



Once a criminal, always a threat?

Investigating whether the Dutch practice of applying Article 1F Refugee Convention criteria to Article 27 Citizenship Directive conforms with EU law

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1. Introduction

In 2007, Mr A was denied asylum in the Netherlands pursuant to Article 1(F) Refugee Convention.¹ A, an Afghan national, was an officer of the Khadamat-e Aetla'at-e Dawlati (KhAD) and the Wazarat-e Amaniat-e Dowlati (WAD),² two intelligence agencies that were active during the 1980s in Afghanistan. Since the Dutch Immigration and Naturalisation Service (*Immigratie- en Naturalisatielidest*, hereinafter IND) considered his work serious enough to presume he committed war crimes,³ A was excluded from international protection based on Article 1(F) Refugee Convention (hereinafter Article 1(F)). Forced to leave the Netherlands, A moved with his Dutch wife to Belgium. In Belgium A's wife made use of her European Union (EU) right to free movement by activating the Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizenship Directive).⁴ Because of this, A received a Belgian residence permit derived from his wife's residence rights.

In 2011, the couple decided to move back to the Netherlands to be able to visit their children. However, to receive a Dutch residence permit, A's exclusion order⁵ – based on Article 1(F) Refugee Convention – needed to be lifted. His application to lift the exclusion order was rejected by the Dutch immigration authorities. The Administrative Jurisdiction Division of the Council of State (hereinafter AJD) later confirmed this decision on 16 June 2015.⁶

1.1 Dutch law on EU citizenship rights of persons excluded on the basis of 1F

The present case illustrates the Dutch policy, advocated by the Dutch Ministry of Security and Justice and applied by the AJD in its case law, which uses an exclusion order based on Article 1(F) to justify a subsequent denial of entry based on Article 27 Citizenship Directive.⁷ In essence, when third country nationals are denied international protection under Article 1(F), they are refused any form of residence permit. No exceptions are permitted, even if the residence right is derived from an EU citizen's right of free movement and their adjacent right to be joined by their family members under the Citizenship Directive.

According to the interpretation of the AJD, when the 1(F) presumption has been legally confirmed, this in itself constitutes a direct threat to the Dutch legal order and the calm of the Dutch population, fundamental interests of society within the meaning of Article 27(2) Citizenship

¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

² The KhAD was a security and intelligence agency of Afghanistan, which also served as the secret police during the Soviet occupation. It was replaced in 1986 by the WAD. For more information, see UNHCR, *Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992* (May 2008) www.refworld.org/docid/482947db2.html accessed 27 April 2016.

³ AJD 9 December 2010, ECLI:NL:RVS:2015:2008.

⁴ Council Directive 2004/38/EC 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 [2004] OJ L 158/77.

⁵ There is a distinction between an 'entry ban' and a 'undesired person' status. An entry ban follows from the Return Directive (2008/115/EC), and can therefore only be applied to third country nationals (see Art 2(1) Return Directive). The "undesired person" status is a national measure, laid down in Art 67 Aliens Act 2000, and is, since the enactment of the Return Directive, only to be applied to those that do not fall under the scope of the Return Directive, like European Union citizens. (See also: District Court of The Hague 9 June 2016, ECLI:NL:RBDHA:2016:6389).

⁶ AJD 16 June 2015, ECLI:NL:RVS:2015:2008. In the Netherlands, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), serves as the highest administrative court in migration cases.

⁷ See also AJD 12 September 2008, ECLI:NL:RVS:2015:BF1415; AJD 28 January 2016, ECLI:NL:RVS:2016:270, JV 2016/58, annotation Battjes. See further section 3 of this expert opinion.

Directive.⁸ The fact that a person is excluded from international protection because he falls under Article 1(F) makes that he fulfils the requirement of a 'genuine and sufficiently serious threat'.⁹ By interpreting the European Court of Justice (CJEU) judgment of *B and D*¹⁰ by analogy, the AJD reasoned that no assessment of the future conduct of the alien is necessary in the application of Article 27 Citizenship Directive because aliens are excluded from international protection even if their conduct is not a current threat to the Member State in question.¹¹ Because 1(F) crimes are by their nature genuine and sufficiently serious, they are also current and the threat is considered to be 'present' according to the AJD. Therefore, there is no need in assessing the possibility of future crimes being committed by the alien.¹² No proportionality test is carried out and the behaviour of the individual is not assessed. By adopting such an interpretation, the Dutch policy draws a link between Article 1(F) Refugee Convention and Article 27 Citizenship Directive, creating a blanket rejection of entry and residence rights that directly affects the right to free movement of Union citizens and raises concerns about its compatibility with EU law.

