Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 17 May 2023 [1]

Case C-402/22

Staatssecretaris van Justitie en Veiligheid
v
M.A.

(Request for a preliminary ruling
from the Raad van State (Council of State, Netherlands))

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) and (5) – Refusal to grant refugee status – Third-country national who has committed a particularly serious crime – Meaning of 'particularly serious crime')

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 14(4)(b) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. [2]

2. The request has been made in proceedings between M.A., a third-country national, and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') concerning the latter's rejection of an application for international protection lodged by M.A.

3. Article 14(4)(b) of Directive 2011/95 provides that Member States may revoke the status granted to a refugee when he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the Member State in which he or she is present.

4. Under Article 14(5) of that directive, in such a case, Member States may also decide not to grant status to a refugee, where such a decision has not yet been taken. The decision at issue in the main proceedings was taken on the basis of that provision.

[1] Original language: French.

[2] OJ 2011 L 337, p. 9.

5. In my Opinion in *AA (Refugee who has committed a serious crime)* and *Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)*,[3] I set out my view that Article 14(4)(b) of Directive 2011/95 is to be interpreted as making a Member State's power to revoke refugee status subject to two cumulative conditions. In that regard, I explained why I consider that a conviction by final judgment for a particularly serious crime is a necessary but not a sufficient condition for a Member State to revoke refugee status.

6. In that Opinion, I also set out the reasons why I consider that the danger represented by the convicted person, at the point in time when a decision to revoke refugee status is taken, must be a genuine, present and sufficiently serious danger to the community of the Member State in question. I also stated that a decision to revoke refugee status must, in my view, comply with the principle of proportionality and, more broadly, with the fundamental rights of the person concerned, as guaranteed by the Charter of Fundamental Rights of the European Union.

7. On the other hand, as none of the questions referred by the national courts in Cases C-663/21 and C-8/22 related directly to the meaning of the requirement for the third-country national in question to have been 'convicted by a final judgment of a particularly serious crime', I did not express a view on that issue.

8. In the present case, the Raad van State (Council of State, Netherlands) expressly asks the Court about that issue in the first question it has referred for a preliminary ruling concerning a rejection of an application for international protection.

9. As the Court has requested, this Opinion will focus on that first question, by which the referring court seeks clarification from the Court as to the criteria by which a 'particularly serious crime', within the meaning of Article 14(4)(b) of Directive 2011/95, may be defined.

10. I will set out below the reasons why I consider that that provision is to be interpreted as meaning that a 'particularly serious crime', within the meaning of that provision, is a criminal offence characterised by an exceptional degree of seriousness. I will set out the method and criteria which, in my view, should enable the Member States to determine whether they are dealing with such a crime.

II. The legal framework

A. International law

11. Article 33 of the Convention Relating to the Status of Refugees,[4] as supplemented by the Protocol Relating to the Status of Refugees[5] ('the Geneva Convention'), provides:

'1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[3] C-663/21 and C-8/22, EU:C:2023:114.

[4] Signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954.

[5] Concluded in New York on 31 January 1967, entered into force on 4 October 1967.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

B. EU law

12. 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;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status …;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations …'

13. Article 14(4) and (5) of that directive provides:

'4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.'

14. Article 17(1)(b) of that directive is worded as follows:

'A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

…

(b) he or she has committed a serious crime.'

15. Article 21(1) and (2) of that directive reads as follows:

'1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

C. Netherlands law

16. Paragraph C2/7.10.1 of the Vreemdelingencirculaire 2000 (2000 circular on foreign nationals), which is headed 'public order as a ground for refusal', states:

'In assessing an application for temporary permission to stay on the basis of asylum, the Immigratie – en Naturalisatiedienst [Immigration and Naturalisation Agency, Netherlands; 'IND'] shall determine whether the third-country national is a danger to public order or national security. Where the third-country national is a refugee within the meaning of the [Geneva Convention], the IND shall determine whether he or she has committed a particularly serious crime …

The IND shall determine whether a crime is (particularly) serious on a case-by-case basis, taking into account all relevant matters of fact and law. In that regard, it shall take into consideration, in every case, the particular circumstances relied on by the third-country national which relate to the nature and seriousness of the offence, as well as the time which has passed since its commission.

…

The IND shall determine whether a crime is (particularly) serious by establishing whether the sum of the sentences imposed meets the applicable minimum threshold. In that context, significant weight shall be given to the individual circumstances, including the proportion of offences that constitute a danger to the community. At least one of the convictions must, in any event, relate to an offence constituting such a danger.

For the purposes of determining whether the sum of the sentences imposed meets the minimum threshold, the IND shall, in every case, have regard to the element which must be served unconditionally.

