Federal Administrative Court
Supreme Court
(https://www.bverwg.de/en)

Judgment of 20 May 2020 - BVerwG 1 C 11.19

ECLI:DE:BVerwG:2020:200520U1C11.19.0

Subsidiary protection by reason of poor humanitarian situation in country of origin

Headnotes

1. Inhuman or degrading treatment by reason of a poor humanitarian situation in a country of origin establishes eligibility for subsidiary protection under section 4 (1) second sentence no. 2 AsylG only if such treatment proceeds purposefully from an agent within the meaning of section 4 (3) in conjunction with section 3c AsylG (see BVerwG, decision of 13 February 2019 - 1 B 2.19 - (...) para. 13)

2. In the absence of individual circumstances that increase a threat, indiscriminate violence must attain an especially high level for the civilian population in order to constitute a serious threat to life or physical integrity within the meaning of section 4 (1) second sentence no. 3 AsylG. For such a level, findings as to density of threat are required, comprising not only an approximate quantitative determination of the risk of death and injury, but also an overall assessment of how the foreign national is affected individually (see BVerwG, judgments of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33, of 17 November 2011 - 10 C 13.10 - (...) para. 22 et seq., and of 13 February 2014 - 10 C 6.13 - (...) para. 24, each concerning the predecessor provision of section 60 (7) second sentence AufenthG old version, which has the same wording; BVerwG, decision 8 March 2018 - 1 B 7.18 - (...) para. 3).

Sources of law

Asylum Act	AsylG, *Asylgesetz*	sections 3c, 4 (1) second sentence no. 2 and 3, (3), section 77 (1)
European Convention on Human Rights (ECHR)		article 3
Directive 2011/95/EU		articles 6, 15 (b) and (c)
Charter of Fundamental Rights of the European Union (CFR)		articles 4, 19 (2)

Summary of the facts

The claimant, a Somali national born in Mogadishu in 1998, requests that she be granted subsidiary protection.

By her own account, the claimant entered the federal territory in 2015, and applied for recognition of entitlement to asylum at the beginning of 2016. In support of her application, she primarily stated threats from Al-Shabaab. By notice of 7 February 2017, the Federal Office for Migration and Refugees (*Bundesamt für Migration and Flüchtlinge*, hereinafter Federal Office) rejected her applications for recognition of entitlement to asylum, for the granting of refugee status, and for the granting of subsidiary protection, and declared instead that there was a deportation ban pursuant to section 60 (5) of the Residence Act (AufenthG, *Aufenthaltsgesetz*) in conjunction with article 3 of the European Convention on Human Rights (ECHR).

The action she brought, by which she ultimately requested to be granted subsidiary protection status, was dismissed by the Administrative Court (*Verwaltungsgericht*) in a judgment of 14 March 2019. The Court based its decision on the ground that upon returning to Somalia, the claimant would not be threatened with inhuman or degrading treatment within the meaning of section 4 (1) second sentence no. 2 of the Asylum Act (AsylG, *Asylgesetz*). Her submission that she would be killed by members of Al-Shabaab upon her return was not found credible. A granting of subsidiary protection on the basis of the poor humanitarian situation in Somalia was ruled out, too. Although that situation did establish a basis for inhuman or degrading treatment within the meaning of article 3 ECHR, but there was no agent who was purposefully inducing or significantly exacerbating the poor humanitarian conditions, as provided in section 4 (3) first sentence in conjunction with section 3c AsylG and article 6 of Directive 2011/95/EU. A mere causal link between the poor security situation and the disastrous humanitarian situation did not suffice. Moreover, the Court of Justice of the European Union (CJEU, hereinafter Court of Justice) has also denied the granting of subsidiary protection so long as an ill foreign national is not "intentionally" denied medical care in his or her home country. Furthermore, recital 35 of Directive 2011/95/EU indicated that risks to which a population of a country is generally exposed did not normally create in themselves an individual threat which would qualify as serious harm. The Court of Justice had recognised an exception to this principle only in the case of article 15 (c) of Directive 2004/83/EC (threat in a situation of armed conflict). Somalia was indeed characterised by an armed conflict that has gone on for years between Al-Shabaab, on one side, and the troops of the Somali government and its allies, on the other. The poor humanitarian conditions for the civilian population did indeed derive significantly from the poor security situation or were predominantly attributable to direct or indirect actions by the agents engaged in the conflict. But they were not purposefully induced or exacerbated by those agents, and rather must be considered "only" collateral damage. Insofar as the parties to the conflict interfere with humanitarian aid, those measures were not directed to causing a deterioration in living conditions for the civilian population, but were a means to an end in the struggle for dominance. Even if one were to view these acts as purposefully causing a deterioration of the humanitarian situation, it would constitute only part of the reason for the poor living conditions, while the armed conflict is the primary reason. If the claimant returned to Somalia, she was also not threatened with serious harm by reason of indiscriminate violence pursuant to section 4 (1) second sentence no. 3 AsylG. It could be left open whether an armed conflict must be assumed in Mogadishu, because in any event there was no individual threat. In the claimant's case there were no circumstances that would increase a threat. Nor was the situation in Mogadishu characterised by such a high degree of threat that practically any civilian might be exposed to a serious individual threat simply by being present. It was not possible to obtain an exact assessment of the density of threat on the basis of a quantitative determination of the risk of death and injury by comparing the total number of civilians living in the region against the acts of indiscriminate violence, because there were no reliable figures. Even irrespective of a quantitative assessment, the documented attacks did not attain such a quantity and quality that an assumption of a threat to the entire civilian population must be assumed.

