



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 14 December 2017¹

Joined Cases C-331/16 and C-366/16

K.

v

Staatssecretaris van Veiligheid en Justitie

(Request for a preliminary ruling from the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg, Netherlands))

and

H. F.

v

Belgische Staat

(Request for a preliminary ruling from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium))

(Reference for a preliminary ruling — Citizenship of the Union — Directive 2004/38/EC — Article 27(2) — Restriction on the freedom of movement and residence on grounds of public policy or public security — Genuine, present and sufficiently serious threat affecting one of the fundamental interests of society — Person excluded from refugee status on the grounds laid down in Article 1(F)(a) of the Geneva Convention and Article 12(2)(a) of Directive 2011/95/EU — Proportionality — Article 28(1) and (3)(a) of Directive 2004/38/EC — Article 7 of the Charter of Fundamental Rights of the European Union — Right to respect for private and family life)

I. Introduction

1. The Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg, Netherlands) and the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) asks the Court for an interpretation of Article 27(2) and Article 28(1) and (3)(a) of Directive 2004/38/EC,² read in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR').

¹ Original language: French.

² Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2. These requests for a preliminary ruling have arisen in proceedings concerning the compatibility with those provisions of measures restricting the freedoms of movement and residence under Directive 2004/38 ordered against individuals who, before acquiring the status of Union citizen or family member of a Union citizen, were excluded from refugee status pursuant to Article 1(F)(a) of the Geneva Convention relating to the Status of Refugees ('the Geneva Convention').³

3. That provision — the wording of which was reproduced in Article 12(2)(a) of Directive 2011/95/EU⁴ — excludes applicants for asylum from the protection flowing from the Geneva Convention if there are serious grounds for considering that they have committed a crime against peace, a war crime, or a crime against humanity.

4. The referring courts seek, in essence, to ascertain whether, and under what conditions, the application to a person — in the past — of the exclusion clause set out in Article 1(F)(a) of that convention justifies a restriction on the freedoms of movement and residence he enjoys under Directive 2004/38.

II. Legal framework

A. International law

5. Article 1 of the Geneva Convention defines, inter alia, the term 'refugee' in Section A of that article, while Section F states:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he 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 has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

³ That convention was signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)) and entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

⁴ Directive 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). The provision reproduces Article 12(2)(a) of 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), which applied at the relevant time and was replaced by Directive 2011/95.

B. EU law

1. *Directive 2004/38*

6. Article 27(1) and (2) of Directive 2004/38 provides:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.’

7. Article 28 of the directive provides:

‘1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years;

...’

2. *Directive 2011/95*

8. Article 12(2) of Directive 2011/95 provides:

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;

...’

C. National law

1. *Netherlands law*

9. Under Article 67 of the Vreemdelingenwet (Law on foreign nationals) of 23 November 2000 ('the Netherlands law on foreign nationals'):

'1. Subject to Section 3, the [Minister van Veiligheid en Justitie (Minister for Security and Justice, the Netherlands)] may declare a foreign national to be undesirable:

...

(e) in the interests of the international relations of the Netherlands.

...

3. Notwithstanding Article 8, a foreign national who has been declared undesirable cannot be lawfully resident.'

2. *Belgian law*

10. Under Article 40*bis*(2) of the wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Law on the entry, residence, establishment and removal of foreign nationals) of 15 December 1980 ('the Belgian law on foreign nationals'), in the version in force at the relevant time in Case C-366/16, family members of a Union citizen include his dependent relatives in the ascending line and those of his spouse.

11. Article 43 of that law transposes Article 27 of Directive 2004/38 into Belgian law.

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

A. Case C-331/16

12. Mr K. has dual Bosnia-Herzegovina and Croatian nationality. He entered the Netherlands in 2001 with his wife and eldest son. According to the referring court, Mr K. has resided continuously in that Member State since then. His youngest son was born there in 2006.

13. Mr K. lodged an initial application for asylum shortly after entering the Netherlands in 2001. The Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, the Netherlands, 'the Netherlands Staatssecretaris') rejected the application by decision of 15 May 2003. That decision was based on the existence of serious grounds for considering that Mr K. had committed crimes falling within the categories referred to in Article 1(F)(a) and (b) of the Geneva Convention in the territory of the former Yugoslavia between April 1992 and February 1994. The decision became final after being confirmed by judgment of the Raad van State (Council of State, the Netherlands) of 21 February 2005.

14. In 2011, Mr K. lodged a second application for asylum which was also rejected by decision of the Netherlands Staatssecretaris of 16 January 2013 due to the application of the exclusion clauses set out in Article 1(F)(a) and (b) of the Geneva Convention. That decision was accompanied by a 10-year ban on entering the territory of the Netherlands. The Raad van State (Council of State) confirmed that decision by judgment of 10 February 2014, following which the decision became final.

15. Mr K. also applied to the Netherlands Staatssecretaris for annulment of the ban on entering the territory of the Netherlands imposed on him. By decision of 22 July 2015, the Netherlands Staatssecretaris lifted the ban and replaced it with a declaration of undesirability under Article 67(1)(e) of the Netherlands law on foreign nationals. That decision was taken because Mr K. had acquired the status of Union citizen following the Republic of Croatia's accession to the European Union on 1 July 2013. Unlike an entry ban, which can only be imposed on third-country nationals, a declaration of undesirability can be made against Union citizens.

16. Mr K. lodged an objection to that declaration of undesirability with the Netherlands Staatssecretaris. His objection was dismissed by decision of 9 December 2015 ('the contested decision in Case C-331/16').

17. In that decision, the Netherlands Staatssecretaris referred to his decisions of 15 May 2003 and 16 January 2013 rejecting Mr K.'s applications for asylum. Referring to the first of those decisions and to the proposal that led to its adoption, the Netherlands Staatssecretaris found that Mr K. must have known of the war crimes and the crimes against humanity committed by the special units of the Bosnian army in which he had served ('knowing participation') and that he had personally participated in those crimes ('personal participation').

18. On the sole basis of those findings, the Netherlands Staatssecretaris considered that, by his presence in the Netherlands, Mr K. had a detrimental effect on the international relations of that Member State. The Netherlands Staatssecretaris took the view that the Netherlands must be prevented from becoming a host country for persons with respect to whom there are serious grounds for considering that they have engaged in conduct of the kind referred to in Article 1(F) of the Geneva Convention. Furthermore, the protection of public policy and public security requires all necessary steps to be taken to prevent the citizens of the Netherlands from coming into contact with such persons and, in particular, to prevent the victims of the crimes alleged to have been committed by Mr K. or their family members from being confronted with Mr K. in the Netherlands.

19. In the light of the foregoing, the Netherlands Staatssecretaris concluded that Mr K. posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of Article 27(2) of Directive 2004/38.

20. In support of that conclusion, the Netherlands Staatssecretaris cited the judgments of the Raad van State (Council of State) of 12 September 2008,⁵ of 16 June 2015,⁶ and of 21 August 2015.⁷ In those judgments, the court found that in view of the exceptional seriousness of the crimes referred to in Article 1(F)(a) of the Geneva Convention, the threat to a fundamental interest of society posed by the presence of a person excluded from refugee status under that provision is, by its very nature, permanently present. According to that court, a finding that such a threat exists does not require any assessment of the likely future conduct of the person concerned.

21. The Netherlands Staatssecretaris also stated that the right to respect for private and family life, enshrined in Article 8 of the ECHR, does not preclude a declaration of undesirability being made in respect of Mr K.

⁵ NL:RVS:2008:BF1415.

⁶ NL:RVS:2015:2008.

⁷ NL:RVS:2015:2737.

22. Mr K. lodged an appeal against the contested decision in Case C-331/16 before the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg).

23. Against that background, the national court enquires, *in the first place*, whether that decision is consistent with the second subparagraph of Article 27(2) of Directive 2004/38. Having regard, in particular, to the amount of time that has passed since the period during which Mr K. allegedly committed the crimes falling within the categories referred to in Article 1(F)(a) and (b) of the Geneva Convention, the national court essentially wonders whether the existence of serious grounds for considering that Mr K. committed such crimes is sufficient to justify the finding that his presence in the Netherlands is a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ within the meaning of the second subparagraph of Article 27(2) of that directive. It also points out that Mr K. has never been convicted of a criminal offence.

24. The national court has doubts regarding the consistency with that provision of the case-law of the Raad van State (Council of State) cited in point 19 of this Opinion, on which the contested decision in Case C-331/16 is based. Those doubts concern both the wording of the provision and the case-law of the Court, particularly its judgments in *Bouchereau*,⁸ *B and D*,⁹ *I*,¹⁰ and *H. T.*¹¹

25. The national court also mentions a judgment delivered in Belgium on 27 March 2013 by the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings),¹² which ruled out any automatic link between the application by the Netherlands authorities of Article 1(F)(a) of the Geneva Convention due to the previous conduct of a family member of a Union citizen and the existence of a threat warranting the refusal to grant him a right of free movement and residence.

26. Furthermore, in his appeal against the contested decision in Case C-331/16, Mr K. submits, in particular, that international relations do not fall within the concept of ‘public policy’ for the purposes of the second subparagraph of Article 27(2) of Directive 2004/38. In addition, the view that any potential contact between Mr K. and one of his victims represents, in itself, a danger to public policy stretches that concept beyond all reasonable bounds. In any event, the Netherlands Staatssecretaris did not provide sufficient reasons as to why Mr K.’s presence in the Netherlands has a detrimental effect on the international relations of that Member State. Nor did he provide any credible evidence that victims of Mr K. are present in the Netherlands.

27. *In the second place*, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) expresses doubts as to whether that decision meets the requirement laid down in the first subparagraph of Article 27(2) of Directive 2004/38, under which all restrictions on the rights of movement and residence of Union citizens must comply with the principle of proportionality. The national court also enquires whether that decision is consistent with Article 28(1) and (3)(a) of that directive. In that regard, it refers to paragraph 3.3 of the Communication from the Commission on guidance for better transposition and application of [Directive 2004/38] (‘the Commission Guidance’).¹³

⁸ Judgment of 27 October 1977 (30/77, EU:C:1977:172, paragraphs 27 to 29).