1.2 Research question and methodology

In light of the foregoing, this study aims to answer the following question:

Do 'serious reasons for considering' a person guilty of a crime against peace, a war crime or a crime against humanity imply that his personal conduct is deemed forever to constitute a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' regardless of developments in time and place?

The present study analyses the Dutch application of Article 27 Citizenship Directive in cases of individuals excluded under 1(F). It scrutinises the Dutch interpretation of Article 27(2) Citizenship Directive, by comparing it with the interpretation of the CJEU and legal academic scholars, with the aim of investigating whether it is in conformity with European Union law. In order to put the Dutch policy into perspective by embedding it in the larger context of the European Union, the study also analyses the policy of three different Member States making use of a functional comparative approach.¹³ These three legal orders were chosen because they all represent a different legal system. The Dutch legal order is influenced by French, German and common law, and therefore forms its own legal system based on European ius commune.¹⁴ Belgium represents the French area of law,¹⁵ the UK is the main seat of the common law legal system and Germany represents the German area of law.

The research limits itself to the application of Article 27 Citizenship Directive and does not assess the 'entry ban' nor the legal consequences of the Schengen Information System alert, which prohibits entry of individuals deemed a threat to the Schengen Member States.

⁸ AJD 16 June 2015, ECLI:NL:RVS:2015:2008, 7.6.

⁹ AJD 12 September 2008, ECLI:NL:RVS:2008:BF1415.

¹⁰ CJEU Joined Cases C-57/09 and C-101/09 *B and D* [2010], para 105, see also section 2.1.

¹¹ AJD 16 June 2015, ECLI:NL:RVS:2015:2008 para 7.7.

¹² *ibid* para 7.7-7.8.

¹³ Asking for the function of a provision in the different legal systems: Zweigert/Kötz, *Einführung in die Rechtsvergleichung: Introduction to Comparative Law* (Tübingen, Mohr Siebeck, 1996, 3rd edition) p 33. Even though it is an old work it is still the most authoritative one in comparative law. The methodological aspects are transferable to public law, even though the book focusses on the comparison of private law.

¹⁴ *ibid* p 100 f.

¹⁵ *ibid* p 99.

1.3 Relevance of the research

This research is relevant because the grounds for restricting free movement laid down in Article 27 Citizenship Directive have been interpreted in various ways throughout the European Union, they are unclear, and might lead to abuse or non-conformity with the Directive.¹⁶ Article 27 was one of the least transposed articles, with a large percentage of Member States implementing it in an incomplete or incorrect manner.¹⁷ Some Member States do not provide for enough conceptual framing of the grounds, while some national laws still provide for automatic expulsions of citizens with previous serious criminal convictions. The public policy ground was the most contentious concept amongst Member States.¹⁸

Secondly, the connection between the increased fear of terrorist threat in the European Union and the use of the 1(F) exclusion clause in Refugee Determination Procedures as well as Article 27 Citizenship Directive highlights the current relevance of the study and the need for a harmonised interpretation of the provisions. The 'number of terrorist incidents has been on the increase for more than 10 years'¹⁹. In parallel, in the past decade and a half, the attention and use of the exclusion clause have increased in Refugee Determination processes in the European Union, while its scope has also been broadened in some Member States.²⁰ In the Netherlands in particular, 'the number of 1(F)-excluded individuals is relatively high compared to States that consider inclusion first'.²¹

1.4 Research outline

Section 2 of this expert opinion examines the purpose and interpretation of the requirements of the application of Article 12(2) Qualification Directive²², transposing Article 1(F) into European Union Law, (section 2.1.) and of Article 27 Citizenship Directive (section 2.2.). It then analyses the Dutch

¹⁶ Committee of Civil Liberties, Justice and Home Affairs, 'Report on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' (2008/2184(INI)), p 7.

