Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

2 May 2018 (*)

(Reference for a preliminary ruling — Citizenship of the European Union — Right to move and reside freely within the territory of the Member States — Directive 2004/38/EC — Second subparagraph of Article 27(2) — Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health — Expulsion on grounds of public policy or public security — Conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society — Person whose asylum application has been refused for reasons within the scope of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95/EU — Article 28(1) — Article 28(3)(a) — Protection against expulsion — Residence in the host Member State for the previous ten years — Imperative grounds of public security — Meaning)

In Joined Cases C−331/16 and C−366/16,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU, from the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of the Hague, sitting at Middelburg, Netherlands) (C−331/16), and from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) (C−366/16), made by decisions of 9 June 2016 and 27 June 2016, received at the Court on 13 June 2016 and 5 July 2016 respectively, in the proceedings

K.

v

Staatssecretaris van Veiligheid en Justitie (C−331/16),

and

H. F.

v

Belgische Staat (C−366/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and E. Levits, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, K. Jürimäe and M. Vilaras (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 July 2017,

after considering the observations submitted on behalf of:

– K., by A. Eikelboom and A. M. van Eik, advocaten,

– the Netherlands Government, by M. K. Bulterman, C.S. Schillemans and B. Koopman, acting as Agents,

– the Belgian Government, by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents, and by I. Florio and E. Matterne, advocaten,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the French Government, by E. Armoët, E. de Moustier and D. Colas, acting as Agents,

– the United Kingdom Government, by C. Crane, G. Brown and D. Robertson, acting as Agents, and by B. Lask, Barrister,

– the European Commission, by E. Montaguti and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2017,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of the second subparagraph of Article 27(2), Article 28(1) and Article 28(3)(a) 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 (OJ 2004 L 158, p. 77).

2 The requests were made in two proceedings where the opposing parties are (i) K. and the Staatssecretaris van Veiligheid en Justitie (Secretary of State for Security and Justice, the Netherlands) (‘the Secretary of State’) concerning a decision declaring K. to be an undesirable immigrant to the Netherlands (Case C−331/16), and (ii) H. F. and the Belgische Staat (Belgian State) concerning a decision refusing to H. F. a right of residence of more than three months in Belgium (Case C−366/16).

Legal context

International law

3 The Convention Relating to the Status of Refugees, 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. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which itself entered into force on 4 October 1967 (‘the Geneva Convention’).

4 Article 1 of the Geneva Convention, following the definition, in section A, of the term ‘refugee’ for the purposes of that convention, states in section F:

‘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.’

EU law

Directive 2004/38

5 Article 16(1) of Directive 2004/38 provides:

‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.’

6 In Chapter VI of Directive 2004/38, which is headed ‘Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health’, Article 27(1) and (2) provide:

‘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 that 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; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

Directive 2011/95/EU

8 Article 12(2) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), 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; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.'

National law

Netherlands law

9 Article 67 of the Vreemdelingenwet (Law on Foreign Nationals), of 23 November 2000 (Stb. 2000, No 495), provides:

'1. Unless Part 3 is applicable, Our Minister may declare a foreign national to be undesirable:

a. if he is not lawfully resident in the Netherlands and has repeatedly committed an act which constitutes an offence under this law;

b. if he has been convicted by a judgment which has become final of an offence in respect of which he faces a prison sentence of three years or more, or if a measure has been imposed on him such as that provided for in Article 37a of the Wetboek van Strafrecht (Criminal Code);

c. if he represents a danger to public policy or national security and is not lawfully resident in the Netherlands within the meaning of Article 8(a) to (e) or (l);

d. pursuant to a treaty, or

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

...

3. By derogation from Article 8, a foreign national who has been declared to be undesirable cannot be lawfully resident.'

Belgian law

10 Under Article 40a(2) of the wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (the Law on the admission, residence, establishment and removal of foreign nationals) of 15 December 1980 (*Belgisch Staatsblad*,31 December 1980, p. 14584), in the version thereof applicable to the main proceedings, the family members of a Union citizen are deemed to included relatives in the ascending line.