⁹ Judgment of 9 November 2010 (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 103 to 105).

¹⁰ Judgment of 22 May 2012 (C-348/09, EU:C:2012:300, paragraph 30).

¹¹ Judgment of 24 June 2015 (C-373/13, EU:C:2015:413, paragraph 92).

¹² Judgment No 99921.

¹³ Communication from the Commission to the European Parliament and the Council of 2 July 2009 (COM(2009) 313 final). Paragraph 3.3 lists the factors relating to the personal and family situation of the person concerned which must be balanced against the fundamental interests of society for the purposes of assessing the proportionality of a measure taken on grounds of public policy or public security that is designed to protect those interests.

28. The national court mentions that Mr K. and his family members are fully integrated into Dutch society in so far as they have resided in the Netherlands since 2001, where Mr K.'s second son was born and where his two sons go to school. Mr K. also stated that his family acquired Croatian nationality for purely technical reasons and that Croatia is totally unfamiliar to them as they have never lived there and have no family there. Furthermore, Mr K. claims that Bosnia-Herzegovina is no longer a place where Catholic Croats can build their lives and that his children have no ties to that country.

29. In those circumstances, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

- '(1) Does Article 27(2) of Directive 2004/38 permit a Union citizen, as in the present case, in respect of whom it has been established in law that Article 1(F)(a) and (b) of the Geneva Convention is applicable to him, to be declared undesirable because the exceptional seriousness of the crimes to which that Convention relates leads to the conclusion that it must be assumed that, by its very nature, the threat affecting one of the fundamental interests of society is permanently present?
- (2) If the answer to question 1 is in the negative, how should an assessment be carried out, in the context of an intended declaration of undesirability, of whether the conduct of a Union citizen, as referred to above, to whom Article 1(F)(a) and (b) of the Geneva Convention has been declared applicable, should be regarded as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society? To what extent does the fact that the 1(F) conduct, as in the present case, took place long ago — in this case: in the period between 1992 and 1994 — play a role therein?
- (3) In what way does the principle of proportionality play a role in the assessment of whether a declaration of undesirability can be imposed on a Union citizen to whom Article 1(F)(a) and (b) of the Geneva Convention has been declared applicable, as in the present case? Should the factors mentioned in Article 28(1) of Directive 2004/38 be involved, either as part of such an assessment, or separately? Should the period of 10 years' residence in the host country mentioned in Article 28(3) *initio* and (a) thereof be taken into account, either as part of such an assessment, or separately? Should the factors listed in paragraph 3.3 of the [Commission Guidance] be fully involved?'

B. Case C-366/16

30. Mr H. F. declared himself to have Afghan nationality. He entered the Netherlands in 2000, where he lodged an application for asylum.

31. By decision of 26 May 2003, the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service of the Netherlands, 'the Netherlands asylum authorities') excluded Mr H. F. from refugee status on the basis of Article 1(F)(a) of the Geneva Convention. By decision of 9 January 2006, those authorities refused to grant him a temporary residence permit on the basis of Article 3 of the ECHR. Both decisions were confirmed by a court and became final.

32. Subsequently, the Netherlands Staatssecretaris issued an exclusion order against Mr H. F. On the basis of that order, an alert was issued for Mr H. F. in 2013 and 2014 for the purposes of refusing entry to or stay in the Schengen territory for an indefinite period under Article 24 of Regulation (EC) No 1987/2006.¹⁴

33. It is apparent from the decision to refer that Mr H. F. has never been convicted of a criminal offence in Belgium or the Netherlands. He also submitted a clean criminal record certificate from Afghanistan.

34. Mr H. F.'s eldest daughter has Netherlands nationality. In 2011, Mr H. F. and his daughter settled in Belgium, where the latter is economically active.

35. Mr H. F. lodged four consecutive applications for leave to remain with the authorised representative of the Staatssecretaris voor Asiel en Migratie, Maatschappelijke Integratie en Armoedebestrijding (State Secretary for Asylum and Migration, Social Integration and the Alleviation of Poverty, Belgium, 'the Belgian Staatssecretaris'). The last three applications sought the grant of a residence permit as a family member of a Union citizen in accordance with Article 2(2)(d) of Directive 2004/38, specifically as a relative in the ascending line of his eldest daughter, a Netherlands national, settled in Belgium. All four applications ended in refusals to grant residence and were accompanied by an order to leave Belgium.

36. By judgment of 17 June 2015, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) annulled the decision refusing residence accompanied by an order to leave Belgium which had been taken in response to the fourth application for leave to remain lodged by Mr H. F. Following that judgment, the authorised representative of the Belgian Staatssecretaris issued a further decision against Mr H. F. on 8 October 2015 refusing him residence in excess of three months which was not accompanied by an order to leave the territory ('the contested decision in Case C-366/16'). The legal basis for that decision is Article 43 of the Belgian law on foreign nationals, which transposes Article 27 of Directive 2004/38 into Belgian law.

37. In support of the decision, the authorised representative of the Belgian Staatssecretaris relied on information contained in the file relating to the Netherlands asylum procedure in respect of Mr H. F., which was obtained with Mr H. F.'s cooperation. It is apparent from the file that, according to the findings of the Netherlands asylum authorities, there are serious grounds for considering that Mr H. F. committed crimes falling with the categories referred to in Article 1(F)(a) of the Geneva Convention. Mr H. F. allegedly participated in war crimes or crimes against humanity, or gave orders to commit such crimes, on account of the position he held in Afghanistan. As political secretary, he had contact with the KhAD, an Afghan intelligence service under the former communist regime, and, as such, reported on disloyal members. Mr H. F. therefore exposed those members to fundamental rights violations perpetrated by the KhAD.

¹⁴ Regulation of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4). Article 24(1) of that regulation provides that 'data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment'. Under paragraph 2 of that article, 'an alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose'. As set out in paragraph 3 of that article, 'an alert may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals'.

38. The authorised representative of the Belgian Staatssecretaris considered that the threat to a fundamental interest of society posed by the presence in Belgian society of a person with respect to whom there are serious grounds for considering that he committed such crimes is, by its very nature, permanently genuine. The assessment of that person's future conduct is not important in that regard, in view of the nature and seriousness of the crimes in question as well as the time when, the place where and circumstances in which they were committed. Consequently, the present nature of the threat posed by the person's conduct and the risk of recidivism do not have to be plausibly demonstrated.

39. The authorised representative of the Belgian Staatssecretaris stated that the refusal to grant residence in such a case serves to protect the victims of those crimes and thus Belgian society and the international legal order. For those reasons, the refusal to grant Mr H. F. a right of residence is consistent with the principle of proportionality.

40. Mr H. F. lodged an application to stay proceedings and an action for annulment against that decision before the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings).

41. That court has doubts regarding the consistency with Article 27(2) of Directive 2004/38 of the view taken in the contested decision in Case C-366/16, set out in point 38 of this Opinion. It notes that that view mirrors the approach taken in the Netherlands by the Raad van State (Council of State) in its judgment of 16 June 2015.¹⁵

42. The national court enquires, in particular, whether the existence of a decision to exclude a person from refugee status taken approximately 10 years earlier by another Member State relieves the authorities of the host Member State of the obligation to examine the present nature and genuineness of the threat posed by the conduct of the person concerned. It points out that, by its nature, such a decision relates to events which took place in the past in that person's country of origin.

43. The national court states that Mr H. F. submits, *inter alia*, in his action against the contested decision in Case C-366/16, that the decision to exclude him from refugee status taken by the Netherlands asylum authorities was based on inaccurate information concerning Afghanistan.

44. It also raises the question of the compatibility of the contested decision in Case C-366/16 with the right to respect for private and family life enshrined in Article 7 of the Charter and Article 8 of the ECHR.

45. In those circumstances, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Should Union law, in particular Article 27(2) of Directive 2004/38, whether or not in conjunction with Article 7 of the Charter, be interpreted as meaning that a residence application, lodged by a third-country family member in the context of family reunification with a Union citizen, who in turn has used his right of free movement and residence, can be refused in a Member State because of a threat resulting from the mere presence in society of that family member, who in another Member State was excluded from refugee status pursuant to Article 1(F) of the Geneva Convention and Article 12(2) of Directive 2011/95 because of his involvement in events within a certain

¹⁵ NL:RVS:2015:2008. See point 21 of this Opinion.

socio-historical context in his country of origin, where the genuineness and the reality of the threat posed by the conduct of that family member in the Member State of residence is based solely on a reference to the exclusion decision in the absence of an assessment of the risk of recidivism in the Member State of residence?’

C. Procedure before the Court

46. The requests for a preliminary ruling in Cases C-331/16 and C-366/16 were registered at the Court Registry on 13 June 2016 and 5 July 2016, respectively. By decision of the President of the Court of 21 July 2016, the two cases were joined for the purposes of the written and oral parts of the procedure and the judgment.

47. Mr K., the Belgian, Greek, French, Netherlands and United Kingdom Governments and the European Commission have submitted written observations in this case.

48. Messrs K. and H. F., the Belgian, French, Netherlands and United Kingdom Governments and the Commission appeared at the hearing held on 10 July 2017.

IV. Assessment

A. Preliminary observations

49. Upon entering the territory of the European Union, Messrs K. and H. F. — who did not, at that time, fall within the scope *ratione personae* of Directive 2004/38 — applied for refugee status. Their applications were refused on the basis of Article 1(F)(a), as regards Mr H. F., and Article 1(F)(a) and (b), as regards Mr K., of the Geneva Convention.

50. Mr K. subsequently acquired the status of Union citizen following the Republic of Croatia’s accession to the European Union. According to information provided by the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings), Mr H. F. secured the status of family member of a Union citizen after joining his daughter, a Netherlands national, in Belgium.¹⁶ Those status changes triggered the application of Directive 2004/38 to Messrs K. and H. F.