In making that determination, it shall also have regard to the conditional element of the sentences, if and in so far as the circumstances (also) involve:

– offences relating to controlled drugs, sexual offences and offences against the person;

– human trafficking; or

– the commission, preparation or facilitation of a terrorist offence.

For the purposes of determining whether there is a danger to public order or national security, the IND shall also have regard to any community service orders. It shall calculate whether the minimum threshold is met on the basis of the following elements:

– the length of the custodial sentence imposed by the court in default of payment of a fine;

– the length of the custodial sentence imposed by the court in the event of the third-country national not complying with a community service order;

– for every period of two hours [of community service required] by an order made in criminal proceedings, one day of custody.

…

Public order where the third-country national is a refugee within the meaning of the [Geneva Convention]

The IND shall not grant temporary permission to stay on the basis of asylum to a third-country national who meets all of the following conditions:

– he or she meets the eligibility conditions for temporary permission to stay on the basis of asylum …; and

– he or she has been convicted of a "particularly serious crime" and constitutes a "danger to the community".

The third-country national shall be regarded as having been convicted of a "particularly serious crime" where all of the following conditions are met:

– he or she has been convicted by a final judgment imposing a custodial sentence or measure involving deprivation of liberty; and

– the total length of the sentence or measure is at least 10 months.

The IND shall also have regard, in making that determination, to any offences committed abroad. In that regard, using information provided by the Openbaar Ministerie [Public Prosecution Service, Netherlands], the IND shall establish what consequences would have attached to those offences under Netherlands law, if they had been committed and punished in the Netherlands.

The IND shall assess the danger to the community on a case-by-case basis, taking into account all relevant matters of fact and law.

In assessing the "danger to the community" represented by the third-country national, the matters to which the IND has regard shall include, in every case, the following:

– the nature of the offence; and

– the sentence imposed.

The IND shall assess the danger that the third-country national represents to the community on the basis of the circumstances as they stand when the application is assessed ("*ex nunc*" assessment).

In any event, the IND may conclude that there is a danger to the community in cases of:

– offences relating to controlled drugs, sexual offences or offences against the person;

– arson;

– human trafficking;

– trafficking in weapons, munitions and explosives; and

– trade in human organs and tissue.

…'

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

17. On 5 July 2018, M.A. lodged a fourth application for international protection in the Netherlands.

18. The State Secretary rejected that application by decision of 12 June 2020. In that decision, the State Secretary stated that M.A. had a reasonable fear of persecution in his country of origin, but that he had been convicted of a particularly serious crime by a final judgment, and consequently represented a danger to the community.

19. The State Secretary based that view on the fact that, in 2018, by a judgment which subsequently became final, M.A. had been sentenced to a term of imprisonment of 24 months [6] for three sexual assaults, an attempted sexual assault and the theft of a mobile telephone, all committed on the same evening.

20. M.A. appealed against the decision of 12 June 2020.

21. By a judgment of 13 July 2020, the rechtbank Den Haag (District Court, The Hague, Netherlands) annulled that decision, on the ground that the State Secretary had not given an adequate statement of reasons for considering, first, that M.A.'s misconduct was so serious that it justified the refusal of refugee status and, secondly, that M.A. represented a genuine, present and sufficiently serious danger to a fundamental interest of society.

22. The Secretary of State brought an appeal against that judgment before the Raad van State (Council of State). In support of that appeal, the Secretary of State submits, first, that the acts of which M.A. was convicted should be regarded as a single offence constituting a particularly serious crime, having regard to the nature of those acts, the sentence imposed and the disruptive

[6] It would appear from the observations submitted by M.A. and by the Netherlands Government that 8 months of that term were suspended.

effect of those acts on the community of the Netherlands. He submits, secondly, that the fact that M.A. has been convicted of a particularly serious crime demonstrates in principle that he represents a danger to the community.

23. M.A. submits, for his part, that the Secretary of State was wrong to take the severity of the sentence that was imposed as the starting point in considering and determining whether the crime was particularly serious. Every case must be individually assessed, but the approach taken by the State Secretary does not allow for this. M.A. also states that sexual assault is the least serious of the sexual offences. Furthermore, as regards the condition relating to whether there is a danger to the community, M.A. submits that the assessment of the rechtbank Den Haag (District Court, The Hague) is correct.

24. The referring court considers that, with a view to ruling on the appeal, it requires clarification of the circumstances to which the Member States are to have regard in determining whether a third-country national has been convicted by a final judgment of a particularly serious crime. It wonders, in particular, to what extent the approach taken by the Court in the judgment of 13 September 2018, *Ahmed*,[7] concerning Article 17(1)(b) of Directive 2011/95, can be transposed to Article 14(4)(b), given that the former refers to a 'serious crime' whereas the latter refers to a 'particularly serious crime'.

