apply to certain kinds of harm in situations of armed conflict. (paragraph 87)
- xi. Article 15(c) also has a different starting point: indiscriminate violence in a situation of armed conflict. The reference to the threat being ‘individual’ includes a real risk to anyone in that situation. It is now clear that being singled out, targeted or subject to differential impact is not a necessary precondition of Article 15(c) protection, although the greater the risk factors arising by reason of relevant personal characteristics the less is the need to rely on generalised violence. ... neither is being singled out a precondition of refugee or Article 3 ECHR protection. The distinction between the protection afforded under Article 3 ECHR and that referred to in Article 15(b) may therefore be narrow in practice but that does not mean that 15(c) does not have its distinct ambit and purpose that should be the focus of analysis. If an applicant falls within one or other it may not be necessary to specify which. The observations of the ECJ at [39] of *Elgafaji* indicate that there is no rigid allocation of different degrees of targeted harm to different parts of the Directive. (paragraph 88)
- xii. ‘Armed conflict’ must mean something other than unpredictable and short lived outbreaks of deadly criminality however indiscriminate or the lone gunman on the rampage. Armed conflict and indiscriminate violence are not terms of art governed by IHL, but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice. (paragraph 89)
- xiii. Although IHL does not define the operative concepts, in order to identify circumstances when they are clearly engaged, we can see nothing in the case law binding on us that makes it impermissible to draw assistance from the rules of IHL as to when violence goes beyond casual criminality and becomes armed conflict. We understand from the submissions of UNHCR and other sources that IHL continues to inform the judgments of some other national courts and tribunals in the EU. (paragraph 90)
- xiv. We have also drawn assistance from the review of case law and concepts by Helene Lambert and Theo Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’, *IJRL* (2010) Vol. 22, No 2, p. 237. The authors note the continuing reference to IHL to inform the spirit of the measures by French courts (pp. 251-255). They regard it as self-evident that the metric of battlefield deaths used by the Correlatives of War Project since 1963 for inter state conflicts is not an appropriate means of measuring civilian deaths (pp. 260-261). The authors recognise that civilian casualties are a material metric in the present context but note the difficulty in obtaining reliable data whilst the conflict is in progress and the risks in excluding indirect casualties who are ‘killed or suffer serious illness as a consequence of the effects of war, for example, from imprisonment, abuse, starvation, or even the destruction of critical infrastructure and services’ (pp. 262-263). They accordingly suggest that attention can also be directed as a way of measurement of the intensity of the conflict to population displacement and to evidence of state failure (pp. 263-266, 272). (paragraph 91)
- xv. We see no reason why these considerations should not be factored into the overall assessment provided that there is a sufficient although not necessarily exclusive causal nexus between the violence arising in the conflict and the harm suffered. The AIT in *GS* was right to conclude that this could include risk of exposure to criminal violence resulting from the failure of protection arising from armed conflict. Destruction of

the necessary means of living, if not simply a remote consequence (as was found by the Tribunal in GS to be the case in Afghanistan in 2009), may equally be a relevant factor. Similarly, population displacement may well be an indicator of the intensity of such problems, whilst consideration of the availability of state protection itself and its efficacy is required under Article 2 of the Directive. An applicant is unable to access protection that is not available. (paragraph 92) ⁽⁹⁾

⁽⁹⁾ Common Article 3 provides: *In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

- (1) *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
 - (b) *taking of hostages;*
 - (c) *outrages upon personal dignity, in particular humiliating and degrading treatment;*
 - (d) *the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*
- (2) *The wounded and sick shall be collected and cared for.*