51. Although Article 1(F) of the Geneva Convention requires the persons to whom that provision applies to be excluded from refugee status for the purposes of that convention, it does not preclude a right of residence which is separate from that flowing from refugee status being granted to such persons, provided that there is no risk of that right of residence being confused with refugee status.¹⁷ It is not disputed that the grant to a person excluded from refugee status of a right of residence as a Union citizen or family member of a Union citizen meets that requirement.

¹⁶ Article 3(1) of Directive 2004/38 provides that the directive ‘shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in [Article 2(2)] who accompany or join them’. Under Article 2(2)(d) of that directive, the direct relatives in the ascending line of a Union citizen are ‘family members’ only if they are dependent on him. The decision to refer does not make clear whether Mr H. F. is, as he claimed at the hearing, dependent on his daughter. However, that decision states that Article 2(2)(d) of Directive 2004/38 applies to Mr H. F. (see point 35 of this Opinion), which presupposes that that requirement is met. However, the Court is in principle required to base its consideration on the factual premisses which the referring court regards as having been established (see judgments of 28 January 1999, *van der Kooy* (C-181/97, EU:C:1999:32, paragraph 30), as well as, to that effect, of 12 February 2009, *Cobelfret* (C-138/07, EU:C:2009:82, paragraph 23)). It is for the referring court alone to determine whether, in this case, Mr H. F. indeed has the status of family member of a Union citizen.

¹⁷ See judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 115 to 120). The Court pointed out in that judgment that Directive 2011/95, like the Geneva Convention, is based on the principle that the Member States may, in accordance with their national law, grant another kind of protection, separate from the protection conferred by the directive and the convention, giving persons excluded from refugee status the right to remain in their territories.

52. In the present case, the rights of residence that Messrs K. and H. F. enjoy under Directive 2004/38 were restricted by measures taken on grounds of public policy or public security within the meaning of Article 27(2) of that directive ('restrictive measures').¹⁸ Those measures were based on the fact that the persons concerned had, in the past, been the subject of decisions to exclude them from refugee status under Article 1(F)(a) of the Geneva Convention, decisions taken by the asylum authorities of the host Member State (in the case of Mr K.) or of another Member State (in the case of Mr H. F.).

53. The referring courts seek, in essence, to ascertain whether those measures were taken in compliance with the conditions laid down in Article 27(2) of Directive 2004/38 — which must, in so far as it permits derogations from the fundamental freedoms conferred by the TFEU, be interpreted strictly.¹⁹

54. The referring courts also raise the question of the compatibility of the restrictive measures at issue in the main proceedings with the right to private and family life under Article 7 of the Charter and Article 8 of the ECHR. In addition, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) enquires whether the protection against expulsion provided for in Article 28(1) and (3)(a) of that directive applies in a situation such as that of Mr K.

B. Establishment of a genuine, present and sufficiently serious threat affecting a fundamental interest of society

55. By the first and second questions raised in Case C-331/16 and the question referred in Case C-366/16, the national courts essentially seek to ascertain whether and, if so, on what conditions, a Member State may consider that the presence in its territory of a Union citizen or member of his family constitutes a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', within the meaning of Article 27(2) of Directive 2004/38, on the ground that the person concerned has — in the past — been the subject of a decision to exclude him from refugee status under Article 1(F)(a) of the Geneva Convention.

56. In particular, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) asks the Court about the relevance, in that context, of the fact that a significant period of time (in this instance, more than 20 years) has elapsed between the alleged commission of the crimes that justified the exclusion from refugee status and the adoption of the restrictive measure at issue. The Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) questions whether it is necessary to assess the risk of recidivism in respect of the conduct referred to in Article 1(F)(a) of the Geneva Convention in the host Member State, given that such conduct occurred in the country of origin of the person concerned within a certain socio-historical context.

57. Those questions reflect the concerns of the national courts as regards the compatibility with Article 27(2) of Directive 2004/38 of the statement of reasons for the contested decisions, according to which the past application of Article 1(F)(a) of the Geneva Convention implies, in the light of the particularly serious nature of the crimes referred to in that provision, that the presence of the person concerned in the territory of the host Member State constitutes a threat that 'by its very nature ... is permanently present'.²⁰

¹⁸ See, by analogy, judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 21).

¹⁹ See, in particular, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 58 and the case-law cited). In its judgment of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 65), the Court held that derogations from the rights linked to a person's status as a Union citizen must be interpreted in a 'particularly restrictive' manner.

²⁰ In respect of the contested decision in Case C-331/16, the statement of reasons is based on a number of judgments of the Raad van State (Council of State) to which that decision refers (see point 20 of this Opinion).

58. In order for a threat within the meaning of Article 27(2) of Directive 2004/38 to be established, it is necessary, first of all, to identify one of the ‘fundamental interests of society’ the protection of which falls within the scope of public policy or public security. In this case, Mr K. argues that safeguarding the interests relied on in support of the contested decisions does not fall within the concepts of ‘public policy’ or ‘public security’ within the meaning of that provision. I will begin by refuting that argument (Section 1).

59. Secondly, the establishment of such a threat requires the Member State concerned to explain how those interests are, in a given case, threatened in a genuine, present and sufficiently serious manner by the personal conduct of the individual in question. I will expand on the implications of that requirement for situations such as those at issue in the main proceedings below (Section 2).

1. Identification of one of the ‘fundamental interests of society’ the protection of which is a matter of public policy or public security

60. According to settled case-law, the concepts of ‘public policy’ and ‘public security’, as justifications for derogating from the freedoms of movement and residence of Union citizens and their family members, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by the EU institutions. However, EU law does not impose a uniform scale of values and acknowledges that the requirements of public policy and public security may vary from one country to another and from one era to another. Member States essentially retain the freedom to determine what constitutes those requirements in accordance with their national needs.²¹

61. In the light of those principles, the Court has previously found that the requirements of public policy and public security within the meaning of the provisions permitting restrictions on those freedoms are not limited to the protection of the calm and direct physical security of the population against the risk of criminal acts.

62. Thus, it has held that the concept of ‘public security’, which covers both the internal security and external security of the Member State at issue, also encompasses ‘a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests’.²²

63. Although the requirements of public policy do not cover economic interests²³ or the mere prevention of disturbance of the social order which any infringement of the law involves,²⁴ they may cover protection of the various interests that the Member State concerned considers to be fundamental interests in accordance with its own system of values. In particular, the Court has recognised that, in certain circumstances, a Member State may invoke, as a matter of public policy, the protection of a fundamental interest as far removed from the calm and direct physical security of the population as the need to ensure the recovery of tax liabilities.²⁵

21 See, in particular, judgments of 28 October 1975, *Rutili* (36/75, EU:C:1975:137, paragraphs 26 and 27); of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraphs 33 and 34); and of 22 May 2012, *I* (C-348/09, EU:C:2012:300, paragraph 23 and the case-law cited).

22 See, in particular, judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 39 and the case-law cited).

23 As is apparent from the wording of Article 27(1) of Directive 2004/38.

24 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 83 and the case-law cited).

25 Judgment of 17 November 2011, *Aladzhov* (C-434/10, EU:C:2011:750, paragraph 37).

64. As is apparent from the decision to refer in Case C-331/16, the restrictive measure ordered against Mr K. was, *first*, based on a provision of Netherlands law allowing a declaration of undesirability to be made against a foreign national ‘in the interests of the international relations of the Netherlands’. In that regard, the Netherlands Staatssecretaris invokes the need to prevent the Netherlands from becoming a host country for persons suspected of having committed crimes against peace, war crimes or crimes against humanity. In the same vein, the decision to refer in Case C-366/16 states that one of the aims of the restrictive measure ordered against Mr H. F. was to protect the international legal order.

65. The French Government submitted that such measures may also be conducive to the interest in establishing stringent procedures to protect the fundamental values of French society and the international legal order, set out, in particular, in Article 21(1) TEU. Such procedures are necessary to help maintain social cohesion and, as the United Kingdom Government also contends, public confidence in the justice and immigration systems. In addition, the United Kingdom Government refers to the interest in upholding the credibility of the commitment of the European Union and its Member States to protect the fundamental values set out in Articles 2 and 3 TEU.²⁶

66. *Secondly*, the Netherlands Staatssecretaris justified the restrictive measure at issue in this case by the need to prevent the citizens of the Netherlands from coming into contact with such persons and, in particular, to prevent their potential victims or members of their families from coming face to face with them. Similarly, the decision to refer in Case C-366/16 states that the contested decision in that case was intended to protect the victims of the persons excluded from refugee status as well as Belgian society.

67. The Netherlands and United Kingdom Governments add, in that connection, that the adoption of restrictive measures against Union citizens or their family members who have been excluded from refugee status under Article 1(F)(a) of the Geneva Convention addresses the need to prevent the social harm associated with the potential commotion resulting from the presence, with complete impunity, of an alleged war criminal in the Member State concerned.

68. My view is that Member States may, without overstepping the bounds of the discretion they enjoy to determine what constitutes public policy requirements, consider that the protection of the interests described above fall within those requirements. In the light of the principles set out in points 60 and 63 of this Opinion, I see no reason to prevent Member States from considering that, in accordance with their own scale of values, those interests are fundamental interests of society within the meaning of Article 27(2) of Directive 2004/38, the protection of which is a matter of public policy.

69. That being so, the possibility of restricting the rights of movement and residence under Directive 2004/38 in the name of the fundamental interests relied on for that purpose is circumscribed by the conditions set out in Article 27(2) thereof.

²⁶ The United Kingdom Government also invokes the need for Member States to fulfil their obligations concerning the fight against terrorism, under various resolutions of the United Nations Security Council, which require them to refuse to give refuge to persons who commit or facilitate the commission of terrorist acts. I note, however, that terrorist acts are the subject of the exclusion clause set out in Article 1(F)(c) of the Geneva Convention. That is not at issue in the present cases.

2. Establishment of a threat affecting the fundamental interests of society invoked on account of the personal conduct of the person concerned

70. Article 27(2) of Directive 2004/38 provides that a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’, within the meaning of that provision, must be based exclusively on the personal conduct of the individual concerned. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention are not to be accepted. Furthermore, previous criminal convictions may not in themselves constitute grounds for taking a restrictive measure.

