DOI:10.1017/ilm.2023.46

INTRODUCTORY NOTE TO CASE C-663/21, BUNDESAMT FÜR FREMDENWESEN UND ASYL V. AA (C.J.E.U.)

BY ELSPETH GUILD*

[July 6, 2023]

Introduction

On July 6, 2023, the Court of Justice of the European Union (CJEU) delivered its judgment in C-663/21 *AA* on a preliminary reference from the Austrian Supreme Administrative Court.[1] The CJEU examined the international legal principle of non-refoulement and how it applies in EU law, particularly to expulsion decisions following the withdrawal of refugee status. It held that EU law "preclude[es] the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period."

Background

The key international convention that defines a refugee and establishes the principle of non-refoulement is the Convention on the Status of Refugees 1951 and its 1967 Protocol.[2] However, the prohibition on refoulement has been incorporated into two human rights conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Article 3) and the Convention for the Protection of All Persons from Enforced Disappearances 2010 (Article 16), both of which prohibit the sending of a person to a country where there is a real risk that they would be subject to torture (as defined) or enforced disappearance (as defined). The European Union (EU) is not a party to any of these conventions, but its member states are all parties to the Refugee Convention (and protocol), the Convention Against Torture, and all except one (Hungary) are either signatories or parties to the Enforced Disappearances Convention. The Refugee Convention permits refoulement of a refugee where there are reasonable grounds for regarding the person as a danger to the security of the country in which they are located, or where, having been convicted by a final judgment of a particularly serious crime, they constitute a danger to the community of that country.[3] The other conventions make no exception to the non-refoulement principle. The European Convention on Human Rights (ECHR) also prohibits refoulement where there is a real risk of torture, inhuman or degrading treatment, or punishment (Article 3). This is binding on all EU states but not directly part of EU law.

In 1999, the EU member states gave competence to the EU to adopt legislation to establish a Common European Asylum System and common standards and procedures for the expulsion of non-EU citizens (or their family members of any nationality). These competences have been exercised through the adoption of secondary legislation setting out minimum standards regarding the definition and procedures applicable to persons who claim to be refugees or otherwise entitled to non-refoulement and legislation on expulsion (which the EU has defined as "return"). At the same time, the EU included references to the Refugee Convention in its primary law as well as a somewhat vaguer reference to "other relevant treaties."[4] EU secondary legislation in the field confirms the compatibility of EU measures with the Refugee Convention (and other relevant conventions).

In 2000, the EU adopted the Charter of Fundamental Rights, which was confirmed as EU primary law in 2010 by treaty amendment. The Charter includes a right to asylum (Article 18), a prohibition on torture, inhuman, or degrading treatment or punishment (Article 4), and a prohibition on removal, expulsion, or extradition to a state where there is a serious risk that the person would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment (Article 19(2)). The Charter makes no exception to the non-refoulement principle regarding Articles 4 and 19(2). All EU secondary law must be consistent with the Charter. Further, the Charter itself requires that Charter rights that correspond to rights guaranteed by the EHCR shall have the same meaning and scope as those in the ECHR, although EU law may provide more extensive protection.[5] The correct interpretation of EU refugee and expulsion law to comply with the Refugee Convention, other relevant treaties, and the Charter has been the matter of substantial judicial consideration for several years.[6]

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In three judgments delivered on the same day, the CJEU sought to clarify the non-refoulement obligation. Each judgment addresses a different issue. *AA*, which is considered here, is fundamental as it determines how the principle of non-refoulement must be applied both in EU refugee and expulsion law, and in the interaction between the two fields.

The CJEU Judgment

The Austrian court requested a preliminary ruling from the CJEU to clarify two issues: first, what is the correct standard for determining whether someone who has been recognized as a refugee may be deprived of that status on the basis of a final judgment of a particularly serious crime that constitutes a danger to the community of the member state where they are present; and second, where such a person who has had their refugee status so revoked is subject to an expulsion decision, whether the non-refoulement principle in the Charter prevents a member state from sending the person to a country where there is a real risk of torture, inhumane, or degrading treatment or punishment or the death penalty.[7]