H. Example of moot court decision

Moot Court sitting at the Offices of EASO on 06 December 2013

Case MC-1/13 The Appellant

v

Safeland Refugee Commissioner

Mock decision

[NB. 1. **The Rules of the Moot Court** were fixed at the outset as being:

a. Procedural

- i. the order of submissions will be appellant, State, Third Party, then for responses Third Party, State and appellant;
- ii. the Court may ask questions at any time but would do so as far as possible until it had heard the first round of submissions;
- iii. the Court will not entertain any application to widen the scope of the appeal;
- iv. the Court will not entertain any application to call the appellant or introduce new evidence about his personal situation;
- v. there was only one appellant; his wife and granddaughter were not parties to the appeal;

b. Substantive

- vi. all returns from Safeland to Discordia are to Capitalia;
- vii. Safeland's Court applies its national legislation but for the purposes of this Moot its national law provisions are identical to those set out in the Recast QD;
- viii. Safeland legislation applies Article 8 of the Recast QD (on internal protection);
- ix. the Safeland Court is deciding the case on the merits (an error of law was found in the decision of the first-instance judge at an earlier hearing);
- x. the Safeland Court considers appeal such as this *ex nunc*, i.e. on the basis of the present day situation.

2. The following is the judgment of the Safeland Court delivered by the panel of Moot Court judges after hearing the oral submissions made by the sub-groups of participants representing the appellant, the State and the Third Party respectively. The panel of Moot Court judges had the benefit of an opinion from a 'Judge Rapporteur'. As those involved were only a sub-group of the judges who participated in the Moot Court exercise, its views do not necessarily reflect those of the participants as a whole. The Moot Court judges took into account the Opinion of Advocate General Mengozzi in the Diakite case but did not have the benefit of the CJEU judgment as it had not been handed down at the time of the meeting.

Scope

The sole issue before the Court is that of Article 15(c) — whether the appellant is a person eligible for subsidiary protection, i.e. whether substantial grounds have been shown for believing that, if returned to his country of origin, he would be at real risk of suffering serious harm as defined by Article 15(c) of the Recast QD.

In this regard this is not a typical case. In the typical case we look first at whether the appellant is a person eligible for refugee protection. We may also have to consider Article 15(b) of the same QD and Article 3 ECHR: but not here.

So far as exclusion is concerned, that is not an issue before us. The first-instance judge found nothing to suggest that the appellant had been engaged in actions contrary to the exclusion clauses of the QD.

Jurisdiction

The only appeal before us is that of the appellant. At the same time, he lives in Safeland with his wife and granddaughter as a family unit and the respondent confirmed before us that any removal to Safeland would be of the appellant together with his family; it would not be of the appellant on his own. Accordingly we reject the submission of the respondent that we should only consider the issue of risk to the appellant. To consider risk to the family as a whole is also consistent, we consider with recital 36 of the QD which states: ‘Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status’. Whilst this only relates to refugee status, we consider it is a principle which should be applied by analogy to subsidiary protection status, since the QD is concerned with recognition of international protection needs whether by reference to the Refugee Convention or by way of subsidiary protection status.

Request for order for preliminary ruling to CJEU

The respondent (government) requested that we decide to make an order for a preliminary ruling to the CJEU. However, as will be made clearer later on, we do not find that this request has been properly formulated, being extremely vague and not supported by any argument. To the extent that it appeared to argue that the meaning of the word ‘civilian’ in Article 15(c) is unclear, we have decided (again for reasons we shall give later on) that this issue is not material to the outcome of the appeal. In making this application the respondent argued that for the Court to refuse to make a reference would contravene Article 6 ECHR. However, leaving aside that the most relevant EU principle is not Article 6 ECHR but Article 47 of the European Charter of Fundamental Rights, this provision does not guarantee a right to a fair hearing to the respondent and in any event our decision to refuse to make a reference encompasses effective consideration of this request.

Applicable Law

As a national court of Safeland, we have to decide this case according to Safeland legislation, but, since it is common ground that the relevant Safeland law mirrors the Recast QD, we only refer to the latter.