In her appeal on points of law, which was admitted by the Administrative Court, the claimant complains of a violation of section 4 (1) AsylG and of article 15 of Directive 2011/95/EU. She argues that inhuman or degrading treatment under these provisions should be decided on the basis of the case-law of the European Court of Human Rights (ECtHR) on article 3 ECHR, and did not require purposeful action by an agent. In light of a proceeding on a referral for a preliminary ruling on article 15 (c) of Directive 2011/95/EU that is now pending before the Court of Justice, she would agree to a suspension of proceedings.

The defendant defends the contested judgment.

Reasons (abridged)

6 The claimant's (leapfrog) appeal, on which, with the parties' consent, the Senate decides without an oral hearing (section 101 (2) in conjunction with section 141 first sentence and section 125 (1) first sentence of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)), is admissible but without merit. The Administrative Court did not violate any law that is subject to an appeal on points of law in holding that the claimant is not entitled to be granted subsidiary protection under section 4 AsylG. In particular, if she returns she is not threatened with inhuman or degrading treatment within the meaning of section 4 (1) no. 2 AsylG by reason of the poor humanitarian situation in Somalia, because such treatment does not proceed purposefully from an agent within the meaning of section 3c AsylG (1.); nor is she threatened with serious harm by reason of indiscriminate violence in a situation of armed conflict pursuant to section 4 (1) no. 3 AsylG, because in any event the requisite individual threat is absent (2.). There is no need for further clarification by the Court of Justice (3.).

7 The legal assessment of a request is based on the Asylum Act in its latest version (currently: in the version promulgated on 2 September 2008 <Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1798>, last amended by the Second Act Adjusting Data Protection Law to Regulation (EU) 2016/679 and Transposing Directive (EU) 2016/680 (*Zweites Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*) of 20 November 2019, which entered into

force on 26 November 2019 <BGBl. I p. 1626>. Changes in the law occurring after the last oral hearing or the decision of the court responsible for finding the facts must be taken into consideration in appeal proceedings on points of law if they had to be considered by the court responsible for finding the facts - if it were to decide instead of the court deciding on appeals on points of law (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 11 September 2007 - 10 C 8.07 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 129, 251 para. 19). Since the present case concerns a dispute under asylum law where the court responsible for finding the facts regularly had to refer to the factual and legal situation at the time of the last oral hearing or the decision pursuant to section 77 (1) AsylG, it would have to base a decision on the latest version if it were to decide on the matter now, unless a derogation is required for reasons of substantive law (established jurisprudence, see BVerwG, judgment of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 12). The provisions, that are decisive here, have not changed, however, since the oral hearing before the Administrative Court.

