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REVOCATION AND DENIAL OF INTERNATIONAL PROTECTION ON SERIOUS PUBLIC ORDER CONCERNS:

AN ANALYSIS OF THE CJEU JURISPRUDENCE*

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ABSTRACT: This factsheet discusses the topics of exclusion, denial, and revocation of international protection for serious public order concerns in the EU context. It examines the provisions of the so-called Qualification Directive concerning "undeserving" asylum-seekers who committed certain serious crimes, such as terrorist acts, and refugees who seriously threaten the security of the host Member States. Furthermore, it analyses three judgments of the Court of Justice of the EU on this issue. Special attention is dedicated to the following aspects: the evolution of the Court jurisprudence, with particular regard to the broadening of the scope of Article 12(2) of the Qualification Directive; the compliance of Article 14(4) to (6) with the Geneva Convention; and the relation between security concerns and the application of the

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1. INTRODUCTION

This factsheet discusses the exclusion, denial, and revocation of international protection for serious public order concerns in the EU context. The analysis is limited to the refugee status and focuses on the main issues deriving from an asylum-seeker's dangerousness for the host Member State (MS). Particular attention is paid to the case of "undeserving" applicants, meaning asylum-seekers who have committed certain crimes that are deemed the most severe under international law, for instance acts of terrorism.

The legal provisions that will be analysed reflect the tension between, on the one hand, the legitimate interests of the MSs to guarantee their internal security and to

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ensure that certain particularly serious crimes at the international level do not remain unpunished and, on the other hand, the protection of applicants' fundamental rights. In particular, it is imperative to respect the principle of *non-refoulement*, meaning the prohibition to send an asylum-seeker back to a country where his/her life would be seriously in danger.

Therefore, the main topical issues that arise are:

- the relation between refugee law and other legal instruments aimed at fighting terrorism;
- the compliance of EU provisions with the relevant international refugee law, namely the 1951 Geneva Convention;
- the need to establish specific conditions and adequate guarantees, to ensure that MSs apply exclusion clauses narrowly and do not arbitrarily derogate from international protection for political reasons.

In light of these premises, the main objective of this work is to provide the reader with some background information about the relevant legal provisions and the current case law of the Court of Justice of the EU (CJEU) on this topic. In order to reach this goal, this factsheet is structured as follows.

The first section explains the legal provisions applying to the categories of asylum-seekers that have been mentioned at the beginning of this introduction, underlying some differences between the Qualification Directive (QD) and the Geneva Convention.

The second part analyses three judgements of the CJEU. This will enable the reader to understand how the relevant legal provisions apply to real cases, how the CJEU case law has evolved over time, and which position the CJEU takes in relation to the compliance of certain provisions of the QD with international law.

2. THE EU LEGAL FRAMEWORK

Recast QD 2011/95, which substituted Directive 2004/83, is the main legal tool regulating uniform standards for the qualification of third-country nationals (TCNs) or stateless persons as beneficiaries of international protection, for attributing the status of refugee, and for defining the content of the protection granted. At the international level, the paramount legal instrument is the 1951 Geneva Convention. Article 78(1) TFEU requires any Union action in the field of asylum policy to respect the principle of *non-refoulement* and to comply with the Geneva Convention. The same obligation to respect the Convention and the EU Treaties is also reiterated in Article 18 of the Charter of Fundamental Rights of the EU (the Charter).

For the purposes of this factsheet, the following articles of the QD are examined: Article 2(d) and (e), Article 12(2) and (3), Article 14(4) to (6) and Article 21(2).

Article 2(d) defines a refugee as a TCN or stateless person facing a 'well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group'. Due to that fear, he/she cannot or does not want to be protected by his/her country or nationality, or - in case of stateless persons - by the country of habitual residence. In addition, he/she must find himself/herself outside that country and must be unwilling to go back there since he/she fears persecution. Furthermore, the conduct of that person must not fall within the scope of Article 12, which specifies the grounds to exclude a TCN or a stateless person from the qualification of refugee. As specified in Article 2(e), the formal recognition provided by a MS to a person that qualifies as refugee is called "refugee status".