11 Article 43 of that Law provides:

'Entry and residence may be denied to Union citizens and their family members only on grounds of public policy, public security or public health and subject to the following limitations:

...

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. ... 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.

...'

12 Article 52(4) of the koninklijk besluit betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Royal Decree on entry to the national territory, residence, settlement and removal of foreign nationals) of 8 October 1981 (*Belgisch Staatsblad*, 27 October 1981, p. 13740), states:

'...

If the Minister or his authorised representative grants a right of residence, or if no decision is made within the period specified in Article 42 of the Law, the Mayor or his authorised representative shall give the foreign national a "residence card of a family member of a Union citizen" corresponding to the template in Annex 9.

...

If the Minister or his authorised representative does not recognise a right of residence, the family member who is affected by that decision shall be notified of it by the issuing of a document corresponding to the template in Annex 20, containing, where appropriate, an order to leave [Belgium]. ...'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C−331/16

13 K. has both Croatian nationality and the nationality of Bosnia-Herzegovina.

14 K. arrived in the Netherlands on 21 January 2001, accompanied by his wife and a minor son. According to the information from the referring court, K. has resided continuously in the Netherlands since that date. On 27 April 2006 his wife gave birth to their second son.

15 On 2 February 2001 K. submitted to the Secretary of State an initial application for a temporary residence permit as an asylum seeker. That application was rejected by the Secretary of State's decision of 15 May 2003, that decision becoming final following its confirmation by a judgment of 21 February 2005 of the Raad van State (Council of State, the Netherlands).

16 On 27 July 2011 K. submitted a second asylum application, which was rejected by the Secretary of State's decision of 16 January 2013. That decision, which was accompanied by a ban on entering the Netherlands for a period of 10 years, becoming final following its confirmation by a judgment of 10 February 2014 of the Raad van State (Council of State).

17 Following the accession of the Republic of Croatia to the European Union, on 3 October 2014 K. made an application to the Secretary of State for the withdrawal of the Netherlands entry ban imposed on him. By decision of 22 July 2015, the Secretary of State accepted that application but declared K. to be an undesirable immigrant to the Netherlands, on the basis of Article 67(1)(e) of the Law on Foreign Nationals. The complaint lodged by K. against that decision was rejected by decision of 9 December 2015.

18 In the latter decision, the Secretary of State first made reference to the decisions of 15 May 2003 and 16 January 2013 rejecting K.'s applications for asylum, in which it was held that K had been guilty of conduct within the scope of Article 1F(a) of the Geneva Convention, in that he had knowledge of war crimes and crimes against humanity committed by special units of the Bosnian army and in that he himself had personally participated in those crimes. The Secretary of State also emphasised that K.'s presence in the Netherlands was likely to be detrimental to the international relations of the Kingdom of the Netherlands and that it should be ensured that the Netherlands did not become a host country for individuals with respect to whom there were substantial reasons to believe that they were guilty of serious offences. The Secretary of State further held that the protection of public policy and public security required that nothing should be left undone to prevent citizens of the Netherlands coming into contact with individuals who, in their country of origin, had been guilty of serious conduct within the scope of Article 1F(a) of the Geneva Convention. In particular, there was an imperative requirement that victims who had suffered from the actions of K., or members of their families, should not again encounter him in the Netherlands. On the basis of all those considerations, the Secretary of State concluded, first, that K. represented a genuine, present, and sufficiently serious threat to one of the fundamental interests of Netherlands society and, second, that the right to respect for private and family life did not preclude K. being declared to be an undesirable immigrant.

19 K. brought an action against the decision of 9 December 2015 before the referring court. He claimed, in essence, that the reasons relied on by the Secretary of State to justify his decision were insufficient. Apart from the fact that the international relations of Member States do not fall within the scope of the concept of public policy, the allegation that he currently represents a threat is based on presumptions from conduct of which he was guilty more than

two decades in the past and on the argument that the fact that that conduct falls within the scope of Article 1F(a) of the Geneva Convention means that the threat is permanent. Further, the claim that any contact in the Netherlands that K. might have with a victim would in itself entail a risk to public policy would unduly extend the concept of 'public policy'. Moreover, there is no reliable evidence that any victims of K. are in the Netherlands. K. added that, in any event, he had never been prosecuted nor a fortiori convicted with respect to any of the acts he is alleged to have committed. Referring to paragraph 50 of the judgment of 11 June 2015, *Zh. and O.* (C−554/13, EU:C:2015:377), K. concluded that the general justification relied on by the Secretary of State, that he represented a risk to public policy, was incompatible with EU law.

