Case C-8/22

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:

5 January 2022

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

2 December 2021

Applicant:

XXX

Respondent:

Commissaire général aux réfugiés et aux apatrides

I. Subject matter of the main proceedings

1 The applicant is requesting that a judgment delivered on 26 August 2019 'the judgment under appeal') by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, 'CCE') be set aside.

II. Brief summary of the facts and the procedure in the main proceedings

2 On 23 February 2007, the applicant was recognised as a refugee by the Commissariat général aux réfugiés et apatrides (Office of the Commissioner General for Refugees and Stateless Persons, 'CGRA').

3 On 20 December 2010, he was sentenced by the Cour d'assises de Bruxelles (Brussels Assize Court) to 25 years' imprisonment.

4 On 4 May 2016, the respondent withdrew his refugee status pursuant to Article 53/3/1 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on the entry to Belgian territory, stay, residence and removal of foreign nationals, 'the

Law of 15 December 1980’). Paragraph 1 of that provision states: ‘The Commissioner General for Refugees and Stateless Persons may withdraw refugee status where a foreign national, having been convicted by final judgment of a particularly serious offence, represents a danger to the community or when there are reasonable grounds for regarding him as a danger to national security’.

5 The applicant lodged an appeal before the CCE, which dismissed it by the judgment under appeal. .

III. Essential arguments of the parties in the main proceedings

I. The applicant

6 The applicant's first ground of appeal alleges inter alia infringement of Article 14 of 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 (OJ 2011 L 337, p. 9), of Article 55/3/1 of the Law of 15 December 1980 and of the principle of proportionality, enshrined in Belgian law and in European Union law.

7 The applicant maintains that, according to the CCE, the onus is on him to establish that, notwithstanding the existence of that conviction, he does not constitute, or no longer constitutes, a danger to the community.

8 The applicant criticises the CCE's reasoning. Neither the existence of past convictions nor the fact that the CGRA took a decision implies a reversal of the burden of proof. The CCE should have examined the intentions of the Belgian legislature and of the EU legislature. It is not the intention of the Belgian legislature to consider that a conviction suffices to establish the threat or creates any presumption of a present threat; on the contrary, two conditions have to be met: a conviction for a particularly serious crime and constituting a danger to the community. Conversely, a conviction is not necessary for the person concerned to constitute a danger to national security.

9 Since Article 55/3/1 (1) of the Law of 15 December 1980 and Article 14(4) of Directive 2011/95 are not worded in exactly the same way, the national provision must be interpreted in accordance with EU law. Article 14(4) of Directive 2011/95 provides: ‘Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present, (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State’. The

provision of EU law therefore places more specific emphasis on the two cumulative conditions (conviction and danger).

10 Consequently, according to the applicant, before the CCE, it was for the CGRA to establish that he constituted a danger to the community, which it could not do by simply referring to the conviction. Also, the CCE had to state reasons for its position regarding the threat constituted by the person concerned, taking into account all the evidence, without the existence of a past conviction sufficing or establishing any presumption which the convicted person must rebut in order to avoid withdrawal of status. However, the CCE does not seem to consider that the CGRA has to demonstrate that the two cumulative conditions are satisfied, but only that the person concerned may try to establish that, in spite of the conviction, he or she does not constitute a danger.

11 In any event, the CCE should have verified the facts relied on by the CGRA and examined the current arguments put forward by the applicant. However, the CGRA relies on criminal offences dating back to 2006, which is not enough for an analysis of the present situation.

12 The EU case-law relating to Article 7(4) of 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 (OJ 2008 L 348, p. 98) has identified basic principles where the administration considers the foreign national to constitute a ‘risk’, with regard to the principle of proportionality and the need for an individual examination of the case at issue. The applicant cites the judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377). Moreover, the Court's case-law establishes a link between Directive 2008/115 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96). That guidance is relevant in the present case as regards ‘refugee law’.