71. The Court has repeatedly held that a previous criminal conviction for specific offences is not, in itself, sufficient to establish a threat affecting one of the fundamental interests of society.²⁷ However, the circumstances which gave rise to that conviction may be taken into account, as a basis for such a finding, in so far as they provide evidence, following a case-by-case analysis, of personal conduct constituting a genuine, present and sufficiently serious threat to a fundamental interest of the host society.²⁸

72. In that context, although the establishment of a threat ‘implies, in general, the existence in the individual concerned of a propensity to [re-engage in the conduct punished under criminal law] in the future’,²⁹ past conduct alone may, in some circumstances, meet the conditions for such a threat.³⁰

73. Below, I will explain why I think that the principles set out in point 71 of this Opinion apply by analogy where the individual concerned has previously been the subject not of a criminal conviction, but of a decision to exclude him from refugee status under Article 1(F)(a) of the Geneva Convention (Section (a)).

74. Thereafter, having regard to the case-law referred to in point 72 of this Opinion, I will set out the reasons for my conclusion that the past conduct of the individual concerned, as is apparent from the findings on which that decision is based, may be sufficient to justify the view that there is a ‘present’ threat, notwithstanding the lengthy period of time that has elapsed since the commission of the alleged crimes and the lack of any propensity to commit such crimes again in the host Member State (Section (b)).³¹

(a) Relevance of the prior application of Article 1(F)(a) of the Geneva Convention

(1) Applicable principles

75. In order to ascertain whether the principles set out in point 71 of this Opinion are sufficient to regulate the situation of a person who, in the past, was excluded from refugee status under Article 1(F)(a) of the Geneva Convention, two specific considerations should be borne in mind.

²⁷ See, in particular, judgments of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 68 and 93); of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 38); and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 64 to 67). Also see, by analogy, judgment of 19 January 1999, *Calfa* (C-348/96, EU:C:1999:6, paragraph 25).

²⁸ See, in particular, judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 28); of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 77); and of 7 June 2007, *Commission v Netherlands* (C-50/06, EU:C:2007:325, paragraph 41). Also see, to that effect, judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 46).

²⁹ Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 29), and of 22 May 2012, *I* (C-348/09, EU:C:2012:300, paragraph 30). Also see, to that effect, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 50).

³⁰ Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 29).

³¹ I prefer this wording to the risk of ‘recidivism’. As the Belgian Government pointed out, the concept of ‘recidivism’ presupposes the existence of a criminal conviction, according to the common use of that word. It is apparent from the decisions to refer that Messrs K. and H. F. have never been convicted of the conduct of which they are accused under Article 1(F)(a) of the Geneva Convention.

76. The exceptionally serious nature of the crimes covered by that provision could militate in favour of a more flexible approach from the point of view of the Member States, allowing them to establish a threat within the meaning of Article 27(2) of Directive 2004/38 solely on the ground that the exclusion clause provided for in Article 1(F)(a) of the Geneva Convention was applied to the person concerned. The crimes listed therein offend against the most fundamental values underpinning both the international legal order and human rights³² and are of concern to the international community as a whole.³³

77. Furthermore, the fact that the application of that provision does not require any conviction for the crimes in question³⁴ or evidence in a criminal sense of their commission militates more in favour of greater caution in relation to the taking into account of the circumstances that led to the exclusion decision, as they transpire from the assessments of the asylum authorities, as a basis for finding that such a threat exists.

78. In my view, those considerations do not prevent the above principles being applied.

79. *In the first place*, I consider that a finding of a threat within the meaning of Article 27(2) of Directive 2004/38 cannot be made automatically, without further examination, simply because the asylum authorities previously excluded the person concerned from refugee status on the basis of Article 1(F)(a) of the Geneva Convention. The requirement for an examination of the personal conduct of the individual concerned, which flows from the wording of Article 27(2) of Directive 2004/38, does not, to my mind, allow any derogation, even where the conduct of which he is accused is extremely serious.

80. That approach is also vindicated by the fact that Article 1(F) of the Geneva Convention and Article 27 of Directive 2004/38 pursue different objectives.³⁵

81. As the Court held in *B and D*,³⁶ the exclusion clauses provided for in Article 12(2) of Directive 2011/95, which mirror Article 1(F) of the Geneva Convention, were introduced with the aim ‘of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability’.

32 In that regard, the European Court of Human Rights (‘ECtHR’) held, in its judgment of 21 October 2013, *Janowiec and Others v. Russia* (CE:ECHR:2013:1021JUD005550807, § 150), to which the French Government referred at the hearing, that serious crimes under international law such as war crimes, genocide or crimes against humanity are of a larger dimension than ordinary criminal offences and amount to ‘the negation of the very foundations of the ECHR’.

33 See Article 5 of the Statute of the International Criminal Court, signed in Rome on 17 July 1998 (*United Nations Treaty Series*, Vol. 2187, No 38544), which entered into force on 1 July 2002.

34 However, according to the United Nations High Commission for Refugees (‘the HCR’), Article 1(F)(a) of the Geneva Convention may, in some cases, where truly heinous crimes are concerned, apply even if the person concerned has been convicted and served his sentence. See the HCR, ‘Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, of 4 September 2003 (‘the HCR Background Note’), paragraphs 72 and 73. Recital 22 of Directive 2011/95 states that ‘consultations with the [HCR] may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention’.

35 See, to that effect, judgment of 24 June 2015, *H. T.* (C-373/13, EU:C:2015:413, paragraph 77).

36 Judgment of 9 November 2010 (C-57/09 and C-101/09, EU:C:2010:661, paragraph 104).

82. By contrast, the exclusion clauses are not intended to protect the host society against the possible danger posed by the presence in that society of the asylum applicant concerned, this being an objective pursued by other provisions of Directive 2011/95.³⁷ The Court has also held that the application of Article 12(2) of the directive does not require the person to pose a present danger to the host society.³⁸

83. In the light of the different objectives pursued by those provisions, the assessments guiding the application of Article 1(F)(a) of the Geneva Convention, like those forming the basis of a criminal conviction,³⁹ do not necessarily coincide with the assessments to be carried out from the point of view of the interests inherent in protecting public policy and public security under Article 27(2) of Directive 2004/38.⁴⁰

84. *In the second place*, however, the reasons underpinning a decision to exclude a person from refugee status may be taken into account when they disclose, in the light of the specific circumstances of each individual case, personal conduct amounting to a genuine, present and sufficiently serious threat to one of the fundamental interests of society.⁴¹ In that situation, the considerations that justified the application of Article 1(F)(a) of the Geneva Convention may also serve as the basis for establishing a threat within the meaning of Article 27(2) of Directive 2004/38.⁴²

85. That principle is not called in question by the fact that the exclusion of a person from refugee status is not conditional on the existence of a criminal conviction or proof of the crimes for which the person concerned is accused to the evidential standards generally applicable under criminal law in the legal systems of the Member States and under international criminal law ('beyond reasonable doubt').⁴³

37 As set out in the judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraph 101), 'any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) of that directive, pursuant to which Member States may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) Article 21(2) of the directive, which provides that the host Member State may — as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention — refuse a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State'.

38 Judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraph 105).

39 See judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 27), and, by analogy, of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 59).

40 That conclusion is not affected by the fact that, following the decision to exclude Mr H. F. from refugee status, he was the subject — in the Netherlands — of an exclusion order and an alert in the SIS. In accordance with Article 24(2) of Regulation No 1987/2006, this presupposes that the Member State which issued the alert considered that the presence of the third-country national concerned in its territory posed a threat to public order or public security (see footnote 14 of this Opinion). As is apparent from the judgment of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 25), a restrictive measure cannot be based exclusively on reasons advanced by another Member State for the purposes of adopting such a measure. A restrictive measure 'must ... be adopted in the light of considerations pertaining to the protection of public policy or public security in the Member State imposing the measure'. A fortiori, such a measure cannot be based solely on the grounds relied on by another Member State when deciding to refuse to grant a third-country national who does not fall within the scope of Directive 2004/38 leave to enter or stay.

41 In practice, it is for the national authorities to familiarise themselves with the asylum file of the person concerned before adopting a restrictive measure. When what is in issue is a decision taken by another Member State to exclude a person from refugee status resulting in an alert in the SIS, the onus is on that Member State, pursuant to the principle of genuine cooperation, to make supplementary information available to the host Member State of the person for whom the alert was issued to enable it to gauge, in the specific case, the gravity of the threat that that person is likely to represent (see judgment of 31 January 2006, *Commission v Spain* (C-503/03, EU:C:2006:74, paragraph 56)).

42 I will set out the factors to be taken into account in that regard in points 91 to 100 of this Opinion.

43 See, in particular, Article 66(3) of the Statute of the International Criminal Court as well as Rule 87(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted on 11 February 1994, as last amended on 8 July 2015.

86. It is apparent from the case-law that the existence of a criminal conviction is neither sufficient nor necessary in order to support a finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Depending on the circumstances, even a mere suspicion of a crime may, together with other factors relating to the case in question, be used as a basis for establishing the existence of a threat to public policy or public security.⁴⁴

87. A fortiori, ‘serious reasons for considering’ that the person concerned has committed a crime of the kind covered by Article 1(F)(a) of the Geneva Convention — which entail, more than mere suspicions, clear, reliable, credible and convincing evidence⁴⁵ — may be taken into account together with other factors⁴⁶ for the purposes of substantiating such a finding.

88. Furthermore, the insertion in Article 1(F) of the Geneva Convention of that standard of proof, which is lower than the standard under criminal law, is due to the fact that that provision applies in most cases to persons who have not been tried, far less convicted, of the crimes of which they are accused.⁴⁷ One of the objectives of the refugee status exclusion clauses is precisely to combat impunity by preventing asylum being used as a way of avoiding criminal proceedings.⁴⁸ In addition, the asylum authorities have neither the powers nor resources to prove criminal acts which, moreover, allegedly occurred in factual circumstances that are particularly difficult to clarify.⁴⁹

89. In the present case, it is clear from the decisions to refer that the restrictive measures taken against Messrs K. and H. F. were aimed, inter alia, at preventing the disorder that their presence in the territory of the host Member State might cause in society, particularly for their potential victims. According to the Netherlands Government, the alleged disorder consists in the shock that might be generated by the presence there, with complete impunity, of persons suspected of having committed the most serious crimes under international law.