¹⁷ See graph 'Overview by article' in: Commission of the European Communities, 'Report on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' COM(2008) 840 final, p 13.

¹⁸ Committee of Civil Liberties, Justice and Home Affairs ('2008/2184(INI)'), pp 30-39. Kostakopoulou and Ferreira argue that this is due to a 'the fact that there is not a 'uniform scale of values' across all EU Member States, thereby leading the court to accept a certain margin of appreciation in determining the precise definitional content of public policy': D Kostakopoulou and N Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship', *Warwick School of Law, Legal Studies Paper* (2013) papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722 accessed 25 May 2016, p 23.

¹⁹ EUROPOL European Law Enforcement Agency, 'European Union Terrorism Situation and Trend Report 2015' (2015), p 5.

See also Datagraver, 'People killed by terrorism per year in Western Europe 1970-2015' (2016)

www.datagraver.com/case/people-killed-by-terrorism-per-year-in-western-europe-1970-2015 and P Nesser, 'Toward an Increasingly Heterogeneous Threat: A Chronology of Jihadist Terrorism in Europe 2008-2013', *Studies in Conflict & Terrorism* (2014) pp 449-453.

²⁰ M Bolhuis and J Van Wijk, 'Study on the Exchange of Information between European Countries Regarding Persons Excluded from Refugee Status in Accordance with Article 1F of the Refugee Convention' (Norwegian Directorate of Immigration, 2015), p 4. See on the broader scope of application in the United Kingdom eg G Gilbert, 'Exclusion under Article 1F since 2001: Two Steps Backwards, One Step Forward' (2014) repository.essex.ac.uk/11695/ accessed on 30 May 2016.

²¹ M Bolhuis and J Van Wijk, 'Study on the Exchange of Information between European Countries Regarding Persons Excluded from Refugee Status in Accordance with Article 1F of the Refugee Convention' (Norwegian Directorate of Immigration 2015), p 16.

²² Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304.

interpretation of Article 27 Citizenship Directive in cases of 1(F) excluded individuals. This leads to the conclusion that a 1(F) excluded person cannot automatically be considered a threat to public policy or security as defined by Article 27 Citizenship Directive (section 2.3.).

In section 3, the Dutch law and practice on the application of Article 12(2) Qualification Directive (section 3.1.) and of Article 27 Citizenship Directive (section 3.2.) is analysed. Particular attention is given to the Dutch use of blanket rejections of applications based on a previous exclusion under Article 1(F) Refugee Convention.

Section 4 comprises a comparative analysis of the policy in Germany, the United Kingdom and Belgium. It concludes that in the three Member States analysed, the application of Article 27 Citizenship Directive to individuals excluded under 1(F) diverges from the Dutch interpretation (section 4.4.).

Lastly, the expert opinion reasons that the analysed Dutch policy is not in conformity with European law because a person excluded under Article 1(F) cannot be considered a present threat to public order regardless of the circumstances and of the time elapsed after the commitment of the crime that led to that exclusion (section 5).

2 European Union Legislation

Article 12(2) Qualification Directive, which transposes 1(F) Refugee Convention and Article 27 Citizenship Directive operate under two distinct legal systems. The Qualification Directive is part of the Common European Asylum System (CEAS), which was conceived to harmonise common minimum standards and cooperation between Member States in the domain of asylum. The Citizenship Directive, on the other hand, is an integral part of the Area of Freedom, Security and Justice (AFSJ) and acts in an entirely different domain, regulating the right of citizens of the Union and their family members to move and reside in the territory of the Member States.

As a result, the scope of application of the two instruments is considerably different. The Citizenship Directive applies to 'any person having the nationality of a Member State' and their family members²³, while the Qualification Directive applies to third-country nationals or stateless persons who make an application for international protection in the territory of the Member States.²⁴ Thus, a person who falls within the scope of the Qualification Directive will rarely fall under the scope of the Citizenship Directive at the same point in time, and if so, would probably make use of the stronger protection adduced from the latter instead of going through the process of applying for asylum. In order to be able to follow the Dutch authorities' and courts' reasoning regarding the application of the Art 12(2) Qualification Directive requirements in the assessment of the 'present threat' under Article 27 Citizenship Directive it is necessary to first discuss separately the purpose and interpretation of the requirements of the application of Article 12(2) Qualification Directive and of Article 27 Citizenship Directive.