25. Furthermore, with regard to the dispute between the parties as to the meaning of 'a danger to the community', the referring court adopts and repeats the questions referred for a preliminary ruling by the Conseil d'État (Council of State, Belgium) in Case C-8/22.[8]

26. In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

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

(b) Are the criteria for a "serious crime" in Article 17(1)(b) of Directive [2011/95], as set out in paragraph 56 of the judgment [in *Ahmed*], relevant for the purposes of assessing whether a "particularly serious crime" has been committed? If so, are there further criteria which render a crime "particularly" serious?

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

(3) If a conviction by final judgment for a particularly serious crime is not, on its own, sufficient to establish the existence of a danger to the community, must Article 14(4)(b) of Directive [2011/95] be interpreted as requiring the Member State to establish that, since his or her conviction, the applicant continues to constitute a danger to the community? Must the Member State establish that the danger is genuine and present or is the existence of a potential threat sufficient? Must Article 14(4)(b) of [that directive], taken alone or in

[7] C-369/17, 'the judgment in *Ahmed*', EU:C:2018:713.

[8] See footnote 3 to this Opinion.

conjunction with the principle of proportionality, be interpreted as allowing revocation of refugee status only if that revocation is proportionate and the danger represented by the beneficiary of that status sufficiently serious to justify that revocation?

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

27. Written observations were submitted by M.A., the Netherlands Government, the Hungarian Government and the European Commission.

IV. Analysis

28. By its first question, the referring court asks the Court about the scope of Article 14(4)(b) of Directive 2011/95, with a view to establishing how and by what criteria the concept of a 'particularly serious crime', within the meaning of that provision, is to be defined.

29. The referring court wishes to know, in particular, whether the requirements and the circumstances to be taken into account in determining whether a person has committed a 'serious crime' within the meaning of Article 17(1)(b) of Directive 2011/95, as apparent in particular from the judgment in *Ahmed*, are also relevant in determining whether a person has committed a 'particularly serious crime', within the meaning of Article 14(4)(b) of that directive.

30. I would reiterate that the fact of a particularly serious crime having been committed is a necessary – though not sufficient – condition for the exercise of the power to revoke or refuse to grant refugee status enjoyed by the Member States pursuant to that provision or to Article 14(5) of Directive 2011/95.

31. I note that neither Article 14(4)(b) of Directive 2011/95 nor any other provision of that directive defines the concept of a 'particularly serious crime'.

32. I would also observe that Article 14(4)(b) of Directive 2011/95 does not make any reference to the law of the Member States for the purpose of defining the concept of a 'particularly serious crime', as referred to in that provision. It follows both from the need for a uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.[9]

[9] See, in particular, judgment in *Ahmed* (paragraph 36 and the case-law cited), and judgments of 31 March 2022, *Bundesamt für Fremdenwesen und Asyl and Others (Placement of an applicant for asylum in a psychiatric hospital)* (C-231/21, EU:C:2022:237, paragraph 42 and the case-law cited), and of 12 January 2023, *TP (Audiovisual editor for public television)* (C-356/21, EU:C:2023:9, paragraph 34 and the case-law cited).

33. I would state, in that regard, that giving an independent and uniform interpretation to the concept of a 'particularly serious crime', within the meaning of Article 14(4)(b) Directive 2011/95, must not deprive the Member States of their discretion to determine their own policies in criminal matters. In other words, it is not a matter of seeking, by an indirect route, to impose a uniform policy on the Member States as regards criminal matters. Such an interpretation is intended only to ensure that the assessment of whether a crime is particularly serious, for the purposes of the condition set out in that provision, is made in accordance with a common method and common criteria, so that the exercise of the power to revoke or refuse to grant refugee status is subject to the same limits in all Member States.

34. In summary, it is not a matter of denying the differences of view that may exist between Member States as regards criminal policy. It is a matter of providing the competent authorities with the necessary tools to determine, on a common basis, whether a crime is particularly serious.

35. That having been stated, since Directive 2011/95 does not define the terms 'particularly serious crime', they must be interpreted by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. [10]

36. As regards the term 'crime', this must be understood, in my view, as relating generally to an offence provided for by the criminal law of the Member State concerned, and not being limited to specific categories of offence.

37. In reality, the distinctive feature that serves to limit the scope of the concept of a 'particularly serious crime' relates to the seriousness of the offence at issue. Thus, it is only where the crime reaches a level of particular seriousness that the Member States can exercise their power to revoke or refuse to grant refugee status.