Article 12(2) reads as follows:

> A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
> c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

The provision in the QD differs from the corresponding Article 1F of the Geneva Convention in three aspects. First, Article 12(2) at let. b) specifies that the temporal scope includes also crimes committed before submitting an application or while waiting for a decision to be awarded (Guild and Garlick, 2013: 72). Second, it clarifies that particularly cruel actions are considered as serious non-political crimes. Third, Article 12(3) adds that a person, in order to follow within the scope of Article 12(2), must have 'incited or otherwise participated in the commission of these crimes or acts.'

Article 14(4) and (5) allows some degree of discretion to MSs to revoke, refuse to renew or deny refugee status even if a person that qualifies as refugee, 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.

Article 12(2) and Article 14(4) and (5) differ in two ways. First, the former prevents a person falling within its scope to be classified as "refugee", whereas an applicant to whom the latter applies has to be considered a refugee, but the MS is 'not obliged to grant her the refugee status' (Kosar, 2013: 109). Second, the wording of the Article 12(2) requires the MS to exclude certain categories of people from the definition of refugee (EASO, 2016b: 41), whereas Article 14(4) allows discretion to national authorities to decide when refusing to grant the refugee status.

The provisions of Article 14(4) and (5) QD are very similar to Article 33(2) of the Geneva Convention, which lays down an exception to the prohibition of *refoulement* for the same reasons (EASO, 2016b: 46). Article 33(2) states that, if a refugee satisfies the conditions stated by Article 14(4) QD, he/she is not protected by the principle of *non-refoulement* and can be expelled. This issue is also recalled in Article 21 of the QD, named "protection from *refoulement*". The first paragraph reminds the duty of MSs to respect the principle of *non-refoulement*, in accordance with their international obligations. The second paragraph considers two exceptional conditions under which a MS may *refoule* a refugee, whether formally recognized or not, and those scenarios are the same as those outlined in Article 14(4). The third paragraph states that MSs may revoke, end or refuse to renew to grant the residence permit to refugees to whom paragraph 2 applies. However, Article 19(2) of the Charter prohibits the expulsion of a person 'to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

Lastly, according to Article 14(6) QD, MSs should still grant some of the rights that are present in the Geneva Convention to those people who fall within the scope of the two above-mentioned paragraphs of Article 14, such as non-discrimination (Art. 3), freedom of religion (Art. 4), access to court (Art. 16) and to public education (Art. 22). These persons shall not be subject to sanctions for their illegal entry or stay and the restrictions to their freedom of movement shall be limited (Art. 31), grounds for expulsion shall be reduced and coupled with appropriate safeguards (Art. 32).

3. The main case law of the Court of Justice of the European Union

B and D

The first cases to be examined are the joined cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*. This judgment deals with the interpretation of Article 12(2) of the older version of the QD, Directive 2004/83. The two applicants are Turkish nationals of Kurdish origins, who were guerrilla fighters in groups that are considered as terrorist organizations by the EU. German

authorities rejected B's application for asylum and refused to renew D's refugee status. Despite it had been acknowledged that their lives would be in danger in their country of origin (para 64), both decisions were taken because of the exclusion clause, since the competent authority considered that they had committed serious non-political crimes (paras 49 and 60). The CJEU confirms the assumptions that 'terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective' are considered serious non-political crimes, and that international terrorism is a crime against the purposes of the UN (paras 81-83).

The first important point raised by the Court is that the sole fact of being a member of a terrorist organization is not sufficient for the person to fall within the scope of the exclusion clause of Article 12(2)(b) and (c) (para 88). The Court underlines that certain important guarantees must be ensured (Guild and Garlick, 2010: 80). It is necessary to carry out an individual analysis of the acts committed by that person and to assess his/her individual responsibility (paras 94-95). This evaluation shall consider 'the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities' and any other influence and external elements that might impact the person's behaviour (para 97). It is also interesting to note the relation between the QD and other acts concerning terrorism adopted in other areas of EU law, namely Justice and Home Affairs and Common Foreign and Security Policy. They aim to align national legislations concerning terrorist offences, to establish specific measures against terrorist organizations and to list a series of entities that are considered as terrorist groups by the EU. Therefore, the objectives of these instruments are different from the humanitarian character of the Geneva Convention, hence they can only serve to 'establish the terrorist nature of the group' at stake, but they do not justify the automatic exclusion of a member of a terrorist group from refugee status (paras 90 and 92). Such an approach respects the humanitarian purpose of the QD, takes into account the cases in which the membership in a terrorist group is forced by external factors and ensures a narrow interpretation of the exclusion clause since the mere fact that involvement in a terrorist organization is not sufficient to replace a case-by-case assessment of the individual responsibility (Venier and Venturi, 2017: 17).