20 The referring court states, first, that, from the date of Croatia's accession to the European Union, EU law is applicable to K.'s situation. Since a ban on entering the Netherlands can be imposed only on third-country nationals, the decision of 16 January 2013 banning K. from entering the Netherlands for a period of 10 years was withdrawn by the decision of 22 July 2015, confirmed by the decision of 9 December 2015, and replaced by a declaration that K. was an undesirable immigrant, that being a comparable measure that may be imposed on Union citizens. Unlike an entry ban, a declaration that an individual is an undesirable immigrant is, as a general rule, valid indefinitely, but the person concerned may apply for its withdrawal after a certain period of time has elapsed.

21 The referring court states, next, that it is undisputed that there are serious reasons for considering that K. has committed a crime within the meaning of Article 1F(a) of the Geneva Convention, having regard to his conduct in the period between April 1992 and February 1994, when he was a member of a Bosnian army unit. It is also undisputed that K. deserted from that army in February 1994. The declaration that K. is an undesirable immigrant is based exclusively on that conduct. Given the time that has elapsed since that period, the question that arises is whether that conduct can be considered to represent 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.

22 In the view of the referring court, it follows from the case-law of the Raad van State (Council of State) that the threat which the presence of an individual in a situation such as that of K represents to one of the fundamental interests of society is inherently permanent and current, and that there is no need to speculate on the future conduct of such an individual. That conclusion is based, first, on the exceptional gravity of the crimes that are the subject of Article 1F(a) of the Geneva Convention and, second, on the Court's case-law, in particular the judgments of 9 November 2010, *B and D* (C−57/09 and C−101/09, EU:C:2010:661), of 23 November 2010, *Tsakouridis*, (C−145/09, EU:C:2010:708), and of 22 May 2012, *I*, (C−348/09, EU:C:2012:300).

23 The referring court is uncertain, however, whether that interpretation of Article 27(2) of Directive 2004/38 is well founded. Those doubts are increased by the fact that the first sentence of that provision states that measures taken on grounds of public policy or public security must comply with the principle of proportionality. Further, Article 28(1) of that directive lists a number of factors which the host Member State must take into account before taking an expulsion decision, and Article 28(3)(a) of that directive provides that such a decision may not be taken against a Union citizen who has resided in the host Member State for the previous ten years unless it is based on imperative grounds of public security.

24 The referring court also mentions the Communication of 2 July 2009 from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38(COM(2009) 313 final), which confirms how complex it is

to assess whether a measure such as that imposed on K. is proportionate. K. and the members of his family are wholly integrated in Dutch society, having lived in the Netherlands since 2001. K. has, in addition, stated that his family acquired Croatian nationality solely on the basis of ethnicity, but that Croatia is to them entirely foreign, since they have never lived there and have no family there.

25 In those circumstances, the Rechtbank Den Haag, zittingsplaats Middelburg (District Court of the Hague, sitting at Middelburg, Netherlands) decided to stay the proceedings and to 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 that Article 1F(a) and (b) of the Geneva Convention is applicable to him, to be declared an undesirable immigrant 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 1F(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 should account be taken of the fact that the conduct penalised by Article 1F of the Geneva Convention took place, as in this case, long ago, that is, in this case, between 1992 and 1994?

(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 1F(a) and (b) of the Geneva Convention has been declared applicable, as in the present case? Should the factors listed in Article 28(1) of Directive [2004/38] be taken into consideration, as part of that assessment, or separately? Should the period of 10 years in the host Member State, specified in Article 28(3)(a) of [that] directive, be taken into consideration, as part of that assessment, or separately? Should the factors listed in point 3.3. of [the Communication COM(2009) 313 final] be fully taken into consideration?’