Jurisprudence

- a. CJEU. At this point in time we do not have the judgment of the CJEU in *Diakite*, but we do have the Opinion of Advocate General Mengozzi and — although more than one member of our Court has doubts this Opinion is consistent with international law — we all agree it is pragmatic to expect the Court will follow it and so we treat his Opinion as highly persuasive.
- b. National jurisprudence. Thanks to the parties and their production of the EASO spreadsheet furnishing details of Luxembourg, Strasbourg and national court jurisprudence relevant to Article 15(c), our Court has a fuller picture of national jurisprudence on Article 15(c) than any previous national court. In addition to decisions of the CJEU and ECtHR decisions from around 16 Member States courts and tribunals have been cited. We hope our national courts will follow our example in making use of these materials.

Ex nunc examination on merits

We are required to decide this appeal on the merits. We are not confined in this case to the legality of the government decision. That means we must conduct an *ex nunc* examination of the claim.

a. Personal history

However our *ex nunc* approach is subject to one important limitation. It has already been settled at the last hearing that the only accepted facts relevant to the personal history of the appellant are as set out in (a)-(h) of Judge rapporteur Conclusions.

b. COI

The position is different with respect to COI:

- i. The respondent has produced a COI document on the security situation in Discordia. Given our duty of *ex nunc* examination we have admitted this evidence.
- ii. The 3rd party intervener has produced UNHCR Eligibility Guidelines on Discordia and we take these into account also.

Our approach to assessment of evidence pursuant to Article 4 Recast QD

In order to decide this appeal it is necessary to assess the evidence in conformity with the two-stage approach set out by the CJEU in Case C-277/II MM, 22 Nov 2012. The Court said:

‘The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence’.

Given that the factual circumstances of the appellant’s personal history have already been established, the only factual circumstances yet to be established relate to the general security situation in Discordia in the Article 15(c) context.

Under Article 4(1) although it is generally for the appellant to submit all elements needed to substantiate the application, the fact remains, as the CJEU said in MM at [65], that ‘it is the duty of the Member State to cooperate with the appellant at the stage of determining the relevant elements of that application’. By submitting its COI document on Discordia the government has discharged that duty.

Our approach to assessment of factual circumstances relevant to Article 15(c)

Before turning to assess the general security situation in Discordia we should say something about our approach. Article 15(c) cases are special because the subject matter is a country in a situation of violence and conflict. It requires us as judges to have regard to a number of factors or yardsticks.

We do not think we can try and lay down a fixed list of such factors, but from our analysis of leading cases, including *Sufi and Elmi* and *K.A.B v Sweden* App. No 886/11, 5 September 2013, the German Federal Administrative Court, the Dutch Council of State, the UK Upper Tribunal, the French asylum court (to name but a few) and by reference to UNHCR’s Eligibility Guidelines on Discordia, we can extract at least three principles:

- a. First, our approach must be holistic and inclusive. We must take into account as wide a range of variables as possible.
- b. Second, we must not limit ourselves to a purely quantitative analysis of figures of civilian death and injuries etc. Our approach has to be qualitative as well as quantitative.
- c. Third, building on this case law, which in turn has absorbed insights from academic studies, we should look in particular to see what the evidence tells us about the indicia of situations of violence and conflict (the following is intended as a non-exhaustive list):
 - The parties to the conflict and their relative military strengths.
 - The nature of the violence and the levels of violence, both in terms of numbers of civilian deaths and injuries, the methods and tactics of violence used, types of weapons etc.; the extent to which civilians are affected by the violence etc.: see *Sufi and Elmi* at paragraph 241 and *K.A.B v Sweden* at paragraphs 77-78.
 - The ability or lack of it of the state to protect its citizens against violence.
 - The nature and extent of population displacement.
 - Socio-economic conditions.

The legal questions

We remind ourselves at this stage what the key legal questions are which we have to ask ourselves.