The Court outlines the features of the assessment required by Article 12(2), which in particular covers the actual degree of dangerousness of the applicant and a proportionality test. Firstly, the Court clarifies that Article 12(2) is 'a penalty for acts committed in the past' and is aimed at preventing that 'those who have committed certain serious crimes escape criminal liability' (paras 103-104).

Therefore, it is not necessary to conclude that the applicant is a danger for the MS in order to fall under the scope of Article 12(2) (para 105). On the contrary, such an assessment has to be taken into account under Article 14(4)(a) (para 101). Secondly, the Court answers that national authorities already perform an analysis of the personal circumstances when evaluating of the seriousness of the acts committed and the individual responsibility (para 109). Thus, this previous assessment does not make it necessary to carry out a new proportionality test (para 111). In this case, the judgment contradicts paragraph 95 of the Advocate General's Opinion, who stresses the importance to include a further balancing exercise between the gravity of the act committed and the consequences of exclusion, namely whether the person would be refouled, in order to ensure adequate flexibility and protection of fundamental rights.

The final question concerns the possibility for those applicants who are excluded from the refugee status to remain in the MS on the basis of national rules that grant them some kind of protection. The Court declares that, in order to 'maintain the credibility of the protection system', it is not possible to grant a refugee status to persons to whom Article 12(2) applies (para 115). Nevertheless, MSs enjoy discretion in allowing excluded applicants to stay in their territory by granting them another kind of protection under national law, which has to be distinguished from and not confused with the refugee status (para 121).

Lounani

Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, is a request for preliminary ruling concerning the interpretation of Article 12(2)(c) and Article 12(3) of QD 2004/83. The judgment concerns whether Mr Lounani should be excluded from the status of refugee on grounds that he was guilty of acts contrary to the purposes and principles of the United Nations. This case demonstrates the development of the interpretative approach of the CJEU over the years, and the related departure from relevant precedents.

Since 1997, Mr Lounani had been living in Belgium illegally. He was convicted in the *Tribunal Correctionel de Bruxelles* for participation in a terrorist group, the Moroccan Islamic Combatant Group, in activities such as providing logistical support with material resources and information, 'forgery and fraudulent transfer of passports', active participation in the organisation of a network for sending volunteers to Iraq. Since Mr Lounani was also in the leadership of the terrorist group, he was sentenced to a period of six-year imprisonment (paras 28-29). Fearing persecution if returned to Morocco, he applied to the Belgian authorities for refugee status. The application was rejected and Mr Lounani was excluded

from the refugee status under Article 1F(c) of the Geneva Convention (para 31). The *Conseil du contentieux des étrangers* stated 'that none of the acts for which Lounani had been convicted reached the required degree of gravity to be categorised as "acts contrary to the purposes and principles of the UN", within the meaning of Article 12(2)(c) of the QD' (para 37). Therefore, the case was referred to the CJEU for a preliminary ruling.

The referring court raised some questions on the relationship between the QD and Articles 1 and 2 of the Framework Decision 2002/475 on combating terrorism (now replaced by Directive 2017/541), which define actions deemed to be terrorist offences and terrorist groups. In particular, the national court asked whether 'Article 12(2)(c) and Article 12(3) of the Directive [have] to be interpreted as necessarily implying that, for the exclusion clause provided for therein to be applied, the asylum seeker must have been convicted of one of the terrorist offences referred to in Article 1(1) of Framework Decision 2002/475'. It also asked if the exclusion from international protection provided in Article 12(2)(c) of QD is possible for acts related with a terrorist group, when there has been no commission or instigation of or participation in a terrorist act under the scope of Article 1 or of Framework Decision 2002/475 (para 39).

The CJEU affirms that Article 12(2)(c) covers acts contrary to UN purposes and principles set out in the Preamble of the UN Charter, and others drawn by Security Resolutions covering "measures combating terrorism", as defined in recital 22 of the Directive (para 45). On this ground, the Court reasoning is based upon two UN Security Council Resolutions: Resolution 1337(2001) that considers 'various forms of conduct which may fall within the scope of the general concept of terrorism and classifies them' (para 51), and Resolution 1624(2005) that constitutes a more general call to States to fight terrorism and 'bring to justice any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts, or provides safe haven' (para 47).