Case C-366/16

26 H. F., an Afghan national, arrived in the Netherlands on 7 February 2000 and submitted an asylum application on 6 March 2000. By a decision of the competent Netherlands authority of 26 May 2003, H. F. was excluded from refugee status on the basis of Article 1F(a) of the Geneva Convention. That decision was confirmed by the judgment of the Rechtbank te s’-Gravenhage (District Court of the Hague, the Netherlands).

27 By decision of 9 January 2006, the competent Netherlands authority refused to issue to H. F. a temporary residence permit in the Netherlands. That decision was again confirmed by the Rechtbank te s’-Gravenhage (District Court of the Hague). The decision of 26 May 2003 having become final, the Secretary of State adopted a decision banning H. F. from entering the Netherlands.

28 In 2011 H. F. and his daughter settled in Belgium. On 5 October 2011 H. F. lodged in Belgium an application for a residence permit which was rejected as being inadmissible by decision of 13 November 2012 of the gemachtigde van de staatssecretaris voor Asiel en Migratie en Administrative Vereenvoudiging (the representative of the Secretary of State for

Asylum and Migration and administrative simplification, Belgium) ('the representative'). On the same date, the representative adopted a decision ordering H. F. to leave Belgium. H. F. brought an action for the annulment of those two decisions, an action which he later abandoned.

29 On 21 March 2013 H. F. lodged with the representative an application for a residence card in Belgium on the basis of his being a family member of a Union citizen, since his daughter was a Netherlands national. On 12 August 2013 the representative adopted a decision refusing him residence and ordering him to leave Belgium.

30 In response to a second application lodged on 20 August 2013 by H. F. for the same purpose, the representative adopted, on 18 February 2014, a decision refusing him residence and ordering him to leave Belgium. The legal action brought by H. F. against that decision was rejected by a decision of the Belgian court with jurisdiction, that decision now being final.

31 On 18 September 2014 H. F. submitted a third application for a residence card on the basis of his being a family member of a Union citizen. Following that application, the representative again adopted, on 5 January 2015, a decision refusing him residence and ordering him to leave Belgium. H. F. having brought an action against the decision of 5 January 2015, the Belgian court with jurisdiction annulled that decision on 17 June 2015.

32 Following that annulment, on 8 October 2015 the representative adopted a decision refusing H.F. residence for more than three months, without any order to leave Belgium. That decision was the subject of an action for annulment brought by H. F. before the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium).

33 According to what is stated by the referring court, the representative's justification for the adoption of that decision was the information contained in the file relating to H. F.'s application for asylum in the Netherlands, obtained through the cooperation of the Netherlands. It was apparent from that file that the assessment made by the competent Netherlands asylum authorities was that H. F. had committed crimes falling within the scope of Article 1F(a) of the Geneva Convention. In particular, he had participated in war crimes or crimes against humanity, or had given orders, given his position, to commit such crimes. The representative therefore considered that the threat to one of the fundamental interests of society represented by the presence of an individual such as H.F., with respect to whom it is undisputed that there are serious reasons to believe that he has committed crimes within the scope of Article 1F(a) of the Geneva Convention, is inherently permanent and current. An assessment of that individual's future conduct is not, in such circumstances, important, given the nature and gravity of the crimes concerned, and consequently there should be no need to demonstrate whether the threat stemming from the conduct of that individual, and the risk of repetition of such conduct ('re-offending'), is plausible and present. A refusal of a right of residence in such a case also serves to protect the victims of the crimes in question and, thereby, the host society and the international legal order. On all those grounds, the refusal to grant a right of residence to H. F. was proportionate.

34 The referring court states that, although the decision of 8 October 2015 contains no order to leave Belgium, it should be considered to be a measure of the kind that is the subject of the first subparagraph of Article 27(2) of Directive 2004/38. The referring court is uncertain as to the compatibility with Article 27(2) of the argument that national security is undermined by the presence in Belgium of an individual with respect to whom a decision excluding him from refugee status, that decision now being final, was adopted some 10 years earlier in the Netherlands.