Risk in home area

From *Elgafaji* and many of the national court decisions we derive that for Article 15(c) to be engaged, it is not necessary to decide whether the armed conflict is nationwide. We have to focus on the region where the appellant lives — Surubi. Our first question is ‘Is he at Article 15(c) risk in his home area?’ The evidence we have about Discordia as a whole is just background to that.

general risk

The next question is ‘Is the appellant at Article 15(c) risk merely by virtue of being a civilian — i.e. is he at general risk?’

specific risk

If our answer to that question is ‘No’, then we still need to ask if he can succeed under Article 15(c)’s sliding scale by virtue of his specific characteristics. By ‘sliding-scale’ we mean to refer to paragraph 39 of *Elgafaji*: ‘... 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.’

Risk on relocation

Even if we find he can show either general or specific risk in his home area, we must then go on to ask if he can safely reasonably relocate to Capitalia. That is a legitimate question to ask because Safeland applies Article 8 of the QD (10) (Whether it is for the appellant to prove he cannot relocate safely and reasonably or whether it is for the State to show that there is internal protection available on the basis of current COI evidence, we do not need to decide here).

Our findingsCivilian status

The protection under Article 15(c) is only open to a person who is a civilian. We know from the statement of the case that the appellant was called up by the army and deployed to serve as a guard in a military facility near Surubi. In the summer of 2010 he was informally released from this position due to bronchitis but this was on condition that he remains on call to resume his duty if needed.

It is submitted by the respondent that the above facts mean that the appellant is not a civilian, because he is a soldier. The appellant’s counsel submits the opposite.

There are strong arguments against considering that the appellant is a civilian.

On the given facts, Discordia operates compulsory military service he has not been discharged from military service nor is he a reservist. He appears to be still conscripted or employed by the army and has worked as a guard, which means he would have carried weapons. Although he was originally allowed to leave because he was sick, that is subject to recall and there is no evidence that he is not well now. (In respect of the submission by one of the counsels for the appellant that he was still unwell, we pointed out then and do so here that there was no evidence before us to this effect and it was not open to the counsels to seek during submissions to give evidence).

According to the relevant international law — international humanitarian law or IHL — the fact that a soldier is off-duty or off-sick does not mean he has become a civilian. As the Appeals Chamber of the International Tribunal on Yugoslavia observed in *Prosecutor v Blaskic (Judgment) Appeals Chamber, Case No IT-95-14-A, 29 July 2004 at paragraph 114, ‘the specific situation of the victim at the time the crimes [war crimes or crimes against humanity] are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organisation, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.’* (cited in ZQ (serving soldier) Iraq CG [2009] UKAIT 00048).

There are also strong arguments the other way, perhaps, for regarding the appellant as a civilian, namely that he does not appear to have engaged in actual fighting when he was a guard and to all intents and purposes he appears to be someone ‘hors de combat’ and not directly involved in hostilities. According to the Belgian decision *Council of Alien Law Litigation (Raad voor Vreemdelingenbetwistingen)*, 4 Dec 2007, the benefit of the doubt should be given to the applicant who cannot prove he is a civilian.

It is not necessary for us to seek to resolve these contrasting views on the issue of the appellant’s civilian status, because of the following.

As noted earlier it is a given that the appellant will only be removed together with his wife and granddaughter, recital 39 of the Recast QD. Even assuming the appellant is not a civilian, his wife and grandchild certainly are and hence if they are exposed to serious harm contrary to Article 15(c), then so will be the appellant, as their family member.

⁽¹⁰⁾ It may also be argued that it is for the State to raise the possibility of internal relocation in any particular case; that is the position in at least some Member States.

So, because the appellant's wife and grandchild are civilians, if they are at general Article 15(c) risk, so in practice will be the appellant.

It is principally for this reason that we earlier rejected the respondent's request that we make an order for reference to the CJEU on the issue of the meaning of civilian.