38. As regards the usual meaning of the terms 'particularly serious', in everyday language those terms denote a level of seriousness which is so high as to be unusual or uncommon and which, consequently, can be described as 'exceptional'. Those terms are thus synonymous with 'exceptionally serious', 'extraordinarily serious' and 'extremely serious'.

39. It follows that a 'particularly serious crime' is a criminal offence characterised by certain specific features which enable it to be categorised amongst the most serious crimes.

40. That leads me to the view that a 'particularly serious crime', within the meaning of Article 14(4)(b) of Directive 2011/95, is a criminal offence characterised by the fact that it is recognised as exceptionally serious in the Member State wishing to exercise its power to revoke or refuse to grant refugee status.

41. It seems to me that the context of that provision confirms those first steps in my analysis.

42. In that regard, I would observe that the context of the provision dictates that it must be interpreted strictly.

[10] See, for example, judgment of 12 January 2023, *TP (Audiovisual editor for public television)* (C-356/21, EU:C:2023:9, paragraph 35 and the case-law cited).

43. I note that refugee status must be granted to a person where he or she meets the minimum standards set by EU law. Thus, under Article 13 of Directive 2011/95, Member States are to grant refugee status to all third-country nationals or stateless persons who qualify as a refugee in accordance with Chapters II and III of that directive.

44. Article 14(4)(b) and Article 14(5) of Directive 2011/95 contain a ground for revoking or refusing to grant refugee status which constitutes an exception to the general rule laid down in Article 13 of that directive, the effect of which is to limit the rights and benefits set out in Chapter VII of the directive. As an exception, that ground for revoking or refusing to grant refugee status must, in my view, be interpreted strictly, which means that it can only apply where the competent authority demonstrates that the third-country national concerned has been convicted by a final judgment of a crime of exceptional seriousness.

45. In my opinion, a comparison with other provisions of Directive 2011/95 confirms that interpretation. Thus, the grounds for exclusion from refugee status include, pursuant to Article 12(2)(b) of that directive, the commission of a 'serious non-political crime', and the grounds for exclusion from eligibility for subsidiary protection include, pursuant to Article 17(1)(b) of the directive, the commission of a 'serious crime'. In referring to a 'particularly serious crime' in Article 14(4)(b) of the directive, the EU legislature clearly intended to limit the scope of that provision by requiring not only that the degree of seriousness required by that provision is greater than that required for the grounds for exclusion to apply, but also that it constitutes exceptional seriousness. I would also observe that the EU legislature chose the expression 'particularly serious' and not 'very serious'.

46. Furthermore, in line with the observations made by the Court with regard to the corresponding ground in Article 21(2) of Directive 2011/95, which permits refoulement of a refugee, it should be stated that Article 14(4)(b) of that directive subjects the revocation of refugee status to rigorous conditions, since, in particular, only a refugee who has been convicted by a final judgment of a 'particularly serious crime' may be regarded as constituting a 'danger to the community of that Member State'.[11] Those rigorous conditions reflect the serious consequences of revoking or refusing to grant refugee status, which are that the person concerned will not or will no longer be entitled to all the rights and benefits set out in Chapter VII of that directive, those rights and benefits being associated with that status.[12]

47. The interpretation according to which the scope of Article 14(4)(b) and (5) of Directive 2011/95 is limited to crimes of exceptional seriousness also seems to me to be consistent with the interpretation given to Article 33(2) of the Geneva Convention, which provides in particular that the principle of non-refoulement may not be relied on by a refugee 'who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of [the country in which he or she is present]'. I would observe, in that regard, that although that provision has a different purpose, as it lays down exceptions to the principle of non-refoulement, it is uncontroversial that it was the source of the grounds for revoking or refusing to grant refugee status set out by the EU legislature in Article 14(4) and (5) of Directive 2011/95. It therefore seems

[11] See judgment of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 72).

[12] See judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 99).

to me to be appropriate to have regard to the interpretation of Article 33(2) of that convention, which, as stated in recitals 4, 23 and 24 of Directive 2011/95, is the cornerstone of the international legal regime for the protection of refugees. [13]

48. More generally, given that the situations referred to in Article 14(4) and (5) of Directive 2011/95, in which the Member States may revoke or refuse to grant refugee status, correspond, essentially, to the situations in which Article 21(2) of that directive and Article 33(2) of the Geneva Convention permit Member States to refoule a refugee, I consider that the grounds set out in those provisions should be interpreted in the same way.

49. The interpretation of Article 33(2) of the Geneva Convention seems to coincide with my proposed interpretation of Article 14(4)(b) of Directive 2011/95, which is that a 'particularly serious' crime is a crime of an exceptional degree of seriousness.