In answer to the first question, the CJEU held that EU secondary law is consistent with the Refugee Convention regarding the circumstances where someone who has been recognized as a refugee can have that status withdrawn on the grounds of a conviction for a particularly serious crime.[8] To determine what constitutes a particularly serious crime, the penalty provided for and imposed, the nature of the crime, any aggravating circumstances, the intentionality of the individual, the nature and extent of the harm caused and the procedure applied to punish it must be taken into account.[9] The seriousness must apply to one specific crime and cannot be attained by a combination of separate offences.[10] Further, the individual must constitute a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of the society where they are present.[11]

The CJEU determined that the state must take account of the consequences for of refoulement the individual or for the society of the member state where they are present. Here it specified that the prohibition on refoulement in Articles 4 and 19(2) Charter prohibit in absolute terms sending a person to a country where there is a serious or genuine risk of torture, inhuman, or degrading treatment or punishment irrespective of the person's conduct (para 36). Thus, on the one hand, the CJEU finds a parallel between EU secondary law and the Refugee Convention regarding the consequences of withdrawal of refugee status. On the other hand, it finds the non-refoulement principle to be absolute and without exception based on two provisions of the Charter—Articles 4 and 19(2) (rather than the vague words of the EU treaties: "other relevant treaties" which would include the conventions against torture and enforced disappearances).

The second question posed by the national court is whether the principle of non-refoulement also applies when a state is considering taking an expulsion decision (within the scope of EU law)[12] against an individual where the destination country proposed is one where there is a real (or genuine) risk of prohibited treatment. This question seeks to establish whether states would have to carry out an investigation into the risk of prohibited treatment at the time of considering making an expulsion decision, not only at the time of taking a decision on asylum. If such a second examination is required, the court would be required to specify the legal basis of such an obligation. The CJEU held that there is such an obligation in EU law based on the non-refoulement principle. It accepted that where an individual's refugee status has been revoked (and by extension also refused) the person must be regarded as staying "illegally"[13] and according to EU secondary law, unless an exception applies, must be subject to an expulsion decision.[14] This means that states must carry out an examination of the non-refoulement risk before taking an expulsion decision.

The source of this obligation in the first instance is, according to the CJEU, EU secondary law. But it clarifies that this measure of secondary law expresses a general rule binding on all member states when they implement that law and applies at all stages of the expulsion procedure.[15] However, the CJEU went on to find that the principle of non-refoulement is guaranteed as a fundamental right in Article 18 Charter read in conjunction with Article 33 of the Refugee Convention, as well as Article 19(2) of the Charter.[16] Thus, while an exception to non-refoulement is permissible under the Refugee Convention and Article 18 Charter, it is not permissible under Article 19(2) of the Charter.

Conclusion

This judgment is particularly important for two reasons. First, as part of a developing jurisprudence, the CJEU confirms the status of the Refugee Convention in EU law, linked both to secondary law and the Charter. While the EU is

not a party to the Convention, through the Charter articles which express those of the Refugee Convention, the latter must be respected. In this regard the CJEU states and re-states that the Charter is EU primary law.[17] This means that no change to secondary law can affect the principle of non-refoulement. Only a change to the Charter could do this, which would entail a complicated procedure engaging all the EU institutions and the member states, a process not to be entered into lightly.[18] While EU law may be more protective of refugees than the Refugee Convention (the CJEU uses the example of the prohibition of expulsion to a country where there is a real risk of the application of the death penalty), it can never be less protective. Indeed, according to academic opinion, the Charter provisions are bound to evolve with the changing jurisprudence of international human rights law but cannot fall below them.[19] The non-refoulement principle of the Refugee Convention constitutes part of EU law not simply through references made in secondary legislation, but because of the Charter and specifically Article 18.

Second, the CJEU acknowledges that the non-refoulement principle in EU law has a wider reach than that expressed in the Refugee Convention. While the Refugee Convention permits (limited) exceptions to the non-refoulement principle, which allow states to expel refugees to their countries of origin where there is a real (or genuine) risk that they will be persecuted, other international conventions which also use the term "non-refoulement" do not permit exceptions. In these, the prohibition on refoulement is absolute. However, the CJEU does not engage with the non-refoulement principle in this wider body of international human rights law. Similarly, it fails even to mention the non-refoulement principle of Article 3 ECHR in the *AA* judgment. Instead, the CJEU finds that the non-refoulement principle and its application in all expulsion procedures is based on Articles 4, 18, and 19(2) of the Charter. As EU secondary law on expulsion is currently under review, originally proposed in September 2018,[20] the importance of the CJEU's embedding of non-refoulement in all expulsion procedures by reason of the Charter is particularly significant. While amendment to secondary legislation is a relatively simple option for the EU legislator, amending the Charter is much more onerous and problematic.