8 According to section 4 (1) AsylG - and subject to the grounds for exclusion contained in section 4 (2) AsylG, which are not relevant here - a foreign national is eligible for subsidiary protection if he or she has shown substantial grounds for believing that he or she would face a real risk of suffering serious harm in his or her country of origin. Serious harm consists of: (1.) death penalty or execution, (2.) torture or inhuman or degrading treatment or punishment, or (3.) serious and individual threat to a civilian's life or physical integrity by reason of indiscriminate violence in situations of international or internal armed conflict. Pursuant to section 4 (3) AsylG, sections 3c through 3e AsylG apply *mutatis mutandis*, in which case persecution, protection from persecution or the well-founded fear of persecution are to be replaced by the well-founded fear of serious harm, protection against serious harm or the real risk of serious harm; refugee status is to be replaced by subsidiary protection. In this provision, the legislature implemented the requirements of EU law for subsidiary protection under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast, OJ L 337 p. 9) - so-called Qualification Directive.

9 1. The assumption of the Administrative Court, that if the claimant returns to Somalia, she would not be threatened with serious harm within the meaning of section 4 (1) second sentence no. 2 AsylG (torture or inhuman or degrading treatment or punishment) by reason of the poor humanitarian situation, because there is no agent within the meaning of section 4 (3) in conjunction with section 3c AsylG from whom inhuman or degrading treatment would purposefully proceed, does not give rise to any objections within the scope of the appeal on points of law.

10 a) For the criteria constituting inhuman or degrading treatment within the meaning of section 4 (1) second sentence no. 2 AsylG - as in the case of section 60 (5) AufenthG in conjunction with article 3 ECHR, too - recourse has to be taken to the case-law of the European Court of Human Rights on article 3 ECHR, due to the largely identical regulatory area (BVerwG, judgment of 31 January 2013 - 10 C 15.12 - BVerwGE 146, 12 para. 36). Accordingly, the socio-economic and humanitarian conditions in a country of return do not necessarily have a bearing, and certainly not a decisive bearing, on the question whether the person concerned would face a real risk of ill-treatment in that country within the meaning of article 3 ECHR (ECtHR, judgments of 28 June 2011 - Application no. 8319/07 and 11449/07, Sufi and Elmi - para. 278 and of 29 January 2013 - Application no. 60367/10, S.H.H. - para. 74). According to that case-law, the fact that the applicant's circumstances, including his or her life expectancy, would be significantly reduced if his or her residence were to be terminated is not sufficient in itself to give rise to a breach of article 3, because the Convention for the Protection of Human Rights and Fundamental Freedoms is essentially directed at the protection of civil and political rights. The case-law of the European Court of Human Rights provides otherwise only in very exceptional cases, where humanitarian grounds against the removal are compelling (ECtHR, judgments of 27 May 2008 - Application no. 26565/05, N. - (...) para. 42 and of 28 June 2011 - Application no. 8319/07 and 11449/07, Sufi and Elmi - para. 278; BVerwG, judgment of 31 January 2013 - 10 C 15.12 - BVerwGE 146, 12 para. 23, 25, and decision of 13 February 2019 - 1 B 2.19 - (...) para. 6).

11 b) It does not need to be finally decided whether, in applying this strict standard of review, the Administrative Court correctly found a high level of threat that is required to constitute inhuman treatment solely based on the humanitarian situation and general living conditions justifying to assume an exceptional case in which the humanitarian grounds against a removal are compelling (on the ECtHR's assessment of the situation of threat, see judgment of 5 September 2013 - Application no. 886/11, K.A.B. - para. 91, in which, in contrast to what the Court had still held in June 2011, it found that, at any rate in Mogadishu, violence no longer prevails to such an extent that for that reason alone, every returnee is placed at a risk of treatment contrary to article 3 ECHR). This is the case because the Administrative Court noted that it is not sufficient for an application of article 15 (b) of Directive 2011/95/EU if a threat of a violation of article 3 ECHR as interpreted by the European Court of Human Rights arises only in exceptional cases. Rather, a risk of serious harm in the form of torture or inhuman or degrading treatment or punishment that establishes grounds for subsidiary protection, as provided in section 4 (3) AsylG, must always proceed from an agent within the meaning of section 3c AsylG (BVerwG, judgment of 31 January 2013 - 10 C 15.12 - BVerwGE 146, 12 para. 29 and decision of 13 February 2019 - 1 B 2.19 - (...) para. 6).