90. In the light of all the foregoing, I take the view that although the exclusion of a person from refugee status under Article 1(F)(a) of the Geneva Convention cannot, in itself, establish a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it may be taken into account to that end in so far as the circumstances that led to the application of that provision, as they transpire from the assessments of the asylum authorities, disclose personal conduct constituting such a threat.

44 The court ruled to that effect in its judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 52) as regards the interpretation of 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). That provision allows Member States to derogate from their duty to grant a period for voluntary departure in the case of the removal of a third-country national where that person poses a risk to public policy or public security. The Court justified that conclusion on the ground that ‘the Member States essentially retain the freedom to determine the requirements of the concept of public policy in accordance with their national needs and [none of the provisions of Directive 2008/115] permits the inference that a criminal conviction is necessary in that regard’. In my view, that reasoning and the conclusion flowing from it may be transposed to the interpretation of Article 27(2) of Directive 2004/38. Member States enjoy a broad discretion when determining the requirements of public policy also in the context of that provision and Directive 2004/38 does not make any provision either for the need for a criminal conviction.

45 See the HCR, Guidelines on international protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003 (paragraphs 34 and 35), annexed to the Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, December 2011; the HCR Background Note, paragraphs 107 to 109; and the Statement on Article 1F of the 1951 Convention, July 2009, p. 10.

46 See points 91 to 100 of this Opinion.

47 See, however, footnote 34 of this Opinion.

48 See point 81 of this Opinion.

49 See, in that respect, the judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Switzerland) of 11 May 2010, *Y. and family v Federal Office for migration* (ODM) (E-5538/2006, BVGE, § 5.3.2.2). In that judgment, the court made clear that the standard of proof provided for in Article 1(F) of the Geneva Convention is justified both by the subject matter of the decisions based on that provision — which, irrespective of their seriousness, do not impose penalties — and by the limited means of investigation available to the asylum authorities in order to gather evidence relating to events which occurred in circumstances that are often difficult to shed light on.

(2) Factors to be taken into account when assessing whether the circumstances on the basis of which a person was excluded from refugee status disclose personal conduct amounting to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society

91. As the Court pointed out in *B and D*⁵⁰ and *Lounani*,⁵¹ the exclusion of a person from refugee status presupposes a full investigation into the specific circumstances of each individual case. According to various statements made by the HCR, those circumstances include — in addition to the nature of the crimes of which the person concerned is suspected — the degree of individual involvement of that person in the crimes and the possible existence of grounds for excluding criminal liability such as duress or self-defence.⁵²

92. All of those circumstances, as established by the asylum authorities, must, in my view, also be taken into account when appraising whether the personal conduct of the person concerned poses a threat within the meaning of Article 27(2) of Directive 2004/38. In that context, considerable weight may be attached to the particular seriousness of the crimes of which he is accused, referred to in Article 1(F)(a) of the Geneva Convention. Nonetheless, it is necessary to examine all the other relevant factors, too.

93. As regards, in particular, the degree of personal involvement, I note that, under Article 12(3) of Directive 2011/95, an asylum applicant is regarded as having ‘committed’ a crime within the meaning of paragraph 2 of that article in so far as he incited that crime or otherwise participated in it.⁵³

94. In that connection, in its judgment in *B and D*,⁵⁴ the Court held that the asylum authorities may not exclude a person from refugee status on the sole ground that he used to be a member of an organisation involved in crimes of the kind covered by Article 1(F) of the Geneva Convention without ascertaining whether a share of the responsibility can be attributed to him in respect of the crimes of which that organisation is accused in the light of all the circumstances. Those circumstances include ‘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; any pressure to which he was exposed; or other factors likely to have influenced his conduct’.⁵⁵

95. In the case at hand, Mr K. claims that he was excluded from refugee status because of the duties he was obliged to perform in the Bosnian army. He asserts that the practice followed by the Netherlands asylum authorities does not take account of the requirement for an individual examination of the degree of personal involvement of the asylum applicant in question.

96. Mr H. F. submits that the Netherlands asylum authorities applied an exclusion clause to him solely because he used to hold a mere logistical position within the KhAD.⁵⁶

⁵⁰ Judgment of 9 November 2010 (C-57/09 and C-101/09, EU:C:2010:661, paragraph 87).

⁵¹ Judgment of 31 January 2017 (C-573/14, EU:C:2017:71, paragraph 72).

⁵² See, in particular, the HCR Guidelines, paragraphs 10 to 13 and 18 to 23, as well as the HCR Background Note, paragraphs 50 to 75.

⁵³ Also see the HCR Background Note, paragraphs 50 to 56.

⁵⁴ Judgment of 9 November 2010 (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 88 to 99). Although that judgment concerns the application of the exclusion clauses set out in Article 12(2)(b) and (c) of Directive 2011/95 — which mirrors Article 1(F)(b) and (c) of the Geneva Convention — I think that the reasoning adopted by the Court and the resulting conclusion also apply to the exclusion clause laid down in point (a) of those provisions.

⁵⁵ Judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraph 97).

⁵⁶ Mr H. F. relies on a document, included in the file sent to the Court by the referring court in Case C-366/16, in which the HCR publicly questioned the compatibility with the Geneva Convention of the practice followed in the Netherlands whereby the exclusion clauses were presumed to apply to Afghan asylum applicants who had held officer and non-commissioned officer positions within the KhAD. Also see the HCR, Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992, May 2008.

97. I recall that although the authorities of the host Member State are not, in the context of the adoption of a restrictive measure, entitled to call in question the merits of a decision to exclude a person from refugee status,⁵⁷ they are nevertheless required to ascertain whether the evidence on which the asylum authorities based that decision also justifies a finding of threat within the meaning of Article 27(2) of Directive 2004/38.

98. From the perspective of that provision, the fact that the person concerned is or used to form part of an organisation involved in criminal acts may serve as the basis for establishing such a threat only in so far as that fact discloses personal conduct that is prejudicial to public order or public security.⁵⁸

99. In its judgment in *H. T.*,⁵⁹ the Court applied the reasoning in *B and D*⁶⁰ (set out in point 94 of this Opinion), by analogy, in the context of the interpretation of Article 24(1) of Directive 2011/95. That provision entitles a Member State to refuse to issue a residence permit to a refugee where there are ‘compelling reasons of national security or public order’. According to the Court, the concept of ‘public order’ within the meaning of that provision presupposes, in a similar way to Article 27(2) of Directive 2004/38, ‘a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.⁶¹ The Court has ruled that such a threat cannot be based solely on past acts of support for an organisation involved in criminal actions, without any examination of the personal liability of the refugee concerned in the implementation of those actions in the light of the specific facts.⁶² That conclusion seems to me to be valid both with regard to the interpretation of Article 24(1) of Directive 2011/95 and that of Article 27 of Directive 2004/38, since the Court held in the judgment in *H. T.*⁶³ that the concept of ‘public order’ within the meaning of those two provisions must be interpreted in a similar manner.

100. It is for the referring courts to determine whether or not the restrictive measures at issue in the main proceedings were adopted following an individual examination — conducted on the basis of the findings giving rise to the exclusion of Messrs K. and H. F. from refugee status — of all of the relevant factors, in the light of the foregoing considerations.

(b) Relevance of the time elapsed since the alleged commission of the crimes and of the lack of any propensity to commit such crimes again

101. Crimes against peace, war crimes and crimes against humanity, referred to in Article 1(F)(a) of the Geneva Convention, usually concern acts committed in a third country before the asylum applicant in question has entered the territory of the host Member State. As noted by Mr K. as well as the French, Netherlands and United Kingdom Governments, it is highly unlikely that such crimes will be repeated in that Member State after the asylum applicant’s arrival.⁶⁴ That the case because, by definition — as the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) pointed out — such acts are linked to the specific geographical, historical and social context of the third country, particularly to a situation of conflict in that country.

⁵⁷ Where the exclusion decision originates in another Member State, such questioning is incompatible with the mutual trust underpinning the system established by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31), as recital 22 of that regulation makes clear.

⁵⁸ See, to that effect, judgment of 4 December 1974, *van Duyn* (41/74, EU:C:1974:133, paragraph 17), cited in paragraph 3.2 of the Commission Guidance.

⁵⁹ Judgment of 24 June 2015 (C-373/13, EU:C:2015:413).

⁶⁰ Judgment of 9 November 2010 (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 88 to 99).

⁶¹ Judgment of 24 June 2015, *H. T.* (C-373/13, EU:C:2015:413, paragraphs 77 and 79).

⁶² Judgment of 24 June 2015, *H. T.* (C-373/13, EU:C:2015:413, paragraphs 86 to 90).

⁶³ Judgment of 24 June 2015 (C-373/13, EU:C:2015:413, paragraph 77).

⁶⁴ The Court has already held that the application of a refugee status exclusion clause is not conditional on the existence of a ‘present danger’ to the Member State concerned (see point 82 of this Opinion).

102. I am of the view that those considerations are not necessarily decisive in situations such as those at issue in the main proceedings.

103. *In the first place*, as is apparent from the case-law cited in point 72 of this Opinion, the present nature of the threat does not necessarily presuppose the existence of a risk of repetition of conduct that is prejudicial to public order or public security. In some circumstances, past behaviour may, in itself, be sufficient to justify a finding that the personal conduct of the individual concerned poses a threat meeting the requirements laid down in Article 27(2) of Directive 2004/38.