35 The referring court adds that that issue is also related to the right to respect for private and family life, enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The referring court considers that when a decision to refuse residence is to be taken it would appear to be preferable that an assessment using the 'fair balance test' be undertaken.

36 Accordingly, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should EU 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 of a Union citizen in the context of family reunification with that citizen, who has exercised 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 1F of [the Geneva Convention] and Article 12(2) of Directive [2011/95] because of his involvement in events which took place in a specific 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, without any assessment of the risk of re-offending in the Member State of residence?'

37 By order of the President of the Court of 21 July 2016, Cases C−331/16 and C−366/16 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The first two questions and the first part of the third question in Case C−331/16 and the question in Case C−366/16

38 By the first two questions and the first part of the third question in Case C−331/16, and by the question in Case C−366/16, which can be examined together, the referring courts seek, in essence, to ascertain whether Article 27(2) of Directive 2004/38 must be interpreted as meaning that the fact that a Union citizen or a third-country national family member of such a citizen, who has applied for a right of residence in the territory of a Member State, has, in the past, been the subject of a decision excluding that person from refugee status on the ground that there were serious reasons to believe that he had been guilty of acts referred to in Article 1F of the Geneva Convention or in Article 12(2) of Directive 2011/95, enables the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, 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. If the answer is negative, the referring court in Case C−331/16 seeks to ascertain how the existence of such a threat should be assessed and, in particular, to what extent there is any need to take account of the time that has elapsed since the alleged commission of those acts. That court is also uncertain as to effect of the principle of proportionality, referred to in Article 27(2) of Directive 2004/38, on the adoption of a decision that an individual who has been the subject of a decision excluding him from refugee status is an undesirable immigrant to the Member State concerned.

39 It is apparent from Article 27(1) of Directive 2004/38 that Member States may adopt measures which restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security, but those grounds may not be invoked to serve purely economic ends.

40 In accordance with the Court's settled case-law, while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (judgment of 22 May 2012, *I.*, C−348/09, EU:C:2012:300, paragraph 23 and the case-law cited; see, to that effect, judgment of 13 July 2017, *E*, C−193/16, EU:C:2017:542, paragraph 18 and the case-law cited).

41 Accordingly, the concept of 'public policy', in Articles 27 and 28 of Directive 2004/38 has been interpreted in the Court's case-law as meaning that recourse to that concept presupposes, in any event, the existence, in addition to the social disturbance which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (judgment of 24 June 2015, *H.T.*, C−373/13, EU:C:2015:413, paragraph 79 and the case-law cited).

42 As regards the concept of 'public security', it is clear from the Court's case-law that this concept covers both the internal and external security of a Member State (judgment of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 43). Internal security may be affected by, inter alia, a direct threat to the peace of mind and physical security of the population of the Member State concerned (see, to that effect, judgment of 22 May 2012, *I.*, C−348/09, EU:C:2012:300, paragraph 28). As regards external security, that may be affected by, inter alia, the risk of a serious disturbance to the foreign relations of that Member State or to the peaceful coexistence of nations (see, to that effect, judgment of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 44).

43 In this case, it is clear from what is stated by the referring courts that the justification for both the decision to reject K.'s complaint concerning the declaration that he was an undesirable immigrant to the Netherlands, and the decision to refuse to grant H.F. a right of residence of more than three months in Belgium, was to be found in (i) the fact that, since they had previously been excluded from refugee status on the basis of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95, the mere presence of K. and H.F. in the territory of the Member States concerned would be detrimental to the international relations of those Member States and (ii) the necessity of ensuring that those individuals could not come into contact with citizens of those Member States who had been victims of the crimes and acts that K. and H. F. were alleged to be guilty of, and who might be in the territory of those Member States.

44 Further, the French Government and the Government of the United Kingdom have stated in their observations to the Court that measures such as those taken with respect to K. and H. F. can also contribute both to ensuring the protection of the fundamental values of society in a Member State and of the international legal order and to maintaining social cohesion, public confidence in the justice and immigration systems of the Member States and the credibility of their commitment to protect the fundamental values enshrined in Articles 2 and 3 TEU.