12 The case-law of the Court of Justice has clarified that article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU), which is worded identically to section 4 (1) second sentence no. 2 AsylG, should be interpreted as requiring a direct or indirect action by an agent who is responsible for the inhuman living situation in the sense of an attributability which goes beyond unintended collateral consequences requiring an action, or even an intent, directed to obtaining the achieved effects. In a case of inadequate medical care, the Court of Justice decided in a judgment of 18 December 2014 - C-542/13 [ECLI:EU:C:2014:2452] M'Bodj - (para. 35, 41) that the serious harm referred to in article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) cannot simply be the result of general shortcomings in the health system of the country of origin. The Court of Justice derives this conclusion primarily from article 6 of Directive 2004/83/EC (now: Directive 2011/95/EU), which sets out a list of those deemed responsible for inflicting serious harm. However, threats 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 (recital 26 of Directive 2004/83/EC; now: recital 35 of Directive 2011/95/EU). The Qualification Directive is intended to complement rules protecting refugees with subsidiary protection, and to that extent to identify the persons genuinely in need of international protection; its scope does not, however, extend to persons who are allowed to remain in the territories of the Member States for other reasons - such as family or humanitarian reasons (see recitals 5, 6, 9 and 24 of Directive 2004/83/EC; now: recitals 6, 12, 15 and 33 of Directive 2011/95/EU). Consequently, the Court of Justice holds that the requirements of article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) are not met unless a person suffering from an illness is "intentionally" deprived of health care on his or her return (CJEU, judgment of 18 December 2014 - C-542/13, M'Bodj - para. 41). Reinforcing this position, Advocate General B. also assumes that serious harm within the meaning of article 15 (b) of Directive 2004/83/EC (now: Directive 2011/95/EU) must proceed from the direct or indirect action of the public authorities. The threat of inhuman or degrading treatment must arise from factors that are, directly or indirectly, but always deliberately, attributable to the public authorities of that country, either because the threats to the person concerned are being made or tolerated by the authorities in the country of which that person is a national, or because those threats are made by independent groups against which the authorities

of that country are unable to provide effective protection to their citizens (Opinion of Advocate General B. of 24 October 2017 - C-353/16, M.P. - para. 30 et seqq.). Consistently with that position, the Court of Justice states in its judgment of 24 April 2018 - C-353/16 [ECLI:EU:C:2018:276], M.P. - (para. 51) that the threat of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his or her country of origin, is not sufficient, unless that third country national is "intentionally" deprived of health care, to warrant that person being granted subsidiary protection. According to this case-law, the action or omission of the agent causing serious harm must be deliberate and purposeful ("intentional"). Similarly to the jurisprudence of the Federal Administrative Court (BVerwG, judgment of 19 January 2009 - 10 C 52.07 - BVerwGE 133, 55 para. 24) on determining an act of persecution in connection with refugee status under section 3 (1) AsylG or Asylum Procedure Act (AsylVfG, *Asylverfahrensgesetz*), there is therefore a need for a purposeful action or omission by an agent that induces or significantly exacerbates the poor humanitarian situation (BVerwG, decision of 13 February 2019 - 1 B 2.19 - (...) para. 13; (...)). This applies taking account of the objectives of the Directive that have been emphasised by the Court of Justice in general, and the express reference to article 6 of Directive 2004/83/EC (now: Directive 2011/95/EU), not only when the threatened harm is attributable to general shortcomings of the health system in the country of origin, but for all types of cases of an inhuman living situation in a country of origin that are covered by article 15 (b) of Directive 2011/95/EU.

13 This interpretation is consistent with article 3 ECHR and the provisions in article 4 and article 19 (2) of the Charter on Fundamental Rights, which are to be interpreted in its light. The threat of a violation of article 3 ECHR as interpreted by the European Court of Human Rights in exceptional cases in the country of origin would prevent deportation to that country. But this does not mean that the third country national should therefore also be granted leave to reside in a Member State by way of subsidiary protection (CJEU, judgment of 18 December 2014 - C-542/13, M'Bodj - para. 40). A possible denial of international protection does not constitute a final decision as to whether a return to the country of origin - also with reference to article 3 ECHR - is legally permissible under either EU law (see also Mannheim Higher Administrative Court (VGH, *Verwaltungsgerichtshof*), judgment of 3 November 2017 - A 11 S 1704/17 - (...) para. 80) or national law (see section 60 (5) and (7) first sentence AufenthG).