13 Consequently, according to the applicant, when the EU legislature refers, in Article 14(4) of Directive 2011/95, to the fact that the foreign national concerned has been convicted and constitutes a danger, it does not allow the danger to be presumed owing to a preceding conviction; on the contrary, it lays down two separate cumulative conditions which it is for the authority to establish as a reason for its decision; the conviction for a particularly serious crime and the existence of a danger to the community. Article 14(4)(b) of Directive 2011/95 would have been worded differently if the danger were regarded as established owing to the mere fact of the conviction: it would not have referred to the danger to the community, but only to the conviction and, possibly, instead of ‘having’, the words ‘because’ or ‘as’ would have been used.

14 It is therefore necessary to ask the Court whether Article 14(4) of Directive 2011/95, read alone and in conjunction with the principle of proportionality, precludes a national practice of considering that a danger to the community is

presumed on the basis of a conviction for a particularly serious crime, and that it is for the convicted foreign national to establish that he does not constitute a danger to the community.

15 Furthermore, according to the applicant, the CGRA also states as a reason for its position the fact that the tribunal de l'application des peines (Sentence Enforcement Court, 'TAP') considers that the risk posed by the applicant, although low, is 'not excluded', and that the TAP 'takes into account the existence of potential danger' and adopts 'a series of measures to prevent that danger from materialising' following the applicant's conditional release. Since the threat attributed to the applicant is to be at least minimally specific and sufficiently genuine, those considerations are not enough to consider that the CCE was right to hold that danger been established and that, at the very least, would set an inordinately low threshold, contrary to the principle of proportionality. The question of whether a danger is established to the requisite legal standard when the court considers that that danger is 'not excluded' or 'potential' is not a question of assessment in fact but a point of law.

16 In the judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 60), the Court held that 'the concept of "risk to public policy", as set out in Article 7(4) of [Directive 2008/115], presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. In the present case, the reasoning of the CCE's judgment does not reach that threshold.

17 Moreover, in the same judgment, the Court held in essence that the threat attributed to a foreign national who has been convicted must be analysed on the basis of his individual situation and take into account all the relevant evidence, such as the time which has elapsed and the context. However, the CCE states in the judgment under appeal that it does not see how the various considerations relating to the efforts made to reintegrate the applicant into society show that he does not constitute a danger to the community. Also, the CCE does not respond to the applicant's arguments concerning the time which has elapsed since his conviction or to the arguments that the offences for which he was convicted date back to a period when he was a minor with neither ties nor income, which is no longer the case today, that he now no longer suffers from addiction, that he behaved well in prison and that supervision of his release is going well. It follows that the CCE did not rule on the danger posed by the applicant in the light of all the current evidence.

18 It is therefore necessary to ask the Court whether Article 14(4) of Directive 2011/95, read alone and in conjunction with the principle of proportionality, requires the authority to establish that the threat attributed to the foreign national is genuine, present and sufficiently serious, and relates to one of the fundamental interests of society, taking into account all the evidence in the case, and in particular the efforts made by the foreign national concerned to reintegrate and

evidence of his reintegration since his conviction, and the fact that the criminogenic context in which the foreign national committed offences in the past has changed.

II. The Respondent

19 According to the respondent, it is apparent from the *travaux préparatoires* that, in the French version of the draft, the words 'faisant l'objet d'une condamnation définitive pour une infraction particulièrement grave' ['the subject of a conviction by a final judgment for a particularly serious crime'] were replaced by 'ayant été condamné définitivement pour une infraction particulièrement grave' ['having been convicted a final judgment of a particularly serious crime'], in order to emphasise the link between a final conviction for a particularly serious crime and the ensuing danger to society (see Doc. parl., Ch. repr., sess. ord. 2015/2015, nº 1197/01, p.18). It is therefore clear that the Belgian legislature intended to link the danger posed to the community and the fact of having been convicted for a particularly serious crime and that, for the EU legislature, in order for a refugee to be regarded as a threat to the society of the Member State, he must be convicted by a final judgment. That does not imply that the danger may be established on the basis of the conviction alone.

