



Press and Information

Court of Justice of the European Union  
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Judgment in Case C-472/13  
Andre Lawrence Shepherd v Bundesrepublik Deutschland

## **The Court of Justice clarifies the conditions in which a third-country national who has deserted may be granted asylum in the EU**

In August 2008, an American soldier, Andre Shepherd, sought asylum in Germany. He had left his unit, which had been stationed in Germany since April 2007, after receiving an order to return to Iraq. Mr Shepherd believed that he should no longer participate in a war he considered unlawful and in the war crimes that were, in his view, committed in Iraq. During his first tour of duty in Iraq, near Tikrit, between September 2004 and February 2005, he had not participated directly in either military action or combat operations, but had worked as a helicopter maintenance mechanic. Upon his return from that tour, he re-enlisted in the United States army, in which he had initially enlisted in December 2003 for a period of 15 months. In support of his asylum request, Mr Shepherd claims that, as a result of his desertion, he is at risk of criminal prosecution. Moreover, since desertion is a serious offence in the USA, it affects his life by putting him at risk of social ostracism in his country.

His asylum application having been rejected by the Bundesamt für Migration und Flüchtlinge (German Federal Office for Migration and Refugees), Mr Shepherd asked the Bayrisches Verwaltungsgericht München (Administrative Court, Munich) to annul that decision and to order that he be granted refugee status. That court asks the Court of Justice to interpret the **European Directive on refugee status**.<sup>1</sup>

According to that directive, a third-country national who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group may, under certain conditions, be granted refugee status. The directive sets out, inter alia, the factors which support a finding that acts constitute acts of persecution.

**Thus, according to the directive, an act of persecution can, inter alia, take the form of ‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes’.**<sup>2</sup>

In today’s judgment, **the Court holds that**

- **the protection granted in such a situation covers all military personnel**, including logistical or support personnel;
- it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, **including situations in which the asylum seeker would participate only indirectly in the commission of such crimes** if it is reasonably likely that, by the performance of his tasks, he would provide **indispensable support** to the preparation or execution of those crimes;

<sup>1</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

<sup>2</sup> Article 9(2)(e) of the directive.

- **it does not exclusively concern situations in which it is established that war crimes have already been committed** or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the asylum seeker can establish that it is **highly likely** that such crimes will be committed;
- **the factual assessment** which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case (particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant), **that the situation in question makes it credible that the alleged war crimes would be committed**;
- **the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account**<sup>3</sup> in the assessment that must be carried out by the national authorities;
- the refusal to perform military service must constitute the only means by which the asylum seeker could avoid participating in the alleged war crimes<sup>4</sup> and, consequently, **if he did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of the directive is excluded**, unless he proves that no procedure of that nature would have been available to him in his specific situation.

In the event that it is not established that the military service Mr Shepherd refused to perform would have included the commission of war crimes, the Verwaltungsgericht also asks the Court to clarify the conditions giving rise to the protection provided for in the directive in two other situations. According to the directive, **acts of persecution may also exist where the public authorities take discriminatory or disproportionate measures**.<sup>5</sup>

As regards those two situations, the Court holds that, in circumstances such as those in the present case, it does not appear that the measures incurred by a soldier because of his refusal to perform military service, namely **the imposition of a prison sentence**<sup>6</sup> **or discharge from the army, may be considered**, having regard to the legitimate exercise, by that State, of its right to maintain an armed force, **so disproportionate or discriminatory as to amount to acts of persecution** for the purpose of the directive. It is, however, for the national authorities to ascertain whether that is indeed the case.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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<sup>3</sup> The Court notes that an armed intervention engaged upon on the basis of a resolution adopted by the Security Council **guarantees, in principle, that no war crimes will be committed** and that the same applies, in principle, to an operation which gives rise to an international consensus. In addition, the existence, in the legal system of those States, of legislation penalising war crimes and of courts which ensure the effective punishment of those who commit such crimes **is liable to render implausible the hypothesis that a soldier of one of those States could be led to commit such crimes**.

<sup>4</sup> In that respect, the assessment that has to be carried out by the national authorities must take into account the fact that, in the present case, Mr Shepherd not only **enlisted voluntarily** in the armed forces at a time when they were already involved in the conflict in Iraq, but also **re-enlisted** after his first tour in Iraq.

<sup>5</sup> Article 9(2)(b) and (c) of the directive.

<sup>6</sup> It appears that Mr Shepherd runs the risk of a prison sentence for desertion of 100 days to 15 months, or even of five years.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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