45 As the Advocate General stated, in essence, in point 68 of his Opinion, there is nothing to prevent reasons such as those set out in paragraphs 43 and 44 of the present judgment from being considered by the Member States to constitute grounds of public policy or public security, within the meaning of Article 27(1) of Directive 2004/38, capable of justifying the adoption of measures that restrict the freedom of movement and residence, in their territory, of Union citizens or their third-country national family members.

46 Further, it must be emphasised that the crimes and acts that are the subject of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Article 2 TEU, the European Union is founded, and the peace which it is the Union's aim to promote, under Article 3 TEU.

47 It follows from the foregoing that a restriction imposed by a Member State on the freedom of movement and residence of a Union citizen or a third-country national family member of such a citizen, who has been the subject, in the past, of a decision excluding that person from refugee status under Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95, may fall within the scope of the concept of 'measures taken on grounds of public policy or public security', within the meaning of the first subparagraph of Article 27(2) of Directive 2004/38.

48 That said, it is clear from the wording of the first subparagraph of Article 27(2) of Directive 2004/38 that the relevant measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned.

49 Further, the effect of the second subparagraph of Article 27(2) of that directive is that it is a prerequisite for the adoption of such measures that the conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or of the host Member State.

50 It must be borne in mind in that regard that the grounds for exclusion from refugee status laid down in Article 1F of the Geneva Convention and in Article 12(2) of Directive 2011/95 were established with the aim of excluding from that status individuals judged to be undeserving of the protection which refugee status entails and of ensuring that the granting of that status does not enable the perpetrators of certain serious crimes to escape criminal liability, and consequently exclusion from refugee status is not dependent on the existence of a present danger to the host Member State (see, to that effect, judgment of 9 November 2010, *B and D*, C−57/09 and C−101/09, EU:C:2010:661, paragraph 104).

51 It follows that the fact that the person concerned has been the subject, in the past, of a decision excluding him from refugee status pursuant to one of those provisions cannot automatically permit the finding that the mere presence of that person in the territory of the host Member State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38.

52 Measures justified on grounds of public policy or public security may be taken only if, following a case-by-case assessment by the competent national authorities, it is shown that the personal conduct of the individual concerned currently constitutes a genuine and sufficiently serious threat to a fundamental interest of society (judgment of 8 December 2011, *Ziebell*, C−371/08, EU:C:2011:809, paragraph 82 and the case-law cited; see also, to that effect, judgment of 29 April 2004, *Orfanopoulos and Oliveri*, C−482/01 and C−493/01, EU:C:2004:262, paragraph 77).

53 Such an assessment is therefore also necessary for the purposes of the possible adoption, by the competent authority of a Member State, of a measure based on grounds of public policy or public security, within the meaning of Article 27(2) of Directive 2004/38, with respect to a person of whom the competent asylum authorities have taken the view that there were serious reasons to believe that he had committed crimes or was guilty of acts falling within the scope of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95.

54 That assessment must take into account the findings of fact made in the decision of exclusion from refugee status taken with respect to the individual concerned and the factors on which that decision was based, in particular the nature and gravity of the crimes or acts that that individual is alleged to have committed, the degree of his individual involvement in them and the possible existence of grounds for excluding criminal liability such as duress or self-defence.

55 Such an examination is all the more necessary in a situation where, as in the main proceedings, the person concerned has not been convicted of the crimes or acts that were relied on to justify the rejection, in the past, of his asylum application.

56 Moreover, while, in general, the finding of 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 Directive 2004/38, implies the existence in the individual concerned of a propensity to repeat the conduct constituting such a threat in the future, it is also possible that past conduct alone may constitute such a threat to the requirements of public policy (judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 29).

57 In this case, the referring court in Case C−331/16 is uncertain as to the effect of the considerable period of time that has elapsed since the assumed commission of the acts that justified K.'s exclusion from refugee status under Article 1F of the Geneva Convention.

58 In that regard, the time that has elapsed since the assumed commission of those acts is, indeed, a relevant factor for the purposes of assessing whether there exists a threat such as that referred to in the second subparagraph of Article 27(2) of Directive 2004/38 (see, to that effect, judgment of 11 June 2015, *Zh. and O.*, C−554/13, EU:C:2015:377, paragraphs 60 to 62). However, the possible exceptional gravity of the acts in question may be such as to require, even after a relatively long period of time, that the genuine, present and sufficiently serious threat affecting one of the fundamental interests of society be classified as persistent.