So far, practitioner analysis of the judgment has focused on a different aspect: how the balance between the public interest danger and the right to protection of refugees must be made and how the consequences of return have to be considered when adopting an expulsion decision.[21] Academic analysis so far has focused on the Advocate General's opinion and some of the problematic conflations of notions there, again focusing on the serious crime element.[22] The importance of the judgment as part of a judicial project of embedding EU refugee and expulsion law in international law has yet to be fully explored.

ENDNOTES

1 Case C-663/21, Bundesamt für Fremdenwesen und Asyl v. AA, ECLI:EU:C:2023:540 (July 6, 2023) [hereinafter Judgment].

2 189 U.N.T.S. 137, *opened for signature* July 28, 1951 [hereinafter Refugee Convention]; 606 U.N.T.S. 267, *opened for signature* Jan. 31, 1967.

3 Refugee Convention, *id.*, art 33(2).

4 Article 78(1) of the Treaty on the Functioning of the European Union reads: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." *See* Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47.

5 Charter of Fundamental Rights of the European Union art. 52(3), Oct. 26, 2012, 2012 O.J. (C 326) 391.

6 *See, in particular*, C-391/16 M, ECLI:EU:C:2019:403 (May 14, 2019); C-69/21 X, ECLI:EU:C:2022:913 (Nov. 22, 2022); C-402/22, MA, ECLI:EU:C:2023:543 (July 6, 2023).

7 All member states are parties to Protocol 13 European Convention on Human Rights (ETS 187) which abolishes the death penalty.

8 Judgment ¶ 32.

9 *Id.* ¶ 30.

10 *Id.* ¶ 31.

11 *Id.* ¶ 32.

12 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98.

13 The CJEU's preferred term though one which the UN General Assembly and other UN institutions have rejected; *see* https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet_EN_PICUM.pdf.

14 Judgment ¶¶ 46–47.

15 *Id.* ¶ 49.

16 *Id.* ¶¶ 49–50.

17 C-443/14, Alo and Osso, ECLI:EU:C:2016:127 (Mar. 1, 2016); C-181/16, Gnandi, ECLI:EU:C:2018:465 (June 19, 2018); C-391/16, M, *supra* note 6.

18 For an explanation of the process *see*: https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/640167/EPRS_ATA(2019)640167_EN.pdf.

19 Olivier de Schutter, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework;* research paper requested by the European Parliament's Committee on Constitutional Affairs and commissioned and published by the Policy Department for Citizens' Rights and Constitutional Affairs, PE 571.397, Brussels (Nov. 2016), https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2016)571397.

20 Proposal for a recast of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2018) 634. View the current status of this proposal at https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-proposal-for-a-recast-of-the-return-directive.

21 ELENA Weekly Legal Update (July 20, 2023), https://us1.campaign-archive.com/?u=8e3ebd297b1510becc6d6d690&id=bc199b7688#4.

22 Janja Simentić Popović, *The Dangers of Conflation*, VERFASSUNGSBLOG (July 8, 2023), https://verfassungsblog.de/the-dangers-of-conflation.

DOI:10.1017/ilm.2023.46

CASE C-663/21, BUNDESAMT FÜR FREMDENWESEN UND ASYL V. AA (C.J.E.U.)*

[July 6, 2023]

JUDGMENT OF THE COURT (First Chamber)
6 July 2023**

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test – Directive 2008/115/EU – Return of illegally staying third-country nationals – Postponement of removal)

In Case C–663/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 20 October 2021, received at the Court on 5 November 2021, in the proceedings

Bundesamt für Fremdenwesen und Asyl

v

AA,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, P.G. Xuereb, T. von Danwitz and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2022, after considering the observations submitted on behalf of:

- the Austrian Government, by A. Posch, J. Schmoll and V.-S. Strasser, acting as Agents,
- the Belgian Government, by M. Jacobs, A. Van Baelen and M. Van Regemorter, acting as Agents,
- the Czech Government, by A. Edelmannová, M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by J. Möller and A. Hoeschet, acting as Agents,
- the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and C.S. Schillemans, acting as Agents,
- the European Commission, by A. Azéma, B. Eggers, L. Grønfeldt and A. Katsimerou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2023, gives the following

Judgment

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

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** Language of the case: German.