50. As regards the term 'crime', I have already mentioned that this term may have different meanings in national legal systems, a point which has been highlighted in the context of the interpretation of Article 33(2) of the Geneva Convention. [14] Thus, the applicability of that provision does not depend on whether the act of which a person has been convicted is categorised in a particular way in national criminal law, but on whether it is a 'particularly serious' act and is regarded as such under that law. [15]

51. Furthermore, it has been emphasised that Article 33(2) of the Geneva Convention applies only exceptionally. [16] From that perspective, a 'particularly serious crime' is a variety of 'serious crime', restricted to 'exceptional cases'. [17] The requirement for a 'particularly serious crime' is consistent, in terms of the limitation it expresses, with the need for the exception to the principle of non-refoulement – a principle contained in Article 33(2) of the Geneva Convention – to be subject to a particularly high threshold of applicability. [18]

[13] See, inter alia, judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 81 and the case-law cited). See also, as regards the need to interpret the provisions of Directive 2011/95 in a manner consistent with the Geneva Convention, judgment in *Ahmed* (paragraph 41 and the case-law cited).

[14] See, in relation to Article 33(2) of the Geneva Convention, 'The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr Paul Weis', p. 246, available at: https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html. The author states that 'as to criminal activities, the word "crimes" is not to be understood in the technical sense of any criminal code but simply signifies a serious criminal offence'. See also, in relation to Article 1F(b) of the Geneva Convention, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, published by the Office of the United Nations High Commissioner for Refugees (UNHCR), paragraph 155, p. 36, where it is stated that 'the term "crime" has different connotations in different legal systems. In some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder'.

[15] See, in relation to Article 33(2) of the Geneva Convention, the commentary on that convention published in 1997 by the UNHCR's Division of International Protection, available at: https://www.unhcr.org/3d4ab5fb9.pdf (p. 142). From that point of view, the difference between the French-language version of Article 33(2) of the Geneva Convention, which refers to a '*crime ou délit*' and the English-language version, which uses the term 'crime', must be kept in perspective, as the crucial factor is whether there has been a conviction for a particularly serious criminal offence.

[16] See Grahl-Madsen, A., 'Expulsion of Refugees', in Macalister-Smith, P. and Alfredsson, G., *The Land Beyond: Collected Essays on Refugee Law and Policy*, Martinus Nijhoff Publishers, The Hague, 2001, pp. 7 to 16. According to the author, it can be said with certainty that the refoulement of a refugee under Article 33 of the Geneva Convention is an exceptional step to be taken only in exceptional circumstances (p. 14).

[17] See *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, referred to in footnote 14 to this Opinion, at p. 36, paragraph 154.

[18] See Chetail, V., 'Le principe de non-refoulement et le statut de réfugié en droit international', in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et Perspectives*, Bruylant, Brussels, 2001, pp. 3 to 61, especially p. 44.

52. The main objective of Directive 2011/95, which is to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and that a minimum level of benefits is available for those persons in all Member States,[19] also militates in favour of an interpretation according to which the scope of Article 14(4)(b) and (5) of that directive is limited to exceptional cases, or in other words to the most severely punished acts and the most serious forms of criminality in the Member State concerned.

53. Having made those remarks, I will now address the method and criteria by which the Member States can establish whether they are dealing with a 'particularly serious crime' within the meaning of Article 14(4)(b) of Directive 2011/95.

54. In that regard, the case-law of the Court contains a certain number of statements which, it seems to me, can largely by applied by analogy, but ought nevertheless to be supplemented.

55. As regards *the method*, it is apparent from that case-law that the competent authority of the Member State concerned cannot rely on the ground for exclusion laid down in Article 12(2)(b) and Article 17(1)(b) of Directive 2011/95, which relates to the commission by the applicant for international protection of a 'serious crime', until that authority has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the qualifying conditions for the status applied for, come within the scope of that particular ground for exclusion, the assessment of the seriousness of the crime in question requiring a full investigation into all the circumstances of the individual case concerned.[20]

56. The method thus defined seems to me to be compatible with the Member States, in the interests of legal certainty, laying down minimum sentences as thresholds for the exercise of their power to revoke or refuse to grant refugee status under Article 14(4)(b) and (5) of Directive 2011/95.[21] The Member States may equally decide to reserve the exercise of that power to certain types of criminal offence. In every case, however, it is important to ensure that that power is not exercised automatically in any respect.[22] Accordingly, an evaluation of all the individual circumstances must be systematically carried out, whether or not a minimum sentence has been laid down by the Member States. Such an evaluation is all the more important and difficult for the fact that it is the criminal and not the crime that is punished.[23] Furthermore, a single criminal offence may cover a wide range of conduct of varying seriousness.

[19] See recital 12 of Directive 2011/95.