2.1 Article 12(2) Qualification Directive

2.1.1 Purpose

Article 12(2) Qualification Directive draws its content from Article 1(F) Refugee Convention, fully incorporating the meaning, purpose and scope of exclusion from refugee status. Such an overlap between European and international legislation is not surprising, since the Qualification Directive itself describes the Geneva Convention as the 'cornerstone of the international legal regime for the protection of refugees'²⁵, the application of which is explicitly guided by the Directive²⁶. In order to properly analyse the Qualification Directive provision, it is necessary to evaluate Article 1(F) Refugee Convention.

Article 1F Refugee Convention excludes from international protection those individuals who, despite facing a well-founded fear of persecution that would qualify them as refugees under Article 1(A) Refugee Convention, do not deserve to be granted refugee status. It must be noted that the primary *ratio* for such a rule is not to protect the public order or the public safety of the country of refuge, but rather to preserve the credibility and the integrity of the asylum system. 'If state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound

²³ See Art 2(1) for the definition of 'Union citizen' and Art 2(2) for the definition of 'family member'.

²⁴ Art 1 Qualification Directive.

²⁵ Recital 3 of the Preamble to the Qualification Directive.

²⁶ Recital 23 of the Preamble to the Qualification Directive.

to the Convention'²⁷. It follows directly that the exclusion under these provisions is not conditional on the person concerned representing a present danger to the host Member State.²⁸

A second purpose of this Article is to prevent serious criminals from being able to evade prosecution and punishment for the crimes they have committed, by availing themselves of the shield provided by the refugee status. The exclusion is therefore also meant to ensure that a person cannot avoid being returned to his country of origin in order to be prosecuted for his or her criminal acts.²⁹ This is reflected by the wording of the three particular categories of acts singled out in Article 1(F), which refer to whoever '(a) 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) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) has been guilty of acts contrary to the purposes and principles of the United Nations'.

The interpretation of the meaning of various parts of Article 1(F) Refugee Convention has been object of debate both in doctrine and in courts. The next paragraph will focus on one of the most controversial aspects, i.e. the notion of 'serious reasons for considering'.

2.1.2 The meaning of 'serious reasons for considering'

There has been a long debate as to the interpretation of 'serious reasons for considering', since this term represents a rather non-technical and vague definition. It is widely accepted that the exclusion clauses of Article 1(F) should be applied by authorities in a restrictive manner, because of its burdensome consequences on the individual and because of it being a quite complex mechanism, incorporating elements of refugee law, criminal law and extradition law. As a consequence, decision makers must adhere to strict procedural safeguards and standards of fairness when applying this provision.³⁰

An initial interpretation suggested that the 'serious reasons for considering' test is just a standard of evidentiary sufficiency, which sets a negative threshold at level of allegations that are 'more than suspicion or conjecture'³¹. A second interpretation sets a higher threshold, requiring the affirmative standard of 'clear and convincing evidence'.³² Even though exclusion proceedings do not equate with a full criminal trial, the standard of proof required by the term 'serious reasons' has to be a higher threshold than a mere reasonable suspicion.

According to the UN High Commissioner for Refugees (UNHCR), although in asylum procedures the burden of proof is usually shared between the applicant and the State involved, the exceptional nature of the exclusion clauses under Article 1(F) shifts the burden entirely to the State

²⁷ See J Hathaway, M Foster, '*The Law of Refugee Status, Second Edition*' (Cambridge, Cambridge University Press, 2014), p 525. The CJEU held in Case in Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2010], para. 104 that '(the purpose of Art. 1F) is to maintain the credibility of the protection system'. See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992), para 147, available at www.unhcr.org/4d93528a9.pdf accessed 17 May 2016.

²⁸ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 105.

²⁹ United Kingdom Home Office, *Asylum Policy Instructions - Exclusion: Art 1F of the Refugee Convention (v 5.0)* (2012), p 4.

³⁰ M Bliss, 'Serious Reasons for Considering: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses', *International Journal of refugee Law* (2000), p 93.