104. Those circumstances include, to my mind, situations in which a Member State invokes — in support of a restrictive measure — a threat affecting one of the fundamental interests of society which is not dependent on the risk of repetition of criminal conduct.⁶⁵

105. In the present case, the contested decisions were not taken for the purposes of preventing the risk of Messrs K. and H. F. committing crimes against peace, war crimes or crimes against humanity in the host Member State at some point in the future. By contrast, those decisions sought to prevent potential disturbance of the social order and international relations as a consequence of their presence in that State, due to the exceptionally serious nature of the past conduct of which they are suspected and irrespective of their current and future conduct. In the light of the fundamental interests relied on, it is therefore the actual presence of the persons suspected of having committed such crimes in the past, not their present or future conduct in the host Member State, which poses the threat at issue. That threat may meet the requirement for it to be of a present nature as provided for in Article 27(2) of Directive 2004/38 since, as the Netherlands and United Kingdom Governments pointed out, it is the threat and not the conduct of the person concerned which must be present.

106. *In the second place*, although the time elapsed since the alleged commission of the crimes in question must be taken into account when determining whether the threat complained of is a present threat,⁶⁶ it does not necessarily prevent the threat being regarded as present. The risk of disturbance of the social order and international relations as a consequence of the presence in the territory of a Member State of a person suspected of crimes against peace, war crimes or crimes against humanity may continue to exist even — and sometimes all the more so — where that person has enjoyed a long period of impunity. The crimes covered by Article 1(F)(a) of the Geneva Convention are not subject to any time-bar under various instruments of international criminal law.⁶⁷

107. If the examination of the individual conduct of the persons concerned, carried out in the light of the foregoing considerations, were to lead to a finding of a threat within the meaning of Article 27(2) of Directive 2004/38, it would be necessary, furthermore, to determine whether the adoption of the restrictive measures at issue in the main proceedings complies with the principle of proportionality and the fundamental rights of those persons.

⁶⁵ I think that the assertion set out in paragraph 3.2 of the Commission Guidance to the effect that ‘the danger of re-offending is of considerable importance’ should also be understood from that perspective. That assertion is relevant only so far as concerns restrictive measures that aim to protect the calm and physical security of the population against the danger of re-offending. It does not apply to restrictive measures that are intended to safeguard fundamental interests of a different kind.

⁶⁶ See, by analogy, judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 62). According to the case-law, the existence of a threat within the meaning of Article 27(2) of Directive 2004/38 must be assessed at the time when the restrictive measure takes effect (judgment of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 77 to 79)).

⁶⁷ See, in particular, Article 29 of the Statute of the International Criminal Court, as well as the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, signed on 25 January 1974 (*European Treaty Series*, No 82).

C. Review of the proportionality of the restrictive measures and their compliance with the right to private and family life

108. By its third question, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) enquires about how to carry out the mandatory proportionality assessment when a restrictive measure is imposed on an individual who has previously been excluded from refugee status under Article 1(F)(a) of the Geneva Convention.

109. The national court asks, in particular, whether the factors mentioned in Article 28(1) of Directive 2004/38 — reproduced in paragraph 3.3 of the Commission Guidance — must be taken into account in that context. It also seeks to ascertain, in essence, whether the enhanced protection enjoyed by Union citizens who have resided in the host Member State for the previous 10 years, pursuant to Article 28(3)(a) of that directive, applies to the situation of Mr K.

110. The Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) also asked the Court about the compatibility of a restrictive measure such as the contested decision in Case C-366/16 with Article 7 of the Charter. As I will explain below, the review of the proportionality of a restrictive measure is intrinsically linked to the determination of its compliance with fundamental rights. In those circumstances, in order to provide a useful answer to that court, it is important also to provide it with some guidance on the manner in which that review is to be conducted in the context of the case before it.

1. Requirement that the restrictive measures be appropriate and necessary

111. The principle of proportionality, observance with which is mandatory under Article 27(2) of Directive 2004/38, implies that a restrictive measure must be ‘appropriate for securing the attainment of the objective which it pursues’ and must not go ‘beyond what is necessary in order to attain it’.⁶⁸

112. In order to meet those requirements, the host Member State is, in particular, required to determine whether it was possible to adopt alternative measures less restrictive of the freedom of movement and residence of the person concerned which would have been equally effective to ensure the protection of the fundamental interests invoked.⁶⁹

⁶⁸ See, inter alia, judgments of 26 November 2002, *Oteiza Olazabal* (C-100/01, EU:C:2002:712, paragraph 43); of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 29); and of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 40).

⁶⁹ Judgments of 17 November 2011, *Aladzhov* (C-434/10, EU:C:2011:750, paragraph 47), and, by analogy, of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 49).

113. One might ask — as Mr K. did at the hearing — whether the fundamental interests relied on in the present case would be better served by raising legal action in the host Member State against the person concerned⁷⁰ where that Member State has extraterritorial jurisdiction for that purpose.⁷¹ The removal of the person concerned to another Member State (as in the situation of Mr K.) or to a third State without any guarantee that he will be prosecuted there is not liable to address the concerns associated with the impunity of alleged perpetrators of the crimes referred to in Article 1(F)(a) of the Geneva Convention.⁷²

114. However, I think it appropriate to act with restraint in that regard and to accept that, without prejudice to the Member States' obligations under international criminal law to exercise extraterritorial jurisdiction,⁷³ they are free to deal with the potential threat posed by the presence of a person who has been excluded from refugee status by refusing to grant him residence instead of prosecuting him. As the United Kingdom Government pointed out, a Member State may, in some cases, take the view that it is not in a position — even if only in the light of the difficulties in gathering evidence and proving the relevant facts — to prosecute such a person.⁷⁴ It seems to me that these issues stray beyond the scope of the present cases.

2. *Balancing of the legitimate interests in issue*

(a) *Applicable principles*

115. The requirement for restrictive measures to be proportionate under Article 27(2) of Directive 2004/38 also requires a fair balance to be struck between, on the one hand, the protection of the rights which Union citizens and their family members enjoy under that directive, and, on the other, the protection of the fundamental interests of the host society.⁷⁵

⁷⁰ Recital 7 of Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (OJ 2003 L 118, p. 12) states that 'the competent authorities of the Member States are to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law'. The Netherlands Government stated at the hearing that a number of individuals who had been excluded from refugee status had subsequently been prosecuted in the Netherlands.

⁷¹ If necessary, a prosecution may be brought on the basis of universal jurisdiction. In particular, the four Geneva Conventions of 12 August 1949 for the Protection of the Victims of International Armed Conflicts require States parties to exercise that jurisdiction over crimes falling within the scope of those conventions (see Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); Article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II); Article 129 of the Geneva Convention relative to the Treatment of Prisoners of War (III); and Article 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV)). Also see recitals 3 and 7 of Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (OJ 2002 L 167, p. 1).

⁷² See, to that effect, paragraph 4 of the HCR Background Note, according to which 'the growth in universal jurisdiction and the introduction of international criminal tribunals reduces the role of exclusion as a means of ensuring fugitives face justice, thus reinforcing the arguments for a restrictive approach'.

⁷³ See footnote 71 of this Opinion.

⁷⁴ For a description of the challenges posed by the prosecution by national courts of alleged perpetrators of serious crimes under international law, see the Network for investigation and prosecution of genocide, crimes against humanity and war crimes, 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States', The Hague, November 2014, pp. 15 to 23.

⁷⁵ See, in particular, judgment of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 95).

116. That weighing-up is intrinsically linked to the examination of a restrictive measure from the perspective of the fundamental rights the observance of which is ensured by the Court, particularly the right to respect for private and family life enshrined in Article 7 of the Charter and Article 8 of the ECHR.⁷⁶ Those provisions require a balance to be struck between the collective interests invoked in support of an interference with that right and the individual interests of the person concerned. They must, where appropriate, be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Union law in Article 24(2) of the Charter.⁷⁷

117. Article 27 of Directive 2004/38, entitled 'General principles', applies to all restrictive measures. It does not specify which criteria should be taken into account when assessing the proportionality of those measures and their compliance with the fundamental rights of their addressees. By contrast, Article 28(1) of that directive, under the heading 'Protection against expulsion', applies to 'expulsion decisions' and contains a non-exhaustive list of the factors that Member States must take into account before taking such decisions. They include how long the person concerned has resided on the territory of the host Member State, his age, state of health, family and economic situation, social and cultural integration into that State and the extent of his links with the country of origin.

118. Those factors, which also appear in paragraph 3.3 of the Commission Guidance, largely reflect those which, according to the case-law of the ECtHR as developed, in particular, in its judgments in *Boultif v. Switzerland*⁷⁸ and *Üner v. the Netherlands*,⁷⁹ make it possible to determine whether an expulsion measure is compatible with Article 8 of the ECHR.

119. I note, however, that the analysis of the proportionality of a restriction on the freedoms of movement and residence of Union citizens and their family members is not necessarily the same as the analysis conducted under that provision. Indeed, the starting point for the case-law of the ECtHR is that Article 8 of the ECHR does not guarantee the right of a foreign national to enter and reside in a particular country.⁸⁰ By contrast, Union citizens and their family members have the right to enter and reside in the host Member State under the conditions laid down in Directive 2004/38, with the host Member State being required to justify any restrictions on that right.⁸¹ The relative weight to be attached to the criteria may therefore vary, also in the light of the specific objectives of that directive, which include — as is apparent from recitals 23 and 24 thereof — strengthening the degree of integration of such persons in the host society.

⁷⁶ See, in particular, judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 52); of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 81); and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 41). Under Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by EU law. Therefore, since Article 7 of the Charter contains rights which correspond to those guaranteed by Article 8 of the ECHR, they should be given the same meaning and the same scope as those laid down in Article 8 of the ECHR, as interpreted by the case-law of the ECtHR (see judgment of 5 October 2010, *McB.* (C-400/10 PPU, EU:C:2010:582, paragraph 53)).

⁷⁷ Judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 81), and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 36). Also see ECtHR, 3 October 2014, *Jeunesse v. the Netherlands* (CE:ECHR:2014:1003JUD001273810, § 109 and the case-law cited).

⁷⁸ ECtHR, 2 August 2001 (CE:ECHR:2001:0802JUD005427300, § 48).

⁷⁹ ECtHR, 18 October 2006 (CE:ECHR:2006:1018JUD004641099, §§ 57 and 58).

⁸⁰ See, in particular, ECtHR, 2 August 2001, *Boultif v. Switzerland* (CE:ECHR:2001:0802JUD005427300, § 39).

