Case C-402/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 June 2022

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

15 June 2022

Applicant:

Staatssecretaris van Justitie en Veiligheid

Defendant:

M.A.

Subject matter of the main proceedings

Appeal by the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) against the judgment of the Rechtbank Den Haag (District Court, The Hague) in the context of a dispute concerning the rejection of an application for international protection on the ground that the foreign national concerned had been convicted by a final judgment of, inter alia, several counts of sexual assault and that, for that reason, the State Secretary considers that he constitutes a danger to the community.

Subject matter and legal basis of the request

Following requests for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) in Case C-663/21 and from the Raad van State (Council of State, Belgium) in Case C-8/22, the referring court seeks an interpretation of the concept of particularly serious crime in Article 14(4)(b) of Directive 2011/95/EU. The referring court also reiterates the questions referred by the Council of State, Belgium in Case C-8/22.

Questions referred for a preliminary ruling

Question 1(a)

When is a crime so ‘particularly serious’ within the meaning of Article 14(4)(b) of Directive 2011/95/EU that a Member State may refuse to grant refugee status to a person in need of international protection?

Question 1(b)

Are the criteria for a ‘serious crime’ in Article 17(1)(b) of Directive 2011/95/EU, as set out in paragraph 56 of the judgment of the Court of Justice of 13 September 2018, *Ahmed*, ECLI:EU:C:2018:713, relevant for the purposes of assessing whether a ‘particularly serious crime’ has been committed? If so, are there further criteria which render a crime ‘particularly’ serious?

Question 2

Must Article 14(4)(b) of Directive 2011/95/EU be interpreted as providing that danger to the community is established by the mere fact that the beneficiary of refugee status has been convicted by a final judgment of a particularly serious crime or must it be interpreted as providing that a conviction by a final judgment for a particularly serious crime is not, on its own, sufficient to establish the existence of a danger to the community?

Question 3

If a conviction by final judgment for a particularly serious crime is not, on its own, sufficient to establish the existence of a danger to the community, must Article 14(4)(b) of Directive 2011/95/EU be interpreted as requiring the Member State to establish that, since his or her conviction, the applicant continues to constitute a danger to the community? Must the Member State establish that the danger is genuine and present or is the existence of a potential threat sufficient? Must Article 14(4)(b), taken alone or in conjunction with the principle of proportionality, be interpreted as allowing revocation of refugee status only if that revocation is proportionate and the danger represented by the beneficiary of that status sufficiently serious to justify that revocation?

Question 4

If the Member State does not have to establish that, since his or her conviction, the applicant continues to constitute a danger to the community and that the threat is genuine, present and sufficiently serious to justify the revocation of refugee status, must Article 14(4)(b) of Directive 2011/95/EU be interpreted as meaning that danger to the community is established, in principle, by the fact that the beneficiary of refugee status has been convicted by a final judgment of a particularly serious crime, but that he or she may establish that he or she does not constitute, or no longer constitutes, such a danger?

Provisions of European Union law relied on

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: recitals 2, 4, 23 and 24; Articles 2, 12, 14 and 17

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals: Articles 5, 6, 8 and 9

Case-law of the Court relied on

Judgment of 2 March 2010, *Salahadin Abdulla and Others*, C-175/08, EU:C:2010:105

Judgment of 13 September 2018, *Ahmed*, C-369/17, EU:C:2018:713

Judgment of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309

Judgment of 14 May 2019, *M (Revocation of refugee status)*, C-391/16, EU:C:2019:403

Judgment of 12 December 2019, *G.S. (Threat to public policy)*, C-381/18, EU:C:2019:1072

Provisions of international law cited

Geneva Convention of 1951 relating to the Status of Refugees, signed in Geneva on 28 July 1951, as amended by the New York Protocol ('the Refugee Convention'): Article 33

Provisions of national law relied on

Vreemdelingenwet 2000 (2000 Law on foreign nationals; 'Vw 2000'): Article 29

Vreemdelingenbesluit 2000 (2000 Decree on foreign nationals; 'Vb 2000'): Article 3.105c

Vreemdelingencirculaire 2000 (2000 Implementation guidelines for the law on foreign nationals; 'Vc 2000'): paragraph B1/4.4, paragraph C2/7.10.1