³¹ J Hathaway, M Foster, '*The Law of Refugee Status, Second Edition*' (Cambridge, Cambridge University Press, 2014), p 535. The authors describe this threshold as 'far too low'.

³² Federal Court of Canada, *Cardenas v Canada* (Minister of Employment and Immigration), 1994; Federal Court of Australia, *WAKN v. Minister for Immigration and Multicultural and Indigenous Affairs*, 2004.

in providing reasons to justify the exclusion.³³ Moreover, this burden of proof should regard not only the seriousness of the evidentiary picture, but also the individual responsibility of the person excluded. Member States, however, enjoy a certain degree of discretion with regards to the implementation of these criteria. Some of them, like the Netherlands, adopted the standard of a 'personal knowing and participation', as will be further elaborated upon in section 3.³⁴

2.1.3 Present threat

In the landmark case *B and D* the German Federal Administrative Court (*Bundesverwaltungsgericht*, hereinafter *BVerwG*) had asked the CJEU whether 'exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon the person concerned continuing to represent a danger for the host Member State'. The CJEU answered that an exclusion can be based only on past behaviour and that the threat no longer needs to be present.³⁵ It considered that the purpose of Article 1(F) Geneva Convention and Article 12(2) Qualification Directive is to exclude people from refugee status who are undeserving of international protection and to avoid that people who committed serious crimes could escape their criminal responsibility.³⁶ Furthermore, the systematic interpretation of the Directive 2011/95 leads to the conclusion that the present threat has to be dealt with under Article 14(4) Qualification Directive (withdrawal of or refusal to renew refugee status) and Article 21(2) Qualification Directive (exception from non-refoulement) and not under Article 12(2) Qualification Directive.³⁷

2.1.4 Proportionality test

According to UNHCR there is a need for a proportionality test, balancing 'between the offences committed by the individual and the extent to which his fear of persecution is well founded'³⁸. In a recent statement, UNHCR observed that '(a) proportionality test must assess all the consequences of applying the exclusion clauses. In reaching a decision on exclusion, it is therefore necessary to weigh the degree and the likelihood of persecution feared against the seriousness of the acts committed'.³⁹

Nonetheless, State practice on this issue has been far from uniform, with courts in most States rejecting such an approach. They generally refer to the existence of alternative human rights

³³ UNHCR, *Background Note on Exclusion Clauses: Article 1F Refugee Convention relating the Status of Refugees* (2003), para 38.

³⁴ TP Spijkerboer, BP Vermeulen, *Vluchtelingenrecht* (Nijmegen, Ars Aequi Libri, 2005), p 101.

³⁵ *Ibid*, para 105. This judgment was followed by *BVerwG* 10 C 2.10 [2011], para 25. See also S Kessler, § 3 AsylG in *Hofmann (ed.), Ausländerrecht: Commentary* (Baden-Baden, Nomos, 2016, 2nd edition) para 9.

³⁶ *Ibid*.

³⁷ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 104; Federal Administrative Court Germany (*BVerwG*) 10 C 2.10 [2011], para 25; implemented by section 3(4) and section 73(1) first sentence Asylum Act each in connection with section 60 para 8 first sentence.

³⁸ See drafting discussion of the 1951 Convention. In particular, the Statement of the President, UN Doc. A/CONF.1/SR.29 (19 July 1951), at 23.

³⁹ UNHCR, *Statement on Article 1F of the 1951 Convention issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive* (2016) www.refworld.org/pdfid/4a5de2992.pdf accessed 13 May 2016, p 33. In the same Statement, UNHCR affirms that 'in this context, the fact that there is another effective and accessible form of protection against removal, without the rights attached to refugee status, is a relevant consideration in the exclusion assessment. In other words, an exclusion assessment should include review of the accessibility and likely grant of other human rights guarantees under human rights instruments, in particular the protection against removal to torture or to other cruel, inhuman or degrading treatment or punishment'.

protection mechanisms that would apply to the individual. They also hold that a form of balancing is already implied in the 'serious reasons for considering' test.⁴⁰