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), and of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98), in particular Article 5 thereof.

2. The request has been made in proceedings between AA, a third-country national, and the Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum, Austria) ('the Office'), concerning the decision adopted by the latter to withdraw his refugee status, to refuse to grant him subsidiary protection status or a residence permit on grounds worthy of consideration, to issue a return decision accompanied by a prohibition on residence against him and to set a period for voluntary departure.

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 ('the Geneva Convention').

4. Article 33 of that 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.
>
> 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.'

DIRECTIVE 2008/115

5. Article 2(2) of Directive 2008/115 provides:

> 'Member States may decide not to apply this Directive to third-country nationals who:
>
> (a) are subject to a refusal of entry in accordance with Article 13 of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;
>
> (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.'6 Article 3, point 3, of that directive is worded as follows:
>
> 'For the purposes of this Directive the following definitions shall apply:
>
> . . .
>
> (3) "return" means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

– his or her country of origin, or

– a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

– another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted'.?

7. Article 5 of that directive states:

'When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.'

8. Article 6(1) of that directive provides:

'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.'

9. Article 8(1) of Directive 2008/115 is worded as follows:

'Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted ... or if the obligation to return has not been complied with within the period for voluntary departure granted ....'

10. Article 9(1)(a) of that directive provides:

'Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement ...'

DIRECTIVE 2011/95

11. Recital 16 of Directive 2011/95 reads as follows:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [("the Charter")]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.'

12. Article 2(d) of that directive states:

'For the purposes of this Directive the following definitions shall apply:

...

(d) "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country

of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.'

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

'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.'

14. Article 21(2) of that directive is worded as follows:

'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.'

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

15. AA entered Austria illegally on 10 December 2014 and lodged an application for international protection on the same day. By decision of the Office of 22 December 2015, he was granted refugee status.

16. On 22 March 2018, AA was given a custodial sentence of one year and three months and a fine of 180 on the scale of daily penalty units for committing the offences of dangerous threatening behaviour, destroying or damaging the property of others, the unauthorised handling of drugs and drug trafficking. On 14 January 2019, AA was given a custodial sentence of three months for the offences of wounding and dangerous threatening behaviour. On 11 March 2019, he was sentenced to a term of imprisonment of six months for attempted wounding. Those custodial sentences were commuted to suspended sentences.

17. On 13 August 2019, AA was fined for aggressive behaviour towards a member of a public supervisory body.

18. By decision of 24 September 2019, the Office withdrew AA's refugee status, refused to grant him subsidiary protection status or a residence permit on grounds worthy of consideration, issued a return decision accompanied by a prohibition on residence against him and set a period for voluntary departure, while stating that his removal was not permitted.

19. AA lodged an appeal against the Office's decision of 24 September 2019 before the Bundesverwaltungsgericht (Federal Administrative Court, Austria). He subsequently stated that he was withdrawing that appeal in so far as it related to the part of the operative part of that decision finding that his removal would be unlawful.

20. On 16 June and 8 October 2020, AA was sentenced to terms of imprisonment of four and five months for offences of wounding and dangerous threatening behaviour, without the previous suspended sentences being revoked.

21. By judgment of 28 May 2021, the Bundesverwaltungsgericht (Federal Administrative Court) annulled the contested parts of the Office's decision of 24 September 2019. That court found that AA had been convicted by a final judgment of committing a particularly serious crime and that he constituted a danger to the community. Nevertheless, it considered that it was necessary to weigh up the interests of the Member State of asylum against those of

the third-country national concerned as a beneficiary of international protection, taking into account the extent and nature of the measures to which that person would be exposed in the event of revocation of that protection. Given that AA would be exposed, if returned to his country of origin, to a risk of torture or death, that court held that his interests outweighed those of the Republic of Austria.

