Op-Ed: "Refugee Status Withdrawal: the CEAS and the Geneva Convention (C-8/22, Commissaire général aux réfugiés and aux apatrides (Réfugié ayant commis un crime grave))"

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In its judgment of 6 July 2023, *Commissaire général aux réfugiés and aux apatrides (Réfugié ayant commis un crime grave)* (C-8/22), the Court of Justice rules on the interpretation of Directive 2011/95 (the Qualification Directive). More specifically, Article 14(4)(b) of this directive provides that Member States may revoke the status granted to a refugee when he/she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the Member State in which he/she is present. The referring court seeks interpretation of this provision to know whether conviction for serious crime allows to conclude that the existence of a danger to the community is verified. If that is not so, the referring court wants to know how to assess whether a recognised refugee constitutes a danger to the community. The Court provides useful answers to both questions. Its reasoning also raises further questions pertaining to the relationship between the EU's legal system –and more particularly, the Common European Asylum System (CEAS)–, the system established by the Geneva Convention on the Status of Refugees, and the legal systems of the Member States.

The classic interpretative tools

The judgment contains some very classic elements drawn from the Court's standard toolbox for interpreting EU law – especially, it looks at wording, and at the 'general scheme' of the directive. It identifies Article 14 as providing for derogations from the requirement on Member States to grant or maintain refugee status: the provision therefore has to be interpreted strictly. The Court also notes that Article 14 entails two distinct criteria: having been convicted for crime, and constituting a danger for the community (paras 30-32). The Court then compares Article 14 with other provisions of the Qualification Directive and it insists on the need to interpret Article 14 consistently with Article 21(2)(b), which allows for the refoulement of a refugee when 'he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community (…)'. And on this provision, we already have case law clearly saying that the criteria are cumulative (see *H. T. v Land Baden-Württemberg,* C-373/13).

The Court addresses the second question with the same tools. It pays attention to the wording of the provision, compares it with other provisions of the Qualification Directive, and stresses that Article 14 requires the competent authority to identify not just a potential danger, but a 'genuine and present' danger to the community (para 52). Here, too, the Court pays attention to previous case law on how to assess whether third country nationals who are family members of EU citizens represent a threat to public policy and insists that the assessment of the threat must be individualized.

Applying these classic interpretative tools would almost suffice to provide the answers: before withdrawing the refugee status, the competent authority must verify the two criteria (conviction

for serious crime and danger to the community) cumulatively, not alternatively. The assessment of whether the refugee represents a danger to the community must be individualized and focused on identifying an actual, present danger. However, we are not dealing only with EU law here, but also with international law. The Court's reasoning is intertwined with considerations pertaining to the connection between EU law and the Geneva Convention.

International law and the intent of the EU legislator

The Court also relies on another classic interpretative method – searching for the intention of the legislator. The latter chose to include two criteria in Article 14(4). This contrasts with e.g. Article 12(2)(b) of the directive, which allows to exclude the granting of refugee status for the single reason that one has committed a serious non-political crime outside the country of refuge. This is where the Court identifies a direct contact point between EU law and the Geneva Convention: the difference between Article 14(4) and Article 12(2)(b) directly – intentionally – echoes a distinction made in the Geneva Convention, 'which constitutes the cornerstone of the international legal regime for the protection of refugees' (para 34). In particular, Article 14(4) of the Qualification Directive lists grounds for revoking refugee status which 'correspond, in essence, to those in which Member States may refoule a refugee under Article 33(2) of the Geneva Convention'. This provision is 'generally interpreted' as requiring two cumulative criteria to be met (the Court refers to the AG's Opinion, who in para 73 refers to an analysis published by the UN's High Commissioner for Refugees).

The interpretation of international law thus comes in support of the Court's interpretation of Article 14(4) of the directive. Interestingly, the Court deemed it necessary to justify its reasoning by identifying a clear intention of the EU legislator to reflect a specific provision of the Geneva Convention within a specific provision of EU law. Was that really necessary given that EU secondary law in general and the CEAS in particular must comply with the Geneva Convention, as required by Article 78 TFEU and Article 18 of the Charter?

Nevertheless, the outcome is clear: Article 14(4) requires two criteria to be met cumulatively, which means that if a refugee has been convicted of a serious crime, the referring court will have to assess the danger which that person constitutes for the community of the Member State where he/she is present.

A clear obligation to perform an individualized assessment of a 'danger to the community'

By contrast to the close attention paid to the wording of a provision, it is also not unusual to see the Court of Justice accepting a certain flexibility when it comes to terminology. In particular, here, the Court admits that reference to 'public order' in previous case law and other legislation can be relevant here for identifying the applicable standards, even though we do not see this term in Article 14(4). Indeed, the term 'danger to the community' does not convey a choice to lay down a 'substantially different' standard but rather simply reflects the wording of the Geneva Convention (para 56). This allows the Court to rely on established case law and to clarify that revoking status is possible 'only where the third-country national concerned constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of the society of the Member State (…)'. The competent authority must therefore perform 'for each individual case, an assessment of all the circumstances of the case concerned' (paras 60-61). In this process, 'past conduct,' is part of the elements to assess, and final criminal conviction is of 'particular significance' (para 63), but the 'particular circumstances' surrounding the commission of the crime should still be considered. The Court provides additional guidance by indicating that the more time passes between the conviction and a withdrawal decision, the more the events

that took place after the conviction must be taken into account (para 64).

After revocation of the refugee status: what is left?

When both conditions under Article 14(4) are met, the competent national authority *may* revoke the refugee status – it does not *have to* (para 65-66). After having emphasised this, the Court states that the option will have to be exercised in observance with the proportionality principle (para 67) and the fundamental rights guaranteed by EU law (para 68). This sequence is puzzling. A general principle of EU law such as the proportionality principle, and fundamental rights (whether as general principles or as guaranteed by the Charter) always have to be observed in the implementation of EU secondary law – no matter whether an obligation or a mere possibility. A reminder of this very basic notion of the hierarchy of norms would have been useful here, especially since the *option* to withdraw the status when the criteria are met, as provided for in Article 14(4) of the Qualification Directive, might well become an *obligation*, as proposed in the proposal for a Qualification Regulation.

For assessing the implications of revoking a refugee status, the Court also points out (para 69-70) that even in the event of withdrawal of status, as per Article 14(6) of the Qualification Directive some of the rights laid down in the Geneva Convention will continue to apply (e.g. the protection against refoulement under Article 33 of the Geneva Convention). This echoes a previous ruling on the validity of Article 14(4) and Article 14(6) of the Qualification Directive: the Court had held that the 'minimum level of protection laid down by the Geneva Convention' was observed, 'as required by Article 78(1) TFEU and Article 18 of the Charter' (*M (Revocation of Refugee Status),* C-391/16, C-77/17 and C-78/17), para 111). The Court here reasserts that the minimum level of protection is ensured by the Member State who decides to revoke a refugee status, 'without prejudice to any reservations which may be made by that Member State': a phrase which not to be found in Article 78(1) TFEU nor in Article 18 of the Charter. Does this mean that compliance with those (primary law) provisions might have a different meaning depending on the reservations that each individual Member State may have formulated when signing the Geneva Convention?

In a nutshell, this judgment provides an interpretation of Article 14(4) which is rather protective of individuals, as it clearly requires competent national authorities to perform a careful individualized assessment of whether a recognized refugee criminally convicted may constitute a danger to the community of the host Member State. However, underlying questions are left open when it comes to the hierarchy of norms and the logical hierarchy of legal sources applying in the CEAS – and these questions may become more acute with the upcoming reform of this system.

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