[20] See, in particular, judgments of 2 April 2020, *Commission* v *Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 154 and the case-law cited), and of 22 September 2022, *Országos Idegenrendészeti Főigazgatóság and Others* (C-159/21, EU:C:2022:708, paragraph 92).

[21] Such thresholds are provided for, in different ways, by certain Member States, while others favour a case-by-case analysis. See, in particular, the Commission Report entitled 'Evaluation of the application of the recast Qualification Directive (2011/95/EU)', 2019, p. 135, available at: https://www.statewatch.org/media/documents/news/2019/feb/eu-ceas-qualification-directive-application-evaluation-1-19.pdf. As regards the Member States which have defined minimum sentences in their national law, the Commission refers to penalty thresholds going from three to 10 years of imprisonment.

[22] As the Commission rightly points out in its written observations, the Court's case-law on Directive 2011/95 has consistently rejected blanket approaches and insisted on an individual assessment of all the relevant facts: see, in particular, judgments of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 87, 88, 93 and 94), and of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraphs 86 to 89); judgment in *Ahmed* (paragraphs 48 to 50), and judgment of 22 September 2022, *Országos Idegenrendészeti Főigazgatóság and Others* (C-159/21, EU:C:2022:708, paragraphs 80, 81 and 92).

[23] See 'The Refugee Convention, 1951: the Travaux préparatoires analysed with a Commentary by Dr Paul Weis', op. cit., p. 246.

57. In my view, the grounds of the convicting judgment play a decisive role in the evaluation to be carried out. It is therefore necessary to examine whether the court which convicted the person in question described the conduct as 'serious' or 'particularly serious' and the matters to which it referred in support of that description.

58. Thus, as I observed above, it is not a matter of defining a threshold of seriousness of a crime at EU level, as that would not only run counter to the differences in the Member States' criminal law policies, but would also be incompatible with the approach of requiring an examination of all the circumstances of each individual case.

59. Furthermore, it should be observed that, as the Commission has pointed out, given that substantive criminal law has been harmonised only to a limited extent, the Member States retain a certain margin of appreciation as regards the definition of what constitutes a 'particularly serious crime' for the purposes of applying Article 14(4)(b) of Directive 2011/95.

60. Turning now to the *criteria*, the Court has stated, in the judgment in *Ahmed*, that the interpretation according to which an assessment of all the relevant facts is required 'is supported by the report of the European Asylum Support Office (EASO) [24] for the month of January 2016, entitled "Exclusion: Articles 12 and 17 of the Qualification Directive (2011/95/EU)", which recommends, in paragraph 3.2.2 on Article 17(1)(b) of Directive 2011/95, that the seriousness of the crime that could result in a person being excluded from subsidiary protection be assessed in the light of a number of criteria such as, inter alia, the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and the taking into account of whether most jurisdictions also classify the act at issue as a serious crime. The [EUAA] refers, in that regard, to a number of decisions taken by the highest courts of the Member States'. [25]

61. While the criteria to which the Court drew attention in that judgment were referred to in connection with the concept of a 'serious crime', within the meaning of Article 17(1)(b) of Directive 2011/95, I consider that they are also useful in establishing whether a 'particularly serious crime' has been committed, for the purposes of Article 14(4)(b) of that directive, [26] it being understood that, in that context, they must go to demonstrate that the crime at issue is of exceptional seriousness, which represents a very significant difference of degree as compared to a serious crime. [27]

62. I would observe, in that regard, that among the factors taken into consideration in applying Article 33(2) of the Geneva Convention are the nature of the crime, the harm actually inflicted, the form of procedure used for the prosecution and whether the act in question would be regarded as serious in the majority of legal systems. [28]

[24] Now the European Union Agency for Asylum (EUAA) (see Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ 2021 L 468, p. 1)).

[25] See judgment in *Ahmed* (paragraph 56).

[26] See, in that regard, EUAA, *Judicial analysis: Ending international protection*, 2nd ed., 2021, p. 62.

[27] See, by way of example, as regards the criteria applied by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), Hardy, J., and Mathues, G., 'Retrait du statut de réfugié pour motifs d'ordre public – "Constituer un danger pour la société du fait qu'il a été condamné définitivement pour une infraction particulièrement grave"', *Revue du droit des étrangers*, Association pour le droit des étrangers, Brussels, 2020, No 207, pp. 5 to 14, especially pp. 6 to 9.

[28] See the UNHCR position paper 'Prise de position du HCR sur l'initiative populaire fédérale "pour le renvoi des criminels étrangers" (initiative sur le renvoi)', 10 September 2008, paragraph 21, p. 11.