22. The Office brought an appeal on a point of law against that judgment before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), which is the referring court.

23. That court asks whether it is necessary, after it has been established that the third-country national concerned has been convicted by final judgment of committing a serious crime and constitutes a danger to the community, to carry out, for the purposes of the application of Article 14(4)(b) of Directive 2011/95, a weighing up of the interests, taking into consideration the consequences of any return of that third-country national to his country of origin.

24. In addition, that court has doubts as to the compatibility with Directive 2008/115 of the adoption of a return decision in cases where international protection has been withdrawn but it has already been established that removal to the country of origin is unlawful. In such a situation, the stay of a third-country national would be tolerated in Austria, without that stay being lawful or that third-country national being the subject of an actual return decision.

25. In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> (1) In the assessment as to whether the asylum status previously granted to a refugee by the competent authority can be revoked on the ground set out in Article 14(4)(b) of Directive [2011/95], must the competent authority carry out a weighing up of interests in such a way that revocation requires that the public interests in forced return must outweigh the refugee's interests in the continuation of the protection afforded by the State of refuge, whereby the reprehensibility of a crime and the potential danger to society must be weighed against the foreign national's interests in protection – including with regard to the extent and nature of the measures with which he or she is threatened?
>
> (2) Do the provisions of Directive [2008/115], in particular Articles 5, 6, 8 and 9 thereof, preclude a situation under national law in which a return decision is to be adopted in respect of a third-country national whose previous right of residence as a refugee is withdrawn [following] the revocation of asylum status, even if it is already declared at the time of adoption of the return decision that his or her removal is not permissible for an indefinite period of time on account of the principle of non- refoulement, and this is also declared capable of having legal force?'

Consideration of the questions referred

THE FIRST QUESTION

26. By its first question, the referring court asks, in essence, whether Article 14(4)(b) of Directive 2011/95 must be interpreted as meaning that the application of that provision is subject to a condition that it must be established, after weighing up the interests involved, that the public interest in the return of the third- country national concerned to his or her country of origin outweighs that third-country national's interest in the continuation of international protection, having regard to the extent and nature of the measures to which that third-country national might be exposed if he or she were to be returned to his or her country of origin.

27. 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.

28. It follows from paragraphs 27 to 42 of today's judgment, *Commissaire général aux réfugiés et aux apatrides (Refugié who has committed a serious crime)* (C–8/22), that the application of Article 14(4)(b) is subject to the fulfilment of two separate conditions relating, first, to the third-country national concerned having been convicted by a

final judgment of a particularly serious crime and, secondly, to it having been established that that person constitutes a danger to the community of the Member State in which he or she is present.

29. Therefore, although the questions referred in the present case do not relate to the first of those conditions, it should be noted that it is for the referring court, as the Advocate General observed in point 51 of his Opinion, to determine whether that condition is satisfied, by satisfying itself that at least one of the criminal offences for which AA has been convicted by a final judgment must be classified as a 'particularly serious crime' within the meaning of Article 14(4)(b).

30. In that regard, it should be noted that it follows from paragraphs 23 to 47 of today's judgment, *Staatssecretaris van Justitie en Veiligheid (Particularly serious crime)* (C–402/22), that a crime which, in view of its specific features, is exceptionally serious, in so far as it is one of the crimes which most seriously undermine the legal order of the community concerned, constitutes a 'particularly serious crime' within the meaning of that provision. In order to assess whether a crime for which a third-country national has been convicted by a final judgment has such a degree of seriousness, account must be taken, inter alia, of the penalty provided for and the penalty imposed for that crime, the nature of that crime, any aggravating or mitigating circumstances, whether or not that crime was intentional, the nature and extent of the harm caused by that crime, and the procedure applied to punish it.

31. The Court held, in particular, in paragraph 39 of that judgment, that the application of Article 14(4)(b) of Directive 2011/95 can be justified only in the event of a conviction by a final judgment for a crime which, taken individually, falls within the concept of 'particularly serious crime'. That presupposes that it has the degree of seriousness referred to in the preceding paragraph of the present judgment, it being specified that that degree of seriousness cannot be attained by a combination of separate offences, none of which constitutes per se a particularly serious crime.