Succinct presentation of the facts and procedure in the main proceedings

1 The foreign national is from Libya. On 5 July 2018, he lodged a fourth application for international protection. In her decision of 12 June 2020, the State Secretary for Justice and Security (the competent determining authority in Netherlands immigration law) rejected the application for international protection on the ground that, in 2018, the foreign national was sentenced, by final judgment of the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden), to 24 months' imprisonment for having committed, on the same evening, three counts of indecent assault, one count of attempted indecent assault and the theft of a mobile phone from one of his victims. According to the State Secretary, those acts together constitute a 'particularly serious crime' and, for that reason, the foreign national constitutes a danger to the community. The State Secretary therefore based her refusal to grant the foreign national refugee status on Article 14(4)(b) of Directive 2011/95, read in conjunction with paragraph 5 thereof.

2 By judgment of 13 July 2020, the District Court of The Hague upheld the foreign national's appeal against the State Secretary's decision. The District Court held that the State Secretary had not provided an adequate statement of reasons as to why the acts committed by the foreign national, the actual severity of those acts and the nature and degree of violence were of such seriousness and magnitude that this justified the refusal of refugee status. The District Court referred to the judgment of the Court of Justice of 13 September 2018, *Ahmed*, C-369/17, EU:C:2018:713 ('*Ahmed*'). The District Court also held that, as regards the question as to whether the foreign national posed a danger to the community, the State Secretary had to assess whether the foreign national represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. According to the District Court, the State Secretary also failed to state adequate reasons for the decision on that ground.

3 The State Secretary appealed against that judgment before the referring court.

The essential arguments of the parties in the main proceedings

4 On appeal, the State Secretary argued that the District Court had been wrong to find that she had failed to provide an adequate statement of reasons as to why the foreign national had been convicted by a final judgment of a particularly serious crime. In the Court of Appeal judgment, the foreign national was sentenced to a total of 24 months' imprisonment for, inter alia, multiple counts of sexual assault. This fulfils the criteria for a 'particularly serious crime' in the Vc 2000, paragraph C2/7.10.1 (which lays down the policy of the State Secretary in this area), namely a final judgment sentencing the foreign national to one or more prison sentences or measures involving deprivation of liberty of a total of at least ten months for one or more crimes.

5 The State Secretary explained that the level of sentence set down in the Vc 2000 is regarded as a lower limit and serves to safeguard legal certainty. If that level of sentence is met, the 'particularly serious' nature of the crime is assessed taking into account all the circumstances of the case. Accordingly, the State Secretary interprets the concept of 'particularly serious crime' within the meaning of Article 14(4)(b) of Directive 2011/95. Furthermore, in the Vc 2000, the State Secretary interpreted the concept of danger to the community in such a way that a foreign national who has been convicted of a sexual offence (such as sexual assault) may, in any event, be assumed to constitute a danger to the community. The State Secretary therefore acted in accordance with a published policy rule.

6 According to the State Secretary, the particular seriousness of the offences committed was apparent from the fact that the foreign national had tried to grab the genitals of his victims and to touch their bodies. In so doing, the foreign national seriously undermined the physical integrity of his victims. According to the State Secretary, the attention given to this case in the media demonstrates that sex offences such as these cause feelings of fear and insecurity and are disruptive to society. It is partly for that reason that the criminal court imposed on the foreign national a sentence of 24 months' imprisonment, which is considered severe by Netherlands standards. Ultimately, the State Secretary felt justified in refusing the foreign national refugee status.

7 As regards the concept of danger to the community in Article 14(4)(b) of Directive 2011/95, the State Secretary took the view that the danger to the community was, in principle, established by the fact that the foreign national had been convicted by a final judgment of a 'particularly serious crime' and that it was for the foreign national to demonstrate that he did not constitute a danger to the community. Moreover, referring to the judgment of the Court of Justice of 12 December 2019, *G.S. (Threat to public policy)*, C-381/18, EU:C:2019:1072, paragraph 54, the State Secretary argued that the District Court had applied the wrong standard of review by finding that, for the purposes of interpreting the concept of danger to the community, she had to assess whether the foreign national represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

8 The foreign national claimed that the State Secretary was wrong to refuse to grant him refugee status. According to the foreign national, the State Secretary was wrong to apply that power – which constitutes a limitation on the obligation to grant refugee status to a refugee – in a non-restrictive manner. Moreover, the State Secretary was wrong to take the level of sentence as the starting point for examining and assessing whether the crime was particularly serious. According to the foreign national, the principle of proportionality of EU law requires that each case be judged on its merits, which is not the case when using the length of the sentence as a starting point. In his view, it would be disproportionate to refuse him refugee status when he has plausibly demonstrated that he has a well-founded fear of persecution in his country of origin.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 The Raad van State (Council of State, Netherlands), while drawing inspiration from the questions referred in the requests for a preliminary ruling in Cases C-663/21 (Supreme Administrative Court, Austria) and C-8/22 (Council of State, Belgium), seeks further information.