63. Accordingly, I consider that regard must be had to the following criteria for the purposes of demonstrating that a 'particularly serious crime' has been committed, within the meaning of Article 14(4)(b) of Directive 2011/95: the nature of the act in question,[29] the harm caused,[30] the form of procedure used to prosecute and try the person concerned, the nature and duration of the sentence imposed[31] and whether the majority of jurisdictions also consider the act in question to be a particularly serious crime.

64. Furthermore, regard must be had to the fact that in the judgment in *Ahmed*, the Court held, in relation to the sentence provided for, that Article 17(1)(b) of Directive 2011/95 precludes national legislation pursuant to which an applicant for subsidiary protection may be considered to have committed a serious crime on the basis of the sole criterion of the penalty provided for, in relation to a specific crime, by the law of that Member State.[32] That judgment recognises, nonetheless, that the penalty provided for is of particular importance in assessing the seriousness of a crime.[33]

65. Where the sentence has been imposed and is no longer merely provided for, it seems to me that the nature and duration of the sentence must play an even more important role.[34]

66. I recognise, however, by analogy with the Court's observations in *Ahmed*, that the sentence imposed cannot be used as the sole and automatic test of whether a crime is particularly serious. That consideration, like that of the nature of the crime, must be supplemented by an assessment of all the circumstances, including an examination of the context in which the offence was committed and of the conduct of the person in question,[35] based, in particular, on the grounds of the convicting judgment.

67. Given that Article 14(4)(b) of Directive 2011/95 refers to a final judgment, the court delivering that judgment must be regarded as having taken all the individual circumstances into account with a view to imposing the sentence it considered appropriate. In that regard, the decisive nature of the grounds of the convicting judgment and of the assessment carried out by the criminal court delivering that judgment, to which I have drawn attention above, seems to me to follow from the difference between the grounds for exclusion from refugee status or eligibility for subsidiary protection, which are set out in Article 12(2)(b) and Article 17(1)(b) of that directive and refer to the person concerned having 'committed' a serious crime, and the ground for revoking or refusing to grant refugee status, which is set out in Article 14(4)(b) and (5) of the directive and refers to the person concerned having been 'convicted by a final judgment'.

29 The fact that an act is characterised by a high degree of cruelty may be an indication that a crime is particularly serious, as may the fact that the penalised act was – or was not – intentional.

30 This can include the concrete effects of the offence on the community, or in other words the nature and extent of the detriment caused to the victims and more generally to the community: social disturbance, consideration of anxieties and the measures taken to address them. See Hinterhofer, H., 'Das "besonders schwere Verbrechen" iS des § 6 Abs 1 Z 4 AsylG – Ein konkretisierender Auslegungsvorschlag aus strafrechtlicher Sicht', *Fremden- und asylrechtliche Blätter: FABL: Jahrgangsband mit Judikatursammlung*, Sramek, Vienna, 2009, No 1, pp. 38 to 41.

31 Whether or not a custodial sentence is suspended is, in my view, of indisputable importance.

32 See judgment in *Ahmed* (paragraph 58).

33 See judgment in *Ahmed* (paragraph 55).

34 See, on the sentence criterion, Kraft, I., 'Article 14, Revocation of, ending of or refusal to renew refugee status', in Hailbronner, K. and Thym, D., *EU Immigration and Asylum Law: A Commentary*, 2nd ed., C.H. Beck, Munich, 2016, pp. 1225 to 1233, especially p. 1231. The author notes that a particularly serious crime is generally accepted to have been committed, in the context of Article 33(2) of the Geneva Convention, where a person has been convicted for crimes punishable by long terms of imprisonment such as murder, rape, armed robbery, arson, international terrorism and so on.

35 See, in relation to Article 33(2) of the Geneva Convention, Goodwin-Gill, G.S. and McAdam, J., *The refugee in international law*, 3rd ed., Oxford University Press, Oxford, 2007, p. 239, and Hathaway, J.C., *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2021, pp. 413 to 416.

68. Furthermore, it seems to me to be of particular relevance, in the context of the assessment to be carried out, to compare the sentence imposed with the maximum sentence provided for by law in respect of the offence at issue.[36] Consideration should also be given to the position of the sentence imposed on the scale of sentences in use in the Member State concerned.[37]

69. I would also add the following considerations, which, it seems to me, are among those which are useful in assessing whether a crime is of exceptional seriousness:

– whether the aggravating circumstances outweigh the mitigating circumstances or vice versa, and

– the nature of the legal interest to which harm was caused.[38]

70. I would also observe that Article 14(4)(b) of Directive 2011/95 refers to a refugee having been 'having been convicted by a final judgment of *a* particularly serious crime'.[39] In my view, the use of the singular, as well as the need to interpret that provision restrictively, prevent that ground for revoking or refusing to grant refugee status from being applied based on the sum of the sentences imposed for a number of criminal offences where no single one of those offences, taken by itself, can be classified as a 'particularly serious crime'.[40]

71. It is for the referring court to assess, having regard to the method and the criteria which I have described, whether it is can classify M.A.'s conviction as relating to a 'particularly serious crime'. That court will need to take account, in particular, of the nature and level of the sentence imposed on M.A., which was a term of imprisonment of 24 months. It will also need to establish whether eight months of that term of imprisonment were suspended, as would appear to be the case based on the written observations submitted by M.A. and by the Netherlands Government.