59 In Case C−366/16, the referring court has doubts as to the relevance, for that assessment, of the risk of re-offending in the host Member State, where the crimes or acts referred to in Article 1F of the Geneva Convention or in Article 12(2) of Directive 2011/95 took place in the country of origin of the individual concerned, in a specific historical and social context that is not liable to recur in that Member State.

60 In that regard, it must be observed that, however improbable it may appear that such crimes or acts may recur outside their specific historical and social context, conduct of the individual concerned that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38.

61 It must further be stated that, as is apparent from Article 27(2) of that directive and the Court's settled case-law, a measure which restricts the right of freedom of movement may be justified only if it complies with the principle of proportionality, which presupposes determining whether that measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it (see, to that effect, judgment of 17 November 2011, *Gaydarov*, C−430/10, EU:C:2011:749, paragraph 40 and the case-law cited).

62 That assessment entails that the threat that the personal conduct of the individual concerned represents to the fundamental interests of the host society, on the one hand, must be weighed against the protection of the rights which Union citizens and their family members derive from Directive 2004/38, on the other (see, to that effect, judgment of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 50 and the case-law cited).

63 In that assessment, account must be taken of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life as enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (judgment of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 52 and the case-law cited).

64 As the Advocate General stated in point 112 of his Opinion, the host Member State is, in particular, required to determine, in that context, whether it was possible to adopt other measures less prejudicial to 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 (see, to that effect, judgment of 17 November 2011, *Aladzhov*, C−434/10, EU:C:2011:750, paragraph 47).

65 In the light of all the foregoing, the answer to the first two questions and to the first part of the third question in Case C−331/16, and to the question in Case C−366/16, is that Article 27(2) of Directive 2004/38 must be interpreted as meaning that the fact that a Union citizen or a third-country national family member of such a citizen, who applies for a right of residence in the territory of a Member State, has been the subject, in the past, of a decision excluding him from refugee status under Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security.

66 The finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State, of the personal conduct of the individual concerned, taking into consideration the findings of fact in the decision to exclude that individual from refugee status and the factors on which that decision is based, particularly the nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted. That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place

in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding.

67 In accordance with the principle of proportionality, the competent authorities of the host Member State must, in addition, weigh the protection of the fundamental interest of society at issue, on the one hand, against the interests of the person concerned in the exercise of his right to freedom of movement and residence as a Union citizen and in his right to respect for private and family life, on the other.

The second part of the third question in Case C−331/16

68 By the second part of its third question, the referring court in Case C−331/16 seeks to ascertain, in essence, (i) whether the factors listed in Article 28(1) of Directive 2004/38 must be taken into account for the purposes of the adoption of a decision that a person whose asylum application has, in the past, been rejected on the basis of Article 1F of the Geneva Convention is an undesirable immigrant, to the territory of the Member State concerned, and (ii) whether the enhanced protection for which, under Article 28(3)(a) of that directive, Union citizens who have resided for the previous ten years in the host Member State are eligible is applicable to the situation of such a person.

69 In that regard, it must be observed that, at the hearing, the Netherlands Government stated that the decision of 22 July 2015 declaring K. to be an undesirable immigrant to the Netherlands implied that he was under an obligation to leave the Netherlands. That being the case, that decision must be regarded as being an expulsion decision, within the meaning of Article 28(1) of Directive 2004/38.

70 In order to adopt such a decision with due regard to the principle of proportionality, account must be taken of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with the host Member State.

71 As regards the protection provided for in Article 28(3)(a) of Directive 2004/38, it must be recalled that that directive establishes a system of protection against expulsion measures which is based on the degree of integration of the persons concerned in the host Member State, so that the greater the degree of integration of Union citizens and their family members in that Member State, the greater the safeguards those persons may rely on against expulsion (see, to that effect, judgments of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 25, and of 17 April 2018, *B and Vomero*, C−316/16 and C−424/16, paragraph 44).

