



New Horizons in Asylum Law

Two recent cases on the EU Asylum Directives have made clear that EU law does not simply mirror existing asylum and human rights law, but has real, additional, practical effect.

By Tom Hickman

The first, *Elgafaji* C-465/07, concerns the Qualification Directive (2004/83/EC), which establishes an EC “status” of refugee, broadly following international refugee law, and a secondary “subsidiary protection status” (“SPS”), broadly reflecting human rights law on risk on return. In February, the ECJ held that Article 15(c), which defines the scope of SPS, is, “a provision, the content of which is different from that of Article 3 ECHR” and it has to be interpreted “independently”, with “its own field of application”.

The Court held that SPS arises where a person would be subject to a “serious threat” of “indiscriminate violence” arising from “armed conflict” if returned. This goes beyond the Strasbourg case law, at least (but importantly), in lowering the threshold to requiring a risk of a serious threat only.

The ECJ also took what may come to be seen as first steps in forging its own jurisprudence on risk on return. In comments that differ subtly from the Strasbourg cases, the ECJ stated 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 level of indiscriminate violence he must show”.

The second case, *T* (sub nom *Tekle*) (heard with an appeal from *Omar & Min Min*), is a decision of the Court of Appeal announced on 1 April, with reasons to follow. The question was whether the Reception Directive (2003/9/EC) grants an asylum seeker a right to work after 12 months whilst a fresh claim is being considered. The respondent’s fresh claim had not been addressed for four and half years and he was left in “limbo”: denied the basic social right to earn his own living. The Government’s position was that the Reception Directive confers only “welcome” and “initial encounter” rights, which are lost when an asylum claim is initially refused.

Counsel for Min/Omar and for *T* pointed out that a third Directive, the Procedures Directive (2005/85/EC), sets out procedures for dealing with fresh claims. Reading the Directives together makes clear that the Reception Directive right to work applies to unprocessed fresh claims. In other words, the scheme is comprehensive: there is no human rights gap. The Court of Appeal agreed.

Taken together *Elgafaji* and *T* provide a compelling illustration that the “Common European Asylum System” is a practical reality. Crucially, and as the ECJ re-affirmed in *Elgafaji*, all domestic law must be interpreted consistently with the Directives.

This new horizon for asylum law brings with it complexities. But as both cases demonstrate, it also brings with it exciting and practical opportunities for protecting and enhancing human rights.

Michael Fordham QC appeared for T