Then, the Court considers that a strict interpretation of Article 12(2)(c) QD, solely based on the terrorist offences listed in Article 1(1) of Framework Decision 2002/475, would confine the definition of terrorist offences to specific acts meanwhile its scope is more extended. This interpretation is also clarified by Recital 6 of Framework Decision, stating that 'the definition of terrorist offences, including those relating to terrorist groups, should be approximated' (para 50).

Moreover, the Court reaffirms the need for an individual assessment, previously remarked in *B and D*. The Court underlines that it must be carried out on the basis

of specific circumstances and facts that can lead to consider that the applicant, even with characteristics qualifying him for refugee status, falls under the scope of exclusion (para 72).

The Court also considers Resolution 2178 (2014) addressing the issue of 'foreign fighters', expressing concerns on the growth of the phenomenon of individuals helping in planning and organizing terrorist acts in States other than their State of residence or nationality (para 67).

Lastly, the Court concludes that Article 12(2)(c) and (3) must be interpreted as justifying the exclusion from refugee status, through individual assessment, on ground of serious acts contrary to the purposes and principle of the UN, since Mr Lounani was convicted for instigating or organizing activities of a terrorist group, in a position of leadership, and the identification of a direct link to a terrorist act is not necessary (para 79).

M, X, and X

Joined cases C-391/16 *M v. Ministerstvo vnitra*, and C-77/17 and C-78/17 *X and X v. Commissaire général aux réfugiés et aux apatrides* concern two revocations of the refugee status and one refusal. These decisions were taken because the applicants had committed particularly serious crimes, such as robbery, extortion, intentional assault and battery, possession of weapons, rape of minor, and homicide, and were considered a danger in the MS. The questions referred by the national courts concerned the validity of Article 14(4) to (6) "Revocation of, ending of or refusal to renew refugee status" of Directive 2011/95. It concerned whether the effect of that provision is to exclude the TCNs and stateless persons who satisfy the material conditions laid down in Article 2(d) "from being refugee", infringes the Article 1 of the Geneva Convention. Specifically, it is asked whether the conditions described by the Article of the Qualification Directive (QD) go beyond the exhaustive scheme of the Geneva Convention.

Firstly, the Court discusses the compliance of the provisions of the QD with the Convention. The Court argues that, as it is apparent form recitals 4, 23 and 24 of the Directive, the Convention constitutes the 'cornerstone of the provisions of that directive'. Moreover, the purpose of the QD is to 'ensure that Article 1 of the Convention is complied with in full' (paras 80-81 and 83). The Court offers an important contribution to the interpretation of a terminology difference, stating that Article 2(d) of the QD reproduces in essence the definition of refugee set out in Article 1A of the Geneva Convention, while Article 2(e) of the QD defines the 'refugee status' as 'the recognition by a MS of a TCN or stateless person as a

refugee'. According to recital 21 of the QD, 'the recognition of the refugee status is declaratory and not constitutive of "being a refugee"' (paras 84-85). The Court adds to the foregoing that being a refugee for the purpose of Articles 2(d) of the QD and 1A of the Geneva Convention is not dependent on the formal recognition of the refugee status, as it can be seen by the wording of Article 21(2) of the QD 'refugee […] whether formally recognized or not'(para 90). Thus, the Court argues that despite the revocation of the refugee status, a person, who materially satisfy the conditions of Article 2(d) of the Directive and Article 1A of the Convention, continues to be a refugee (para 97).
Considering the grounds set out by Article 14(4) and (5) under which MSs may refuse to grant or revoke the refugee status, these circumstances correspond to those of Articles 21(2) of the QD and 33(2) Geneva Convention, as the Advocate General explains in point 56 of his Opinion (para 93). The Court argues that 'while Article 33(2) of the Geneva Convention denies the refugee the benefit [...] of the principle of *non-refoulement*', Article 21(2) of the QD must be applied and interpreted in compliance with the rights guaranteed by the Charter. In particular, MSs must respect Article 4 prohibiting torture and inhuman or degrading treatments and punishments, as well as Article 19(2) forbidding the removal to a State where there is a serious risk of the person being subjected to such treatment. 'Therefore, MSs may not remove, expel or extradite a foreign national where there are substantial grounds for believing that he will face a genuine risk [...] of being subjected to treatment prohibited by Articles 4 and 19(2) of the Charter' (paras 94-95). In short, MSs cannot derogate to the principle of *non-refoulement* since it derives from Article 4 of the Charter which is an absolute right. Since it is part of EU primary law, secondary law, such as the QD, must conform to it.