⁸¹ Also see, in that regard, Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive, A Commentary*, Oxford University Press, Oxford, 2014, p. 267.

(b) Applicability of the criteria set out in Article 28(1) of Directive 2004/38 to situations such as those at issue in the main proceedings

(1) Situations such as that of Mr K.

120. As is clear from the file submitted to the Court by the national court, the declaration of undesirability made against Mr K. in the Netherlands include an order to leave the Netherlands territory. The Netherlands Government maintained at the hearing that Mr K. would be likely to be the subject of a measure involving enforced removal if he did not comply with that order by the time limit set.

121. Consequently, the contested decision in Case C-331/16 falls within the scope of Article 28(1) of Directive 2004/38, as that government indeed conceded.

122. *First*, it is irrelevant that Mr K. was not the subject of a measure involving enforced removal, as the Netherlands Government made clear at the hearing. As is apparent from the case-law,⁸² that provision applies to all measures involving the expulsion of a Union citizen or a member of his family. It is not limited to measures of enforced repatriation by means of which, in some cases, expulsion decisions are implemented where the persons to whom they are addressed fail to comply with them voluntarily.⁸³

123. *Secondly*, the factors listed in Article 28(1) of Directive 2004/38 must be taken into account in spite of the fact that, as is apparent from the decision to refer and subject to verification by the national court, the only residence right enjoyed by Mr K. in the Netherlands was a short-term residence right, allowing him to stay in that Member State pending a decision on his applications for asylum and any appeals. Mr K. seems to have remained in the Netherlands without any right of residence there after the decision to exclude him from refugee status and to impose an entry ban on him had become final.⁸⁴

⁸² In particular, in its judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 2); of 22 May 2012, *I* (C-348/09, EU:C:2012:300, paragraph 2), and of 17 March 2016, *Bensada Benallal* (C-161/15, EU:C:2016:175, paragraph 2); the Court treated as expulsion decisions within the meaning of Article 28(1) of Directive 2004/38 measures entailing the loss of the right of entry and residence in the territory of a Member State and ordering the persons concerned to leave failing which they would be deported, without the threat of deportation ever being implemented.

⁸³ I think there is a certain similarity between the concept of ‘expulsion decision’ within the meaning of Article 28(1) of Directive 2004/38 and the concept of ‘return decision’ taken against a third-country national within the meaning of Article 3(4) of Directive 2008/115. The latter concept refers to ‘an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return’. Under Article 8(3) of that directive, read in conjunction with Article 3(5) thereof, a Member State may, with a view to enforcing a return decision, adopt a separate decision or act ordering the enforcement of the return obligation, that is to say, the physical removal of the person concerned from its territory.

⁸⁴ The decision to refer shows that, initially, during the period between his arrival in the Netherlands in 2001 and the confirmation by the Raad van State (Council of State) of the rejection of his application for asylum in 2005, Mr K. resided lawfully in that Member State on a short-term basis pending a final decision on that application. Subsequently, Mr K. stayed in the Netherlands notwithstanding the first decision to exclude him from refugee status dated 15 May 2003. The decision to refer does not specify whether he was then given leave to remain on another basis. Lastly, Mr K. declined to leave the Netherlands following the second decision to exclude him from refugee status taken on 16 January 2013, which was accompanied by an entry ban.

124. The ECtHR has previously held, in that regard, that the balancing of collective and individual interests in the light of all the factors set out in particular in its judgments in *Boultif v. Switzerland*⁸⁵ and *Üner v. the Netherlands*⁸⁶ is required even where the integrative links in the host Member State were forged by the person concerned without him having a right of residence there. That fact may, however, be taken into account as part of the balancing exercise,⁸⁷ which is for the national court to carry out.

(2) *Situations such as that of Mr H. F.*

125. The Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) emphasised that the decision refusing residence to Mr H. F. was not accompanied by an order to leave the territory. The presence of the person concerned in Belgium was, as it were, ‘tolerated’, even though he did not have a right of residence or any particular status there.⁸⁸

126. The question therefore arises as to whether the adoption of such a restrictive measure, even though it does not entail the removal of the person to whom it is addressed, nonetheless requires the criteria listed in Article 28(1) of Directive 2004/38 to be taken into account.

127. I note that the deprivation of a right of residence is — like an expulsion decision, although to a lesser degree — liable to jeopardise the integration of the person concerned in the host Member State and harm his private and family life.

128. A number of the factors listed in Article 28(1) of Directive 2004/38, such as the person’s length of residence and the strength of his ties with the host Member State, are intrinsically linked to the integration following upon residence in that Member State. With that in mind, those factors may be relevant when assessing the proportionality and compatibility with Article 7 of the Charter of a restrictive measure that does not involve the removal of the person concerned, in so far as that person has already been able to integrate and develop a private and family life in that Member State by reason of his residence there.⁸⁹ As the Belgian and United Kingdom Governments pointed out, those factors are, by contrast, irrelevant as regards decisions which primarily entail a refusal of entry to a Member State. By definition, the persons to whom such decisions are addressed have not had the opportunity to integrate there or build a private and family life.

⁸⁵ ECtHR, 2 August 2001 (CE:ECHR:2001:0802JUD005427300, § 48).

⁸⁶ ECtHR, 18 October 2006 (CE:ECHR:2006:1018JUD004641099, §§ 57 and 58).

⁸⁷ See, in particular, ECtHR, 3 November 2011, *Arvelo Aponte v. the Netherlands* (CE:ECHR:2011:1103JUD002877005, §§ 55 and 59), and ECtHR, 3 October 2014, *Jeunesse v. the Netherlands* (CE:ECHR:2014:1003JUD001273810, §§ 108 and 113 to 123). In its judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 53); of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 86); and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 42), the Court also mentioned the legality of the residence as one of the factors to be taken into account when assessing whether a restrictive measure is proportionate and compatible with fundamental rights.

⁸⁸ As the Court made clear in its judgment of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraph 110), the exclusion of a person from refugee status does not imply the adoption of a position on the question of whether that person can be deported to his country of origin. Situations in which a person neither has leave to remain nor is likely to be deported may arise where Article 4 of the Charter and Article 3 of the ECHR — from which there are no derogations — prevent his removal to a country where he would face a real risk of being subjected to torture or to inhuman or degrading treatment. The decision to refer does not state whether the impossibility of removing Mr H. F. flows from those provisions.

⁸⁹ A comparison may be made with the conclusion reached in the judgment of 9 November 2000, *Yiadom* (C-357/98, EU:C:2000:604, paragraph 43), according to which a decision refusing a Union citizen residence taken after a stay of several months in the Member State concerned pending a decision on his application cannot be classified as a refusal of entry as provided for in Article 8 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), since repealed. Such a decision must be treated as an ‘expulsion decision’ for the purposes of Article 9 of that directive and be accompanied by more extensive procedural safeguards. Advocate General Léger (Opinion in *Yiadom* (C-357/98, EU:C:2000:174)) found, in support of that approach, that ‘the person present on the national territory, including when he is waiting for his situation to be made lawful, has objectively more opportunities to form social links, whether personal or professional, than a person who has not yet crossed the frontier. He is, all in all, more integrated into the host State’.

129. It is in the light of those considerations that I read paragraph 3.3 of the Commission Guidance, which states that the factors listed in Article 28(1) of Directive 2004/38 must be taken into account when adopting a restrictive measure in accordance with Article 27 thereof. That paragraph means, to my mind, that those factors must be taken into consideration in so far as they are relevant in an individual case.

130. My proposed approach also reflects the case-law of the ECtHR, under which the ‘fair balance’ that has to be struck between public policy interests and individual interests applies when determining whether a contracting State has complied with both its ‘negative obligations’ (not to interfere with the right to private and family life of an individual by removing him from its territory) and its ‘positive obligations’ (to allow him actually to exercise that right, in particular by granting him a right of residence). As is clear from that case-law, the boundaries between those two categories of obligations do not lend themselves to precise definition.⁹⁰

131. The ECtHR has, moreover, examined a case the facts of which were similar to those in Case C-366/16. The decision in *K. v. the Netherlands*⁹¹ concerned the compatibility with Article 8 of the ECHR of an expulsion measure, taken by the Netherlands against an Afghan national excluded from refugee status under Article 1(F) of the Geneva Convention, the enforcement of which had been stayed. As is apparent from that decision, the abovementioned ‘fair balance’ applies in that context.

132. However, the ECtHR stated that one of the factors to be taken into account for that purpose was the extent to which the State measure at issue actually impeded family life. It made clear that considerable weight may be attached to the fact that the person concerned is not at risk of being removed from the host country and thus of being separated from his family.⁹²

133. In my view, that factor is also relevant when examining the proportionality of a restrictive measure under Article 27(2) of Directive 2004/38, which is a matter for the national court. I would add, however, that the factors relating to the integration of the person concerned are of particular importance in the context of the application of that provision, in the light of the objectives pursued by Directive 2004/38.⁹³

3. Applicability of Article 28(3)(a) in a situation such as that of Mr K.

134. The Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg) pointed out that Mr K. had resided continuously in the Netherlands for more than 10 years when the contested decision in Case C-331/16 was taken.⁹⁴ The court therefore seeks to ascertain whether Mr K. enjoys the enhanced safeguards against expulsion provided for in Article 28(3)(a) of Directive 2004/38, which is also an expression of the principle of proportionality.⁹⁵

⁹⁰ See, in particular, ECtHR, 28 June 2011, *Nunez v. Norway* (CE:ECHR:2011:0628JUD005559709, § 68); ECtHR, 3 November 2011, *Arvelo Aponte v. the Netherlands* (CE:ECHR:2011:1103JUD002877005, § 53); and ECtHR, 3 October 2014, *Jeunesse v. the Netherlands* (CE:ECHR:2014:1003JUD001273810, § 106).

⁹¹ ECtHR, decision of 25 September 2012 (CE:ECHR:2012:0925DEC003340311, § 42). The ECtHR cast doubt on the applicant’s status as a ‘victim’ within the meaning of Article 34 of the ECHR and found that even if he did have that status, the Netherlands authorities had not erred in striking a balance between the collective and individual interests involved.