The CJEU shares this view.⁴¹ Article 12(2) Qualification Directive reads that a person is excluded from being a refugee where the provisions of Article 1(F) apply. This does not seem to leave Member States space to balance the extent of persecution feared against the gravity of the acts at the basis of the exclusion. The CJEU indeed ruled in *B and D* that 'the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) [Qualification Directive] is not conditional on an assessment of proportionality in relation to the particular case'.⁴² In the CJEU's view the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person. Therefore, where it concludes that Article 12(2) applies, it cannot be required 'to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed'.⁴³

2.1.5 The possibility to grant an alternative status

As shown in the previous paragraphs, from the exclusion provided by Article 1(F) Refugee Convention follows directly and mandatorily that the individual cannot benefit from the refugee status provided by the Geneva Convention and the Common European Asylum System. Nonetheless, neither the Convention nor the EU Directives pose on the Member States an obligation to expel the individual concerned or to deny the individual any form of legal residence, albeit not any kind of asylum status. In this light it is important to note that the Qualification Directive aims at a minimum harmonisation. Member states can provide for more favourable standards under national law as stipulated in Article 3 Qualification Directive. Moreover, nothing prevents the State itself to prosecute him or her for the acts at the base of the exclusion decision.

Despite the expulsion under Article 1(F), an individual might still be entitled to treatment in accordance with international law and human rights law obligations. The international instruments restricting the power of States to expel aliens from their territory are not affected by the exclusion contained in the analysed provision. In particular, the *non-refoulement* principle contained in Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prevents Member States to return individuals, regardless of the gravity of their crimes, to a State where they fear a real risk of torture, inhuman or degrading treatment⁴⁴. A similar obligation is contained in Article 7 of the 1966 International Covenant on Civil and Political Rights and in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In *B and D* the *BVerwG* asked the CJEU whether it is compatible with the purposes of the Qualification Directive that the person excluded from refugee status receives a right to asylum under national constitutional law.⁴⁵ The CJEU held that this includes another kind of protection allowing the

⁴⁰ See also ECtHR (GC), 28 February 2008, *Saadi v. Italy*, App no 37201/06, para 139.

⁴¹ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 109.

⁴² CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 111.

⁴³ *Ibid*, para 109.

⁴⁴ See, *inter alia*, ECtHR 15 November 1996, *Chahal v United Kingdom*, Appl No 23 EHRR 413.

⁴⁵ *Ibid*, para 67.

individual to stay in the territory of the Member State.⁴⁶ However the Member States are not allowed to grant a status, which is comparable to or can be confused with the refugee status.⁴⁷ The Court did not specify the terms of the comparability. However, the mere fact that a person excluded from refugee protection is granted a residence status is not considered to be contrary to the purpose of the Directive.

To conclude, an individual who has committed a particularly serious crime and has been formally excluded from the international protection under Article 1(F), must not be sent back to a place where he would face torture or ill treatment and he or she may be granted a form of legal residence provided that it does not entail the risk of confusion with the refugee status.

2.2 Article 27 Citizenship Directive

The Citizenship Directive consolidated and simplified EU legislation and case law, giving effect to the right of free movement and residency accorded by Article 21 Treaty on the Functioning of the European Union (TFEU) to Union citizens.⁴⁸ It applies to all persons in possession of the nationality of a EU Member State and their family members throughout the territory of the Union, who move or reside in a Member State that they are not nationals of.⁴⁹ Although the wording seems to imply that there is a requirement to move to or reside in another Member State in order for a person to fall under its scope, the CJEU has ruled that people who left their home Member State to exercise their free movement rights and re-entered it on a later date can rely on EU free movement law and thus on the Citizenship Directive.⁵⁰ EU citizens have the right to be accompanied by their family member(s) when returning to their home Member State, based on the principle that they have to be able to 'enjoy at least the same rights of entry and residence' guaranteed to them if they would be residing in another Member State. This right is independent of the motives for making use of the free movement or to the requirement of being employed.⁵¹

According to the TFEU, there may be limitations and conditions to the exercise of free movement rights of EU citizens⁵² that can be restricted on the grounds of public policy, public security or public health.⁵³ Chapter VI of the Citizenship Directive details these limitations, setting out general principles, an incremental protection system depending on the length of residency, as well as defining procedural rules for the restrictions.⁵⁴ Article 27 of the Directive is applied by Member States to justify restricting the entrance or residence of Union citizen and their family members on the above-mentioned grounds. In the sections below, the provision's purpose is highlighted, the general principles for its application are detailed, and its terms are scrutinised for a comprehensive understanding of its interpretation.