The last important point stressed by the Court is about Article 14(6) of the QD. This Article provides that in cases where Article 14(4) and (5) applies, individuals concerned 'are entitled to rights set out in or similar to those set out, in Articles 3, 4, 16, 22, 31, 32 and 33 of Geneva Convention, in so far as they are present in the MS' (para 101). In the opinion of the Court, in the present case, the conjunction "or" must be 'interpreted in cumulative sense' (para 102). In particular, those individuals who fall under the scope of Article 14(4) e (5) may be authorized to stay lawfully in the territory of the MS concerned, on another legal basis (para 106). Moreover, the Court states that Article 14(6) must be interpreted as meaning that, when Article 14(4) and (5) applies and the persons concerned are present in their territory, MSs must grant refugees 'as a minimum the rights enshrined in the Geneva Convention expressly referred to in Article 14(6) of that directive and the rights provided for by that convention which do not require a lawful stay' (para 107).

The Court observes that under the Geneva Convention the persons to whom scenarios described in Article 14(4) and (5) apply 'are liable [...] to a measure whereby they are *refouled* to their country of origin, even though their life or freedom would be threatened in that country' (para 110). On the contrary, Article 21(2) of QD does not allow the persons to be refouled, if this expulsion leads to a violation of their fundamental rights guaranteed by Articles 4 and 19(2) of the Charter (para 110). In conclusion, the Court states that Article 14(4) to (6) ensures the minimum level of protection laid down in Geneva Convention, as required by Articles 78(1) TFEU and 18 of the Charter (paras 111-112).

4. CONCLUSIONS

The most relevant development in the interpretation of Article 12(2) and (3) of the Directive - the exclusion clause - is that its scope has changed from *B and D* to *Lounani*. In the first case, the Court focuses especially on the actual role played by the individual in the commission of terrorist acts and on his individual responsibility, establishing that a mere membership to terrorist group cannot justify the automatic exclusion from the refugee status. In *Lounani*, the Court delivers an opposite judgment and it has broadened the scope of Article 12(2) and (3), ruling that also the logistical and organizational support to the terrorist group in the preparation of its activities is sufficient for the exclusion clause to apply. The fact that in the latter judgment the Court establishes that the Framework Decision on combating terrorism and other instruments of international law - without a primarily humanitarian aim - are not limits of the interpretation of the QD is also an interesting development. Moreover, this last judgment reflects the recent emergence of new security concerns, especially the issue of foreign fighters. The result of this evolution in the interpretation of Article 12(2) has significantly widened the scope of Article 1F of the Geneva Convention in the EU.

In addition, the interpretation of article 14(4) to (6) of the Directive in *M, X and X* gave to the Court an opportunity to clarify the interaction between the EU and international asylum systems, by confirming the compliance of the QD with the Geneva Convention. In essence, the Court argues that the Directive provides for a more generous treatment of applicants who have been revoked or refused international protection for security reasons. In fact, under EU law, the revocation of the refugee status does not affect the fact that a person materially satisfies the conditions for being a refugee, and it does not have the automatic effect of derogation of the principle of *non-refoulement*. Indeed, Article 14 of the QD must comply with the Charter that strongly protects fundamental rights, such as

prohibition of torture, which could be put at risk in case of *refoulement*. Furthermore, the person continues to be a refugee and if he/she is present in the MS, he/she must be granted some minimum rights.

To sum up, this factsheet has demonstrated that despite MSs maintain a certain degree of discretion when dealing with applications of "undeserving" asylum-seekers and refugees that can threaten internal security, national authorities must respect certain limitations and procedural guarantees. Indeed, an individual assessment of the personal circumstances is necessary for the first applicants, and the revocation or denial of refugee status cannot automatically imply a derogation from certain rights, in particular the *non-refoulement* principle. In order to deal with this issue, as mentioned both in *B and D* and in *M, X and X*, MSs are allowed to issue another type of national permit, different from the refugee status, that enables individuals concerned to remain lawfully on their territory.

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