32. As regards the second of the conditions referred to in paragraph 28 above, it is apparent from paragraphs 46 to 65 of today's judgment in *Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)* (C–8/22) that a measure referred to in Article 14(4)(b) may be adopted only where the third-country national concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State in which he or she is present. In the context of the assessment of the existence of that threat, it is for the competent authority to carry out an assessment of all the circumstances of the individual case concerned.

33. In addition, as noted in paragraphs 66 to 70 of that judgment, that authority must weigh up, on the one hand, the threat represented by the third-country national concerned to one of the fundamental interests of the society of the Member State in which he or she is present and, on the other hand, the rights which must be guaranteed, in accordance with Directive 2011/95, to persons fulfilling the substantive conditions of Article 2(d) of that directive, in order to determine whether the adoption of a measure referred to in Article 14(4)(b) of that directive constitutes a measure proportionate to that threat.

34. In the present case, it is necessary, in the light of the questions raised by the referring court, to determine whether, in the context of that balancing exercise, Article 14(4)(b) of that directive also requires Member States to take account of the consequences, for the third-country national concerned or for the society of the Member State in which that third-country national is present, of his or her possible return to his or her country of origin.

35. In that regard, it is true that the situations referred to in Article 14(4) of Directive 2011/95, in which the Member States may revoke refugee status, correspond, in essence, to those in which Member States may refoule a refugee under Article 21(2) of that directive and Article 33(2) of the Geneva Convention (see, to that effect, 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 93).

36. However, while Article 33(2) of the Geneva Convention denies the refugee the benefit, in such circumstances, of the principle of non-refoulement to a country where his life or freedom would be threatened, Article 21(2) of Directive 2011/95 must, as is confirmed by recital 16 thereof, be interpreted and applied in a

way that observes the rights guaranteed by the Charter, in particular Article 4 and Article 19(2) thereof, which prohibit in absolute terms torture and inhuman or degrading punishment or treatment irrespective of the conduct of the person concerned, as well as removal to a State where there is a serious risk of a person being subjected to such treatment. Therefore, Member States may not remove, expel or extradite a foreign national where there are substantial grounds for believing that he or she will face a genuine risk, in the country of destination, of being subjected to treatment prohibited by Article 4 and Article 19(2) of the Charter (see, to that effect, 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 94).

37. Thus, where the refoulement of a refugee covered by one of the scenarios referred to in Article 14(4) and Article 21(2) of Directive 2011/95 would expose that refugee to the risk of his fundamental rights, as enshrined in Article 4 and Article 19(2) of the Charter, being infringed, the Member State concerned may not derogate from the principle of non-refoulement under Article 33(2) of the Geneva Convention (see, to that effect, 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 95).

38. In those circumstances, in so far as Article 14(4) of Directive 2011/95 provides, in the scenarios referred to therein, for the possibility for Member States to revoke 'refugee status' as defined in that directive, while Article 33(2) of the Geneva Convention, for its part, permits the refoulement of a refugee covered by one of those scenarios to a country where his or her life or freedom would be threatened, EU law provides more extensive international protection for the refugees concerned than that guaranteed by that convention (see, to that effect, 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 96).

39. It follows that, in accordance with EU law, the competent authority may be entitled to revoke, pursuant to Article 14(4)(b) of Directive 2011/95, the refugee status granted to a third-country national, without, however, necessarily being authorised to remove him or her to his or her country of origin.

40. At a procedural level, such removal would involve the adoption of a return decision, in compliance with the substantive and procedural safeguards provided for in Directive 2008/115, which provides, inter alia, in Article 5 thereof, that the Member States are required, when implementing that directive, to respect the principle of non-refoulement.

41. Therefore, the revocation of refugee status, pursuant to Article 14(4) of Directive 2011/95, cannot be regarded as implying the adoption of a position on the separate question of whether that person can be deported to his or her country of origin (see, to that effect, judgment of 9 November 2010, *B and D*, C–57/09 and C–101/09, EU:C:2010:661, paragraph 110).

42. Accordingly, the consequences, for the third-country national concerned or for the community of the Member State in which that third-country national is present, of that national's potential return to his or her country of origin are to be taken into account not when the decision to revoke refugee status is adopted but, as the case may be, where the competent authority considers adopting a return decision against that third- country national.