⁹² ECtHR, decision of 25 September 2012, *K. v. the Netherlands* (CE:ECHR:2012:0925DEC003340311, § 47).

⁹³ See point 119 of this Opinion.

⁹⁴ The Netherlands Government disputes the national court’s account of the facts as regards the continuity of Mr K.’s stay in the Netherlands. It will be for the national court to clarify that issue. That being said, the Court is required to base its ruling on the factual premiss underpinning the decision to refer (see footnote 16 of this Opinion).

⁹⁵ See, in that regard, recital 23 of Directive 2004/38 as well as the Report from the Commission to the European Parliament and the Council of 10 December 2008 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2008) 840 final, p. 9).

135. That directive, as mentioned in recitals 23 and 24 thereof, establishes a progressive system of protection against expulsion which is dependent on the degree of integration into the host Member State. The degree of integration is, in a sense, objectively presumed according to the length of residence in that Member State. The longer the residence, the stronger the integrative links forged in the host society are deemed to be and, therefore, the more comprehensive is the protection against expulsion.⁹⁶

136. It is from this perspective not only that Article 28(1) of Directive 2004/38 requires account to be taken of the length of residence for the purposes of assessing the proportionality of an expulsion measure, but also that paragraphs 2 and 3 of that article provide, respectively, that a person may not be expelled from the host Member State except on ‘serious grounds of public policy or public security’ if he has acquired a right of permanent residence there and on ‘imperative grounds of public security’ if he has resided there for 10 years prior to the adoption of the measure.

137. Mr K.’s situation is special in a number of ways in that he resided in the Netherlands before acquiring the status of Union citizen following the accession of the Republic of Croatia to the European Union. Furthermore, as noted in point 123 of this Opinion, the decision to refer seems to suggest — subject, always, to verification by the referring court — that Mr K. resided in the Netherlands without having a right of residence there.

138. I consider, *in the first place*, that the fact that that period of residence preceded the accession of the Republic of Croatia to the European Union does not, in itself, prevent that period being taken into account in order to calculate Mr K.’s length of residence for the purposes of applying Article 28(3)(a) of Directive 2004/38.

139. In its judgment in *Ziolkowski and Szeja*,⁹⁷ the Court held that, without prejudice to possible transitional provisions in the Act of Accession of that Member State to the European Union,⁹⁸ the periods of residence of a national of one Member State in the territory of another Member State, completed before the accession of the former State to the European Union and in compliance with the conditions laid down in Directive 2004/38, must be taken into account for the purposes of the acquisition of the right of permanent residence in the latter Member State under Article 16(1) of that directive.

140. According to the Court, this is because the provisions of Directive 2004/38 must be applied to the present and future effects of situations arising before the accession to the European Union of the Member State of nationality of the person concerned and, therefore, before the date of transposition of the directive in that Member State. That reasoning is also valid for the interpretation of Article 28(3)(a) of Directive 2004/38.

141. However, *in the second place*, as the Netherlands Government and the Commission pointed out, the fact that Mr K. did not hold a right of residence allowing him to remain lawfully in the Netherlands under the national law of that Member State — if that is the case — would, in my view, preclude him from enjoying the protection conferred by that provision.

⁹⁶ See Opinion of Advocate General Bot in *Tsakouridis* (C-145/09, EU:C:2010:322, point 45).

⁹⁷ Judgment of 21 December 2011 (C-424/10 and C-425/10, EU:C:2011:866, paragraphs 60 to 62). The Court restated that finding in its judgment of 6 September 2012, *Czop and Punakova* (C-147/11 and C-148/11, EU:C:2012:538, paragraph 35).

⁹⁸ Annex V to the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the [TEU], the [TFEU] and the [Euratom Treaty] (OJ 2012 L 112, p. 21) allows Member States to derogate, on a transitional basis, from some of the provisions of Directive 2004/38.

142. The wording of Article 28(3)(a) of Directive 2004/38 does not specify whether the period of residence entitling a person to protection against expulsion under that provision refers solely to periods of lawful residence. The wording can be distinguished in that respect from Article 16(1) of the directive, which provides that only a continuous period of five years' lawful residence permits the acquisition of a right of permanent residence and, therefore, the corresponding protection against expulsion provided for in Article 28(2) of that directive. As is apparent from recital 17 of Directive 2004/38, the requirement set out in Article 16(1) thereof that the residence be lawful means not only that the person concerned must not have been the subject of an expulsion decision, but also that the residence must be in compliance with the conditions laid down in that directive.⁹⁹ The Court has not yet ruled on whether the period of residence required in order to receive the protection provided for in Article 28(3)(a) of Directive 2004/38 also implies that those conditions must be met.¹⁰⁰

143. I will refrain from expressing my view on that question in general terms because all that is required in Case C-331/16 is a more specific determination of whether that period of residence includes periods of residence completed by the person concerned, before the accession to the European Union of his Member State of nationality, when he did not have a right of residence allowing him to remain lawfully in the host Member State under the national law of that State.

144. In my view, the answer to that question must be in the negative.

145. I note that, as stated in recitals 23 and 24 of Directive 2004/38, the aim of Article 28(3)(a) thereof is to protect persons who have become genuinely integrated into the host Member State from expulsion. That provision pursues its own ends, relating to the promotion of Union citizens' integration into the European Union,¹⁰¹ and goes beyond the safeguards flowing from Article 7 of the Charter and Article 8 of the ECHR.

146. According to the case-law of the Court, the decisive criterion for assessing whether the integrative links of the person concerned in the host Member State are sufficiently strong to render him eligible for the protection established by Article 28(3)(a) of Directive 2004/38 is whether that person has lived in that Member State for the 10 years preceding the expulsion decision.¹⁰²

147. The Court has not, however, excluded the possibility of taking qualitative factors into account as part of that assessment. Thus, in *G.*,¹⁰³ it held that periods of imprisonment are not to be included when calculating the 10-year period of residence entitling a person to the protection provided for in Article 28(3)(a) of Directive 2004/38. It is true that non-compliance with national legal rules on the entry and residence of foreign nationals is hardly comparable to the commission of a criminal offence. However, the Court's approach entails accepting that account may be taken — albeit to a very limited extent — of certain qualitative factors relating to the integration that is required in order to qualify for that protection, like the integration that is a precondition for the acquisition of the right of permanent residence laid down in Article 16(1) of that directive.¹⁰⁴

⁹⁹ The conditions include those listed in Article 7(1) of Directive 2004/38 relating to the possession of sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. See judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 47).

¹⁰⁰ In pending Case C-424/16 (OJ 2016 C 350, p. 19), the Court is to consider a connected question referred for a preliminary ruling by which the Supreme Court of the United Kingdom asks whether the protection provided for in Article 28(3)(a) of Directive 2004/38 depends upon the acquisition of a right of permanent residence within the meaning of Article 16 and Article 28(2) of that directive. In his Opinion in Joined Cases *B and Secretary of State for the Home Department* (C-316/16 and C-424/16, EU:C:2017:797, point 59), Advocate General Szpunar proposed that the Court answer that question in the affirmative.

¹⁰¹ In its judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 50), the Court pointed out that the integration of Union citizens has implications in terms not only of citizens' individual interests, but also of the interests of the European Union in general.

¹⁰² Judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 31), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 23).

¹⁰³ Judgment of 16 January 2014 (C-400/12, EU:C:2014:9, paragraphs 32 and 33).

¹⁰⁴ See judgments of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraph 64), and of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 25).

148. In *Dias*,¹⁰⁵ the Court found that a period of presence in the territory of the host Member State, completed before the entry into force of Directive 2004/38 and when the person concerned did not have any right of residence, calls in question the integrative link with that Member State. Such a period should not, therefore, be taken into account for the purposes of acquiring a right of permanent residence.

149. In my view, that reasoning implies that a person cannot rely on genuine integration of such a kind as to entitle him to the highest level of protection against expulsion provided for in Directive 2004/38 where, before acquiring the status of Union citizen, he resided in the host Member State irregularly although the national law of that Member State did not permit him to do so. That reasoning is stronger where, as in the present case, the person concerned was residing in the host Member State in breach of an entry ban previously ordered against him when the expulsion decision at issue was taken.

V. Conclusion

150. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of The Hague, sitting in Middelburg, the Netherlands) and the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) as follows:

- (1) Article 27(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that, although the exclusion — in the past — of a Union citizen or a member of his family from refugee status under Article 1(F)(a) of the Geneva Convention relating to the Status of Refugees cannot, in itself, establish a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it may be taken into account to that end in so far as the circumstances that led to the application of that provision disclose the existence of personal conduct constituting such a threat.

The host Member State is required to carry out an individual assessment of the personal conduct of the person concerned in the light of, in particular, the findings of the asylum authorities as regards the seriousness of the crimes of which the person is accused, the degree of personal involvement in the commission of the crimes and the possible existence of grounds for excluding criminal liability.

The fact that there is no risk of the person concerned re-engaging in crimes of the kind covered by Article 1(F)(a) of the Geneva Convention in the host Member State, as well as the fact that a significant period of time has elapsed since the alleged commission of such crimes, do not, in themselves, preclude a finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

- (2) Article 27(2) of Directive 2004/38, read in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that any restriction imposed by a Member State on the freedoms of movement and residence of a Union citizen or a member of his family must comply with the principle of proportionality and respect that person's right to a private and family life. In that regard, the Member State must weigh the protection of the fundamental interests relied on in support of such a restriction against the interests of the

¹⁰⁵ Judgment of 21 July 2011 (C-325/09, EU:C:2011:498, paragraphs 55 and 63).

person concerned relating to the exercise of those freedoms and his private and family life. The Member State must take into account, *inter alia*, the factors mentioned in Article 28(1) of that directive in so far as they are relevant in the individual situation at issue.

- (3) Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that the period of 10 years' residence in the host Member State, entitling a person to the protection against expulsion established by that provision, does not include periods during which a Union citizen has — before the accession to the European Union of his Member State of nationality — resided in the host Member State without having leave to do so under the national law of that Member State.