14 c) In application of these principles, the Administrative Court found that there were no persuasive grounds to assume serious harm within the meaning of section 4 (1) second sentence no. 2 AsylG solely by reason of the poor humanitarian situation in Somalia, because this situation does not proceed purposefully from an agent. In finding so, it assumed, with regard to the facts, that Somalia is characterised by an armed conflict that has gone on for years between Al-Shabaab, on one side, and the troops of the Somali government and its allies, on the other. However, the Court concluded that the resulting deterioration in the living conditions of the Somali civilian population is "only" collateral damage of the intense civil war. Measures taken by Al-Shabaab and the authorities that affected the humanitarian situation were not intended to cause a deterioration in the living conditions of the civilian population, but rather were a means to an end in the struggle for dominance. Even if one were to view these acts as a purposeful deterioration of the humanitarian situation, that influence would be relatively minor, because the armed conflict is the primary reason for the poor living conditions, and the purposeful deterioration is only part of the reason.

15 There is no reason to object within the scope of the appeal on points of law to either the Administrative Court's assessment of the facts concerning the circumstances in Somalia, or its associated subsidiary legal conclusion that what is at most a subordinate purposeful deterioration of the humanitarian situation by an agent within the meaning of section 3c AsylG cannot in itself suffice for a grant of subsidiary protection under section 4 (1) second sentence no. 2 AsylG. Poor humanitarian conditions in a country are typically attributable to a multiplicity of factors. If a grant of subsidiary protection under section 4 (1) second sentence no. 2 AsylG requires the presence of an agent to whom the inhuman living situation can be attributed, that situation must in any event be significantly, and not just to a small extent, attributable to the deliberate, purposeful actions of an agent.

16 2. The claimant does also not meet the requirements of section 4 (1) second sentence no. 3 AsylG. According to that, serious harm can also consist of serious and individual threat to a civilian's life or physical integrity by reason of indiscriminate violence in situations of international or internal armed conflict. Under this third case group - which implements the requirements of article 15 (c) of Directive 2011/95/EU - subsidiary protection covers situations of threat to the fundamental right to life and physical integrity that arise in armed conflicts, and that in themselves are not to be qualified as persecution under the fundamental conception of the Geneva Refugee Convention.

17 a) For its prognosis of whether the claimant would be exposed to a serious individual threat to life or physical integrity by reason of indiscriminate violence upon her return to Somalia, the Administrative Court correctly focused on the factual circumstances in Mogadishu. The point of reference for the threat assessment required under section 4 (1) second sentence no. 3 AsylG is the actual destination in the event of a return. As a rule, this is the foreign national's region of origin, to which that person will typically return (BVerwG, judgment of 14 July 2009 - 10 C 9.08 - BVerwGE 134, 188 para. 17, with reference to CJEU, judgment of 17 February 2009 - C-465/07 [ECLI:EU:C:2009:94], Elgafaji - (...)). As the claimant lived in Mogadishu prior to leaving the country, the assumption that she will return there is justified.

18 b) The Administrative Court furthermore correctly assumed that a serious individual threat to life and physical integrity as provided in section 4 (1) second sentence no. 3 AsylG can also proceed from a general threat to a large number of persons in an armed conflict - as the Administrative Court presumed in the claimant's favour - if that threat becomes concentrated in the foreign national's person.