⁴⁶ See Art 2(g) Qualification Directive.

⁴⁷ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 119 and further.

⁴⁸ Art 20(2)(a) and 21 TFEU.

⁴⁹ Art 1-3 Citizenship Directive. See for the definition of 'family member' Art 2(2) Citizenship Directive.

⁵⁰ E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, OUP Oxford, 2014), p 58.

⁵¹ CJEU Case C-370/90 *Surinder Singh* [1992], CJEU Case C-190/01 *Akrich* [2003] and CJEU Case C-291/51 *Eind* [2007].

⁵² Art 21 TFEU.

⁵³ Art 45(3) TFEU regarding free movement of workers and Art 52(1) TFEU regarding the right of establishment.

⁵⁴ Arts 27-33 Citizenship Directive.

2.2.1 Purpose

The Citizenship Directive states in recital 2 of the Preamble that Union citizenship 'should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence'. Following that line, it expresses the purpose of the Directive on recital 3 of the preamble as being to 'simplify and strengthen the right of free movement and residence of all Union citizens'. Article 27, although constructed as a limitation to those rights, remains part of the system that aims at strengthening the rights of Union citizens because it structures the possible restrictions, reducing the risk of arbitrariness.

On the one hand is the free movement right of citizens, which is considered to be one of the fundamental freedoms of the European Union.⁵⁵ On the other hand is the Member State's sovereign power to control the entry, residence and expulsion of non-citizens. Laying down the three grounds under which the free movement right may be restricted, Article 27(2) provides Member States with a 'residual control' over the matter, while defining strict rules for the use of these powers, which guarantees the limited application of the exceptions.⁵⁶ Accordingly, recital 22 of the preamble states that the aim of the provision is to 'ensure a tighter definition of the circumstances and procedural safeguards' of the restrictions based on public policy, security and health.

2.2.2 General principles

A number of general principles for the application of Article 27 can be adduced from the wording of the provision and the CJEU's case law, which will be addressed below. Firstly, although there is a degree of flexibility for the Member States in applying the Directive's public policy and public security requirements 'in light of their national needs', there is an obligation to interpret them strictly.⁵⁷ This means that the law of each Member State establishes the definition of the terms, but EU law limits the discretion.⁵⁸ Member States must make a 'clear distinction between public policy and public security' when applying Article 27, with measures covered by public policy not being able to be extended to fall under public security.⁵⁹ Similarly, the protected interests of the society on which the restriction is based must be properly defined by the State⁶⁰ and any action taken in that regard must be properly justified.⁶¹

⁵⁵ Recital 2 of the Preamble to the Citizenship Directive.

⁵⁶ E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, OUP Oxford, 2014), p 246.

⁵⁷ CJEU Case C-36/75 *Rutili* [1975], para 27. In its report on the application of the Directive, the European Commission stated that the application of the three grounds is subject to rigorous material and procedural safeguard. Commission of the European Communities, 'Report on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' COM(2008)840 final, p 7.

⁵⁸ D Kostakopoulou and N Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship', *Warwick School of Law, Legal Studies Paper* (2013), papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722 accessed 5 June 2016, p 7.

⁵⁹ Commission of the European Communities, COM (2009) 313 Final, p 10. According to the Commission, the distinction is as follows: 'Public security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions. Public policy is generally interpreted along the lines of preventing disturbance of social order'.

⁶⁰ E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, OUP Oxford, 2014) p 253.

⁶¹ Recital 25 of the Preamble to the Citizenship Directive

Restrictions of the right to free movement may only be taken if they are exclusively based on the personal conduct of the individual, as explicated in paragraph two of the provision.⁶² Reference to personal conduct 'expresses the requirement that a deportation order may only be made for breaches of the peace and public security which might be committed by the individual affected'.⁶³ As a consequence, Member States must conduct a case-by-case assessment of each person against whom restrictive measures are envisioned.⁶⁴ This also means that Member States cannot make restrictions as a deterrent or a general preventive measure⁶⁵, with 'justifications that are isolated from the particulars of the case or that rely on considerations of general prevention' not being allowed⁶⁶. Moreover, as stated in the same paragraph of the provision, 'past criminal convictions shall not in themselves constitute grounds for taking such measures' – a highly relevant condition which will be further elaborated in section 2.2.3 of this expert opinion.