43. In the light of the foregoing, the answer to the first question is that Article 14(4)(b) of Directive 2011/95 must be interpreted as meaning that the application of that provision is conditional on the competent authority establishing that the revocation of refugee status constitutes a proportionate measure having regard to the danger posed by the third-country national concerned to a fundamental interest of the society of the Member State in which that third-country national is present. To that end, that competent authority must balance that danger against the rights which must be guaranteed, in accordance with that directive, to persons fulfilling the substantive conditions of Article 2(d) of that directive, without, however, that competent authority also being required to verify that the public interest in the return of that third-country national to his or her country of origin outweighs that third-country national's interest in the continuation of international protection, in the light of the extent and nature of the measures to which that third-country national would be exposed if he or she were to return to his or her country of origin.

THE SECOND QUESTION

44. By its second question, the referring court asks, in essence, whether Directive 2008/115, in particular Article 5 thereof, must be interpreted as precluding the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.

45. It should be noted that, first, subject to the exceptions laid down in Article 2(2) of Directive 2008/115, that directive applies to any third-country national staying illegally on the territory of a Member State. Moreover, where a third-country national falls within the scope of that directive, he or she must therefore, in principle, be subject to the common standards and procedures laid down by that directive for the purpose of his or her removal, as long as his or her stay has not, as the case may be, been regularised (judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C–69/21, EU:C:2022:913, paragraph 52).

46. From that point of view, it follows from Article 6(1) of Directive 2008/115 that, once the unlawful nature of residence has been established, any third-country national must, without prejudice to the exceptions provided for in paragraphs 2 to 5 of that article and in strict compliance with the requirements laid down in Article 5 of that directive, be the subject of a return decision, which must identify, among the third countries referred to in Article 3(3) of Directive 2008/115, the country to which the third-country national must return (judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C–69/21, EU:C:2022:913, paragraph 53).

47. In that regard, a third-country national whose refugee status has been revoked must be regarded as staying illegally, unless he or she has been granted leave to remain on another basis by the Member State in which he or she is present.

48. Furthermore, a Member State may not remove an illegally staying third-country national under Article 8 of Directive 2008/115 unless a return decision in respect of that third-country national has first been adopted in compliance with the substantive and procedural safeguards established by that directive (judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C–69/21, EU:C:2022:913, paragraph 54).

49. Secondly, Article 5 of Directive 2008/115, which is a general rule binding on the Member States as soon as they implement that directive, obliges the competent national authority to observe, at all stages of the return procedure, the principle of non-refoulement, which is guaranteed, as a fundamental right, in Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, and in Article 19(2) of the Charter. That is the case, in particular, where that authority is contemplating, after hearing the person concerned, the adoption of a return decision in relation to that person (see, to that effect, judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C–69/21, EU:C:2022:913, paragraph 55).

50. Therefore, Article 5 of Directive 2008/115 precludes a third-country national from being the subject of a return decision where that decision concerns, as the country of destination, a country in respect of which substantial grounds have been shown for believing that, if that decision is implemented, that third-country national would be exposed to a real risk of treatment contrary to Article 18 or Article 19(2) of the Charter (judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C–69/21, EU:C:2022:913, paragraph 56).

51. That is indeed the case where, in a situation such as that at issue in the main proceedings, the competent authority intends to return a third-country national to his or her country of origin but has already found that the principle of non-refoulement precludes such a return.

52. In the light of the foregoing, the answer to the second question is that Article 5 of Directive 2008/115 must be interpreted as precluding the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.

Costs

53. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **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, must be interpreted as meaning that the application of that provision is conditional on the competent authority establishing that the revocation of refugee status constitutes a proportionate measure having regard to the danger posed by the third-country national concerned to a fundamental interest of the society of the Member State in which that third-country national is present. To that end, that competent authority must balance that danger against the rights which must be guaranteed, in accordance with that directive, to persons fulfilling the substantive conditions of Article 2(d) of that directive, without, however, that competent authority also being required to verify that the public interest in the return of that third-country national to his or her country of origin outweighs that third-country national's interest in the continuation of international protection, in the light of the extent and nature of the measures to which that third-country national would be exposed if he or she were to return to his or her country of origin.**

2. **2. Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, must be interpreted as precluding the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.**

[Signatures]