72 Article 28(3)(a) of Directive 2004/38, which provides that an expulsion decision may be taken against Union citizens who have resided in the host Member State for the previous ten years only on 'imperative grounds of public security', is consistent with the general scheme of that legislation and significantly enhances the protection of the persons to whom that provision is applicable against expulsion measures that might be imposed on them (see, to that effect, judgment of 23 November 2010, *Tsakouridis*, C−145/09, EU:C:2010:708, paragraph 28).

73 However, as the Court has held in its judgment of 17 April 2018, *B and Vomero* (C−316/16 and C−424/16, paragraph 61), Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided

for in that provision that the person concerned must have a right of permanent residence, within the meaning of Article 16 and Article 28(2) of that directive. It is apparent from Article 16(1) of Directive 2004/38 that such a right can be acquired only if the person concerned has resided legally in the host Member State for a continuous period of five years in accordance with the conditions laid down by that directive, in particular those laid down in Article 7(1) thereof (see, to that effect, judgment of 21 December 2011, *Ziolkowski and Szeja*, C−424/10 and C−425/10, EU:C:2011:866, paragraph 46), or by an EU law instrument earlier than 30 April 2006, the date of expiry of the period for the transposition of Directive 2004/38 (see, to that effect, judgment of 7 October 2010, *Lassal*, C−162/09, EU:C:2010:592, paragraphs 33 to 40).

74 A period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in EU law cannot be regarded as a 'legal' period of residence, within the meaning of Article 16(1) of Directive 2004/38, with the result that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired a right of permanent residence under that provision if, during that period of residence, he did not satisfy those conditions (see, to that effect, judgment of 21 December 2011, *Ziolkowski and Szeja*, C−424/10 and C−425/10, EU:C:2011:866, paragraphs 47 and 51).

75 In this case, while it is stated in the order for reference that K. has resided in the Netherlands continuously since February 2001, there is, however, no information in that order to permit an inference that K., notwithstanding the rejection of his asylum applications, has completed a continuous period of five years in the Netherland in accordance with the conditions laid down by Directive 2004/38 or by an earlier EU law instrument. Nothing therefore in the order for reference indicates that K. has acquired a right of permanent residence within the meaning of Article 16 of that directive. If that is the case, which it is for the referring court to determine, it may be held that the enhanced protection against expulsion provided for in Article 28(3)(a) of that directive is not applicable to him.

76 In the light of all the foregoing, the answer to the second part of the third question in Case C−331/16 is that Article 28(1) of Directive 2004/38 must be interpreted as meaning that, where the measures envisaged entail the expulsion of the individual concerned from the host Member State, that State must take account of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with the host Member State.

77 Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is not applicable to a Union citizen who does not have a right of permanent residence in the host Member State, within the meaning of Article 16 and Article 28(2) of that directive.

Costs

78 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for the national courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 the fact that a European Union citizen or a third-country national family member of such a citizen, who applies for a right of residence in the territory of a Member State, has been the subject, in the past, of a decision excluding him from refugee status under Article 1F of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 and supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, or Article 12(2) 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, does not enable the competent authorities of that Member State to consider automatically that the mere presence of that individual in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures on grounds of public policy or public security.**

   The finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State, of the personal conduct of the individual concerned, taking into consideration the findings of fact in the decision to exclude that individual from refugee status and the factors on which that decision is based, particularly the nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted. That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding.

   In accordance with the principle of proportionality, the competent authorities of the host Member State must, in addition, weigh the protection of the fundamental interest of society at issue, on the one hand, against the interests of the person concerned in the exercise of his right to freedom of movement and residence as a Union citizen and in his right to respect for private and family life.

2. **Article 28(1) of Directive 2004/38 must be interpreted as meaning that, where the measures envisaged entail the expulsion of the individual concerned from the host Member State, that State must take account of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in that Member State, the period of time**

that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with that Member State.

Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is not applicable to a European Union citizen who does not have a right of permanent residence in the host Member State, within the meaning of Article 16 and Article 28(2) of that directive.

[Signatures]

---

* Language of the case: Dutch.