General risk

We are not persuaded that in the appellant's home area the level of violence is at the exceptionally high level identified by the CJEU in *Elgafaji* for the following reasons:

- the figure for civilian deaths and injuries from 2009 to the first six months of 2013 show a decrease since 2012;
- it appears that most of those killed and injured were in the southern region and Surubi is in the central highlands;
- Surubi is said to be 'relatively calm' although on the highway between it and Capitalia there are attacks, especially on government vehicles;
- Whilst it is clear that there have been a significant number of incidents where civilians have been targeted, there does not seem to be a consistent pattern of such attacks and there is little evidence of mass casualty attacks on civilians.
- In *Discordia* generally, whilst there are clearly deficiencies in the ability or willingness of the state to ensure adequate protection, the state of *Discordia* has some 200 000 troops and 85 000 international troops. Their impact would appear to have a strengthening effect on the ability of the state to protect others.
- population displacement figure of 500 000 per annum are troubling but represent a very considerable reduction since the figures of 2011 and earlier and strongly indicate a downward trend and this in the context that *Discordia* has a population of 28 million.

Specific risk

It still remains to consider whether, although not at general risk, the appellant can succeed under *Elgafaji*'s 'sliding-scale'.

As regards the fact that he will return with his wife and granddaughter, there is no evidence to suggest that he or his family has any special vulnerabilities and they face return as a family unit.

As regards the fact that he is a truck driver, we do not consider this is a relevant characteristic because his occupation as such is a matter of choice for him. But in any event, when he left his occupation was that of a soldier in the army where he worked as a guard. Whilst he was informally released subject to recall because of bad bronchitis, there is no evidence to suggest that he still suffers from this condition, hence it is reasonably likely he will return to that occupation.

On the evidence his job as a guard in a military facility near Surubi is not one that will give rise to Article 15(c) risk because the evidence does not demonstrate that this is an area where insurgents are strong.

Accordingly we conclude he is not eligible for subsidiary protection on the basis of risk in his home area.

Risk in Capitalia

However, given that we know the appellant, if returned, will be returned to Capitalia, we still need to consider whether he is at Article 15(c) risk there or on the route back to his home area of Surubi.

On the evidence we do not find he faces either a general or a specific Article 15(c) risk in Capitalia for the following reasons:

- The level of violence in Capitalia is less than in other parts of the country, even though international agencies are sometimes targeted there.
- Although in *Discordia* as a whole there is food insecurity, this is not the case in Capitalia.
- The appellant has relatives in Capitalia and we have not heard any evidence to suggest they would not be ready if need be to help him, his wife and granddaughter with accommodation etc.

Risk en route to Surubi

We accept that the evidence relating to the only highway linking Capitalia and Surubi is mixed. Attacks are said to be frequent. On the other hand, the preponderance of those attacks appears to be directed against government convoys. Given the available figures of deaths and casualties and attacks on this highway, and bearing in mind it is

one of the main highways linking Capitalia to other parts of the country, we do not consider that the risk of attack facing the appellant and his family is a real one which would give rise to serious harm.

The airport

We make a similar observation about the airport. On the evidence there have been no attacks in recent times on planes using the airport. Although the evidence contains a suggestion that this may be a function of lack of insurgent accuracy, we are sure if there was any evidence of actual attacks or of a real likelihood of a successful attack, we would have had more specific evidence about it.

Internal relocation

Since we have not found the appellant would face a real risk of serious harm in his home area of Surubi or in Capitalia the place in Discordia to where he will be returned, we do not need to consider whether he would have a viable internal relocation alternative. However, for the sake of completeness, even if we had found the appellant was at Article 15(c) risk in his home area of Surubi, we find on the available COI evidence that he could relocate in Capitalia safely and reasonably. Our reasons are much the same as we have given earlier when considering return to Capitalia. The level of violence is low there; he has relatives there; the socioeconomic conditions are better than in Discordia as a whole.

In addition, there is no evidence to suggest that he, his wife or grandchild have any particular difficulties such as health problems. Whilst in his 50s the appellant has had two different types of job, as a truck driver and a guard. If he is not required to return to Surubi and recommence his job as a guard, then we are satisfied he could find employment in Capitalia.

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