

## Refugee Status based on Religion following Subsequent Conversion: The European Court of Justice's Decision

The judgment in question arises from a preliminary reference concerning the interpretation of Article 5(3) of Directive 2011/95/EU of the European Parliament and of the Council of the European Union, of 13 December 2011, regarding international protection.

The question was raised in a dispute involving the Bundesamt für Fremdenwesen und Asyl, the Federal Office for Foreigners and Asylum Law in Austria (hereinafter BFA), and an Iranian citizen, JF, who contested the legitimacy of the denial of refugee status. After the BFA rejected an initial application for international protection, JF submitted a repeated application based on his subsequent conversion to Christianity and the consequent risk of persecution in his country of origin. Despite acknowledging that JF converted to Christianity “out of sincere conviction” and actively practices this religion in Austria, the BFA again rejected the request for international protection. This was based on the Federal Asylum Act 2005, which states that the risk of persecution was self-determined by the applicant following his subsequent conversion to another religion. JF appealed to the Federal Administrative Court, which ruled in his favor, finding no abusive conduct by the applicant. The BFA appealed to the Austrian Administrative Court, considering that the text of the Asylgesetz 2005 introduces as a general rule the denial of refugee status to applicants who have themselves determined the circumstances giving rise to the risk of persecution in the host Member State unless such activities are in Austria and constitute the expression and continuation of beliefs already expressed in the country of origin.

The referring court subsequently raised a preliminary question to the European Court of Justice, asking whether Article 5(3) of Directive 2011/95 should be interpreted as precluding national legislation that conditions the recognition of refugee status, based on a risk of persecution resulting from circumstances determined by the applicant after leaving the country of origin, on the dual condition that these circumstances fall within the activities permitted in the Member State concerned and constitute the expression and continuation of a belief already expressed in the country of origin.

The European Court of Justice first made a literal interpretation of the provision subject to the reference, with regard to the terms “in particular” and “normally” used in the text<sup>1</sup>. Firstly, the fact that paragraph 3 of Article 5 of the directive allows Member States to “normally” refuse refugee status under the conditions indicated by the provision does not preclude that an applicant may still obtain recognition of such status. Secondly, the use of the term “in particular,” referring to the possibility of recognizing refugee status when activities giving rise to the risk of persecution – such as in the present case, conversion to another religion – subsequent to departure, constitute the expression and continuation of beliefs or orientations already expressed in the country of origin, does not preclude activities that do not constitute such expression or continuation from being invoked in principle within the scope of an application for international protection. Therefore, the Court of Justice affirmed that the derogation provided for in Article 5(3) of the

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<sup>1</sup> Article 5(2)(3) of Directive 2011/95 states that «A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, *in particular* where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not *normally* be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin».

directive, in addition to being interpreted restrictively, aims to sanction abusive intent of the applicant, in cases where the circumstances underlying the risk of persecution have been “constructed” by the applicant. This must be verified through a comprehensive examination of all elements of the case, without Member States being able to introduce any presumption of abuse merely on the basis of repeated applications for international protection.

However, the key point of the interpretation provided by the Court of Justice can be found in the subsequent passages, where it argued that if abusive conduct by the applicant is established, the clause contained in Article 5(3) of the directive comes into play, which saves the Geneva Convention. Article 33(1) of the Convention provides that no contracting state may reject a refugee to territories where his life or freedom would be threatened because of his religion, among other reasons.

By emphasizing the recourse to peremptory principles of international law, such as *non-refoulement*, the Court of Justice has defined the boundaries of protection for applicants seeking international protection with an interpretation that provides broad protection to all those at risk of persecution, for any reason, in their country of origin.

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