20 It is apparent from the terms of the judgment under appeal that the CCE took into account the fact that the applicant was convicted for a particularly serious crime and examined the issue of whether, therefore, he currently constituted a danger to society. The CCE pointed out that, in spite of the existence of that conviction, the person concerned had to be able to establish, if necessary, that he is not, or is no longer, a danger to society. The CCE then found that the applicant was convicted of a particularly serious crime and that the assessment of the danger which a refugee constitutes for the community must be made according to the particular seriousness of the offence committed, which is wholly consistent with the law.

21 It is also apparent from the terms of the judgment under appeal that the CCE examined the arguments put forward by the applicant in order to assess whether, in spite of that conviction for a particularly serious offence, he still constituted a danger to the community. The reasons why the applicant's pleas were rejected is apparent from the whole decision and the CCE clearly stated the reasons why it considered that the danger which the applicant might represent was still present. That assessment lies within the sole jurisdiction of the trial court.

22 Concerning the principle of proportionality, in the judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661), the Court ruled on the need to conduct a proportionality test in the case of exclusion from being a refugee pursuant to Article 12(2)(b) or (c) of Directive 2011/95. It held that such exclusion is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status. Since the competent authority has already,

in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed (paragraph 109). Article 14(4) of Directive 2011/95 and Article 55/3/1 (1) of the Law of 15 December 1980 also make withdrawal of status conditional on the existence of a certain level of seriousness of the acts committed and, since the court has already taken into consideration all the circumstances of the case in order to assess the acts justifying withdrawal, it cannot be required to conduct another examination of proportionality which would imply a fresh assessment of the level of seriousness of the acts committed. It is therefore not necessary to put a question to the Court on this point.

IV. Findings of the referring court

23 It is apparent from the judgment under appeal that, according to Article 55/3/1(1) of the Law of 15 December 1980, the danger which the foreign national constitutes for the community stems from his conviction for a particularly serious crime. The CCE considers, however, that the applicant may demonstrate that, notwithstanding his conviction, he does not constitute, or no longer constitutes, a danger to the community.

24 The CCE does not consider, therefore, that it is for the CGRA to establish that the applicant, who has been convicted by a final judgment, constitutes a genuine, present and sufficiently serious danger to the community. It takes the view, in essence, that that danger is established, in principle, by the fact that the applicant has been convicted of a particularly serious offence, but that the applicant may adduce evidence that he does not represent, or no longer represents, such a danger.

25 In his first plea, the applicant contests that analysis by the CCE. He maintains, in essence, that it is for the respondent to establish that he constitutes a genuine, present and sufficiently serious danger to the community and not for the applicant to establish that he does not represent, or no longer represents, such a danger. He considers that his conviction for a particularly serious offence cannot suffice, on its own, to prove the existence of that danger, but that it is necessary to demonstrate his persistence and therefore his present character. In particular, the applicant maintains that it is not sufficient if the danger is potential or cannot be excluded; it must be proved. He considers that proportionality test must be conducted in order to determine whether the danger which he constitutes justify the withdrawal of his refugee status.

V. Succinct presentation of the reasoning in the reference for a preliminary ruling

26 Article 55/3/1 of the Law of 15 December 1980 transposed Article 14(4) of Directive 2011/95. The scope to be given to Article 55/3/1 of the Law of 15 December 1980 must be determined according to the scope of the provision of EU law which it transposes.

27 The Conseil d'État (Council of State) therefore considers it necessary to refer questions to the Court concerning the interpretation to be given to Article 14(4) of Directive 2011/95 in order to determine whether the applicant's criticisms are founded.

VI. Questions referred for a preliminary ruling

1. Must Article 14[(4)(b)] of 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, 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?

2. 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?

3. 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?