10 The Supreme Administrative Court, Austria, held that, in the case in the main proceedings, a particularly serious crime had been committed and that, therefore, the conditions for the application of Article 14(4)(b) of Directive 2011/95 were satisfied. In particular, it sought to ascertain how the balancing of interests must be carried out between the right of a foreign national to reside in the European Union and not to be expelled, on the one hand, and the protection of public order, on the other. The answer to its questions could be relevant to the present case, but the Council of State, Netherlands also seeks an interpretation of the concept of particularly serious crime.

11 The Council of State, Belgium has referred questions concerning the interpretation of the concept of danger to the community and the connection between that concept and the concept of particularly serious crime, but did not seek an interpretation of the concept of particularly serious crime itself. The answers to the questions raised by the Council of State, Belgium are also relevant to the referring court. It therefore reiterates the latter's questions (Questions 2 to 4 in the present request).

12 The Council of State, Netherlands notes that the wording of Article 14(4)(b) of Directive 2011/95 does not define the concept of particularly serious crime. That provision is worded as an optional power of the Member States, as indicated by the verb 'may'. The referring court infers from this that the Member States have a margin of discretion when examining whether a foreign national, having been convicted by a final judgment of a 'particularly serious crime', constitutes a danger to the community. The extent of the discretion enjoyed by the Member States in implementing Article 14(4)(b) of Directive 2011/95 is not apparent from that provision. The Council of State, Netherlands therefore raises the question of the legal limits within which the Member States may define the concept of particularly serious crime and on the basis of which circumstances the Member States must determine whether a foreign national has been convicted by a final judgment of a particularly serious crime.

13 It appears, moreover, from the wording of Article 14(4)(b) of Directive 2011/95 that there must be at least one final conviction for a 'particularly serious crime', the term 'particularly serious crime' being drafted in the singular in all the language versions. Multiple convictions for minor offences do not fall within that classification. [1]

[1] See the report 'Judicial Analysis: Ending international protection' by the European Union Agency for Asylum (EUAA), 2021.

14 According to the judgment of the Court of Justice of 2 March 2010, *Salahadin Abdulla and Others*, C-175/08, EU:C:2010:105, paragraphs 51 to 53, the provisions of Directive 2011/95 for determining who qualifies for refugee status were adopted to assist the competent authorities of the Member States in the application of the Geneva Convention relating to the Status of Refugees. It is also apparent from the *travaux préparatoires* relating to Directive 2004/38/EC, which preceded Directive 2011/95/EU, that the EU legislature intended to allow Member States to exclude from refugee status foreign nationals who constitute a danger to the community. This was in accordance with Article 33(2) of the Refugee Convention. Article 14(4)(b) of Directive 2011/95 must therefore be interpreted in the light of the Refugee Convention. However, the concept of particularly serious crime is not defined in that convention either. The UNHCR has, however, stated as a minimum threshold that it must in any event be 'a capital crime or a very grave punishable act'. [2] According to the UNHCR, that assessment must be carried out taking into account all the circumstances of the case.

15 As regards subsidiary protection status, it is clear from the wording of Article 17(1)(b) of Directive 2011/95 that the EU legislature intended to exclude foreign nationals from that status where there are serious reasons for considering that they have committed a 'serious crime'. In *Ahmed*, the Court held that the concept of serious crime is a concept of EU law that must be given an autonomous and uniform interpretation (paragraphs 33 to 36). It also held, in paragraph 56, that a number of criteria are relevant to the assessment by the Member States of the seriousness of the crime referred to in Article 17(1)(b) of the Directive, such as, inter alia, the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and whether most jurisdictions also classify the act at issue as a serious crime. The question is whether those aspects are also relevant to the interpretation of the concept of particularly serious crime in Article 14(4)(b) of the Directive, relating to refugee status. The referring court considers that the judgment in *Ahmed* does not provide sufficient guidance in that regard.

[2] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, paragraphs 155 to 161.