19 According to the case-law of the Court of Justice, the requirement for a serious individual threat by reason of indiscriminate violence refers to 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, 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 a serious threat (CJEU, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 35). However, in light of the recital 26 of Directive 2004/83/EC (now: recital 35 of Directive 2011/95/EU), which notes 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", in light of the subsidiary nature of the serious harm in question, and finally, in light of the broad logic of article 15 of Directive 2004/83/EC (now: Directive 2011/95/EU), in which the harms defined in letters (a) and (b) require a clear degree of individualisation - this possibility is reserved for an exceptional situation which would be characterised by such a high degree of threat that substantial grounds would be shown for believing that that person would be subject individually to the risk in question (CJEU, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 36 et seqq.). The Court of Justice specifies this further as meaning that the more the applicant is able to show that he or she is specifically affected by reason of factors particular to his or her personal circumstances, the lower the level of indiscriminate violence required for him or her to be eligible for subsidiary protection (CJEU, judgment of 17 February 2009 - C-465/07, Elgafaji - para. 39). Consequently if, by reason of the armed conflict prevailing in Somalia, a general threat arises in the Mogadishu region for a large number of civilians, in order for the claimant to be entitled to subsidiary protection that threat must become so concentrated in her person that it constitutes a serious individual threat to her within the meaning of section 4 (1) second sentence no. 3 AsylG.

20 Where there is a high level of indiscriminate violence for the civilian population, such an individualisation may result from circumstances particular to the person of the individual concerned that increase the threat. These include first and foremost personal circumstances that cause the applicant to appear more severely affected by the general, indiscriminate violence, for example because that person is compelled by profession - e.g., as a physician or journalist - to remain in the vicinity of the source of threat. However, one must also take into account personal circumstances by reason of which the applicant, as a civilian, is additionally exposed to the threat of purposeful acts of violence - for example by reason of that person's religious or ethnic affiliation - to the extent that a granting of refugee status does not already come under consideration for that reason in itself (BVerwG, judgment of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33). The Administrative Court has found no such individual circumstances that increase a threat for the claimant, and that finding is binding upon the Court deciding on the appeal on points of law.

21 By exception, an individualisation of the general threat may also arise in cases in which there are no individual circumstances that increase a threat - as is the case here - where there is an exceptional situation that is characterised by such a high degree of threat that practically any civilian would be exposed to a serious individual threat merely because of their presence in the area concerned (BVerwG, judgment of 14 July 2009 - 10 C 9.08 - BVerwGE 134, 188 para. 15 with reference to CJEU, judgment of 17 February 2009 - C-465/07, Elgafaji). If there are no circumstances that increase a threat, an especially high level of indiscriminate violence is required (BVerwG, judgment of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33). To determine the density of threat necessary for this purpose, according to the Senate's jurisprudence - based on the principles it has developed for determining group persecution in the field of refugee law (see, on this, BVerwG, judgment of 18 July 2006 - 1 C 15.05 - BVerwGE 126, 243 para. 20 et seqq.) - what is required first is an approximate quantitative determination of the risk of death and injury, and on that basis, an overall assessment of the foreign national's individual exposure (see BVerwG, judgments of 27 April 2010 - 10 C 4.09 - BVerwGE 136, 360 para. 33, of 17 November 2011 - 10 C 13.10 - (...) para. 22 et seq. and of 13 February 2014 - 10 C 6.13 - (...) para. 24, each regarding the predecessor provision of section 60 (7) second sentence AufenthG, old version, which had the same wording; BVerwG, decision of 8 March 2018 - 1 B 7.18 - (...) para. 3) However, this "quantitative" approach in the Senate's jurisprudence ultimately differs at most gradually from the contrary position that is sometimes argued, namely that a purely qualitative approach is required (...), for it does not aim to establish a "threat value" to be applied to all conflict situations - still less, one endorsed by a supreme court - in the sense of a mathematical-statistical minimum threshold that is to be applied mandatorily; rather, by way of the requirement of a final overall assessment, it leaves adequate room for qualitative appraisals; even the contrary position, with its purely qualitative approach, ultimately cannot manage without having recourse to the actual persecution events (...).