72. Furthermore, as I have already stated, the approach of laying down, in Netherlands legislation, a minimum length of the sentence or measure involving deprivation of liberty imposed, in this case ten months, as a threshold which must be reached if a Member State is to exercise its power to revoke or refuse to grant refugee status, does not seem to me to be contestable in principle. Such an approach must however include an assessment of all the particular circumstances of each individual situation, which the referring court will need to verify.

73. In addition, it seems to me that – as the Commission has rightly observed – it would be contrary to Article 14(4)(b) of Directive 2011/95 for Netherlands legislation to permit the competent authority to add together a number of sentences imposed for a number of criminal offences for the purposes of applying that minimum threshold. In that regard, it seems to me that a distinction must be made according to whether the criminal law of a Member State provides, in the case of concurrent offences, for consecutive sentences or for the imposition of the most severe

[36] The nearer a term of imprisonment comes to the maximum sentence, the more reason the competent authority will have for regarding the crime as particularly serious. (see Hinterhofer, H., op. cit).

[37] If the sentence imposed is in the upper part of the sentencing scale, that may be an indication that the crime in question is particularly serious.

[38] It should be considered whether the harm was caused to property or to persons; violence against the person may more frequently be regarded as particularly serious. Furthermore, the media interest in a crime may indicate that the legal interest to which harm was caused is a fundamental interest.

[39] My italics.

[40] See Hardy, J. and Mathues, G., op. cit., who consider that 'a priori, a large number of convictions for acts which are not exceptionally serious should not be sufficient, even if they show an irresistable tendency to disrupt public order' (p. 9). See also Neusiedler, M., 'Der Asylaberkennungsgrund des "besonders schweren Verbrechens"', *Migralex: Zeitschrift für Fremden- und Minderheitenrecht*, Braumüller, Vienna, 2021, No 1, pp. 8 to 14, and the EUAA legal analysis referred to in footnote 26 to this Opinion, at p. 62, paragraph 5.3.

sentence provided for. It is for the referring court to verify whether M.A.'s sentence was imposed on the first or the second of those bases, the first of which does not enable the competent authority, by adding together a number of sentences imposed for a number of offences, to classify the crime as 'particularly serious' within the meaning of that provision.

V. Conclusion

74. In the light of all the foregoing considerations, I propose that the Court should answer the first question referred for a preliminary ruling by the Raad van State (Council of State, Netherlands) as follows:

Article 14(4)(b) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted,

is to be interpreted as meaning that:

– a 'particularly serious crime', within the meaning of that provision, refers to a criminal offence characterised by an exceptional degree of seriousness;

– a Member State cannot rely on the ground for revoking or refusing to grant refugee status laid down in Article 14(4)(b) or (5) of Directive 2011/95 until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question come within the scope of that particular ground for revoking or refusing to grant such status, the assessment of whether the crime of which that person has been convicted by a final judgment is of an exceptional degree of seriousness requiring a full investigation into all the circumstances of the individual case concerned;

– in order to establish whether a 'particularly serious crime' has been committed, within the meaning of Article 14(4)(b) of Directive 2011/95, the Member State concerned must base its examination in particular on the following criteria: the form of procedure used to prosecute and try the person concerned; the nature and duration of the sentence imposed, comparing that sentence with the maximum provided for by law in respect of the offence at issue and examining the position of that sentence on the scale of sentences in use in that Member State; whether the majority of jurisdictions also consider the act in question to be a particularly serious crime; whether the aggravating circumstances outweigh the mitigating circumstances, or vice versa, and the nature of the legal interest to which harm was caused;

– it does not preclude national legislation laying down a minimum length of the sentence imposed as a threshold which must be met in order for a criminal offence to be classified as a 'particularly serious crime' within the meaning of Article 14(4)(b) Directive 2011/95, provided, first, that the application of that minimum threshold is accompanied by an assessment of all the circumstances of each individual situation and, secondly, that that legislation does not permit the adding together, for the purposes of determining whether that minimum threshold is met, of a number of sentences imposed for a number of criminal offences, where no single one of those offences, taken by itself, reaches the level of exceptional seriousness required by that provision.