22 However, it can be left open whether, to this extent, further clarification must be expected from the Court of Justice in light of the jurisprudence in other European states and the related decision to request a preliminary ruling submitted by the Mannheim Higher Administrative Court, on the criteria of EU law by which the existence of a serious individual threat must be assessed (VGH Mannheim, decision to request a preliminary ruling of 29 November 2019 - A 11 S 2374/19 et al. - (...)). This is because in an overall assessment, the Administrative Court concluded that irrespective of any quantitative consideration of relations, the scope of the general threat in Mogadishu does not present the requisite density of threat. The Administrative Court justified the lack of quantitative findings concerning the risk of death and injury based on a comparison of the total number of civilians living in the region concerned against the acts of indiscriminate violence, that this were a consequence of the fact that such findings concerning the situation in Somalia were unlikely to be reliably possible. The total number of persons who have been the victims of indiscriminate violence could not be estimated even with approximate reliability, because no trustworthy figures were available. There is no need to decide in the present proceedings whether the Administrative Court thus met its judicial duty to investigate under section 86 (1) first sentence VwGO and whether a further inquiry was neither possible nor reasonable, because a leapfrog appeal serves only to clarify fundamental legal questions, and cannot be founded on procedural complaints (section 134 (4) VwGO), which were also not raised here. If, on the basis of the Administrative Court's findings as to the facts, which are fundamentally binding on the Senate, the risk of death and injury cannot be reliably determined, even approximately, in quantitative terms under the duty to investigate the facts incumbent on the Federal Office and the courts, the further assumption of the Administrative Court - which is then founded not least of all on qualitative considerations - that on returning to the Mogadishu region the claimant would not be exposed to a serious individual threat to life and physical integrity from indiscriminate violence does not give rise to objections.

23 According to the findings of the Administrative Court, the security situation in Mogadishu does remain volatile. But the greatest threat to the civilian population in the region does not proceed from armed conflicts between the parties to the civil war, but from attacks by the Islamist militia Al-Shabaab. These are often directed against military and political targets, even though Al-Shabaab's attacks sometimes also purposefully target the civilian population in order to cause chaos and undermine trust in the government's stability. In its capacity as the court responsible for finding the facts, the Administrative Court arrived at the assessment that the documented attacks, which were described in detail, had not thus far reached such a quantity and quality that an assumption of a threat to the entire civilian population of Mogadishu must be assumed. In so finding, it took into account that at present Mogadishu is not among the regions of Somalia that are particularly affected by the conflict, and reports at least mention improvements in the security situation, even though that situation must still be categorised as poor. On the basis of these findings by the court responsible for finding the facts, which are binding on the Senate, the conclusion reached by way of an overall assessment that not every civilian in the Mogadishu region is exposed to a serious individual threat solely on the basis of their presence there does not give rise to any objections within the scope of the appeal on points of law.

24 3. The Senate can decide with no need for a further prior clarification by the Court of Justice.

25 a) The requirements for granting subsidiary protection under section 4 (1) second sentence no. 2 AsylG on the basis of inhuman or degrading treatment attributable to poor living conditions in the country of origin proceed from the aforementioned case-law of the Court of Justice, and the present case offers no reason for a further clarification by the Court of Justice. Insofar as the jurisprudence of the Austrian Supreme Administrative Court (VwGH, *Verwaltungsgerichtshof*) holds that the threat of inhuman or degrading treatment within the meaning of article 3 ECHR is sufficient for granting subsidiary protection, with no need for causation by an actor within the meaning of article 6 of Directive 2011/95/EU, the Supreme Administrative Court itself points out that this is solely the consequence of a more favourable provision under Austrian national law - which breaches EU law (Austrian VwGH, ruling of 21 May 2019 - Ro 2019/19/0006 - (...)). But this jurisprudence is not transferable to the German legal situation, because with the reference in section 4 (3) first sentence AsylG to section 3c AsylG, the German legislature has implemented the application of article 6 of Directive 2011/95/EU for subsidiary protection (as well) in conformity with EU law, and in section 60 (5) and (7) AufenthG it has taken precautions that extend even above and beyond the subsidiary protection under EU law against exposing people to a real threat of inhuman or degrading treatment within the meaning of article 3 ECHR.

26 b) Whether a quantitative minimum threshold is needed for the granting of subsidiary protection under section 4 (1) second sentence no. 3 AsylG on grounds of a serious individual threat by reason of indiscriminate violence when determining the risk of death and injury (see, on this, VGH Mannheim, decision to request a preliminary ruling of 29 November 2019 - A 11 S 2374/19 et al. - (...)), does, at any event, not follow from the jurisprudence of the Senate and it is also not relevant for the decision in the present proceedings, if only because irrespective of that consideration, the Administrative Court denied the existence of a sufficient density of threat on the basis of a comprehensive overall assessment. This too, for its part, does not raise any questions as to standards of EU law that are in doubt.

27 (...)

28 (...)