Lastly, the Citizenship Directive sets out in Article 31 procedural safeguards for the application of the restrictions. It stipulates the right of the concerned person to have access to judicial or administrative redress, the possibilities to seek an interim order during the process and the conditions of removal, and the right of individuals to present their defence in person.

2.2.3 'Genuine, present and sufficiently serious threat'

Through the assessment of the case, it must be concluded that the personal conduct of the individual concerned represents a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.⁶⁷ This phrase has repeatedly been invoked by the CJEU and is now part of Article 27 Citizenship Directive. The CJEU first introduced these concepts in *Bouchereau*, where it concluded that restrictions to free movement require, 'in addition to the perturbation of public order, (...) a genuine and sufficiently serious threat to the requirements of public policy'.⁶⁸ A 'threat' is defined by the Commission as the 'likelihood of a serious prejudice to the requirements of public policy or public security'.⁶⁹ Said threat cannot be presumed, it must be 'genuine'.⁷⁰ It must also be 'present', and not merely presumptive⁷¹ - it must exist at the time when the restrictive measure is taken.⁷²

The appraisal of the characteristic of the 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' should take into account the 'degree of social danger resulting from the presence of the person concerned on the territory of that Member State',

⁶² Art 27(2) now explicitly recalls this principle, which was first established in the case *Bonsignore*, where the Court held that there exists a requirement of basing an exclusion order only on the 'personal conduct of those affected by the measures'. ECR Case C-67/74 *Bonsignore* [1975], paras 5/6.

⁶³ *Ibid* para 6.

⁶⁴ E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, OUP Oxford, 2014) p 258.

⁶⁵ ECR Case C-67/74 *Bonsignore* [1975], para 6 and ECR Case C-36/75 *Rutili* [1975], para 29.

⁶⁶ Art 27 (2) Citizenship Directive.

⁶⁷ *Ibid*.

⁶⁸ ECJ Case C-30/77 *Bouchereau* [1977], para 35.

⁶⁹ Commission of the European Communities, 'Communication of the Commission on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' COM (2009)313 final, p 11.

⁷⁰ *Ibid* p 11.

⁷¹ E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, OUP Oxford, 2014), p 258.

⁷² ECR Joined Cases C-482/01 and C-493/01 *Orphanopoulos and Oliveri* [2004], para 78.

the ‘nature of the offending activities, their frequency, cumulative danger and damage caused’, and the ‘time elapsed since acts committed and behaviour of the person concerned’.⁷³

Closely related to the requirement of a ‘present threat’, is the criterion specified in Article 27 (2), stipulating that ‘previous criminal convictions shall not in themselves constitute grounds for taking such measures’. This condition was first established by the CJEU in *Bouchereau*, where it reasoned that previous criminal convictions may only be taken into account ‘in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy’.⁷⁴ The past offence must thus be an indication of future behaviour, a propensity to act in the same way in the future.⁷⁵

In addition to the discussed requirements, restrictions based on previous criminal convictions may not be automatic.⁷⁶ According to the Commission, re-entry bans can only be imposed together with an expulsion order in ‘grave cases where it is shown that the offender is likely to continue to be a serious threat to public order in the future’.⁷⁷ Similarly, automatic expulsions are not allowed.⁷⁸ Moreover, recital 27 of the Preamble recalls the prohibition of lifelong exclusions for persons covered by the Directive and the obligation of States to provide for a possibility of submitting a renewed application after a reasonable period – and at the latest after three years from the enforcement of the final exclusion order. Accordingly, Article 31(1) allows for persons subject to a re-entry ban to have the possibility of lifting it after a reasonable period of time.

2.2.4 Proportionality test

Article 27 Citizenship Directive states that measures shall ‘comply with the principle of proportionality’. This requirement can also be identified in recital 23 of the Preamble, which details factors that should be taken into consideration by States in their assessment of proportionality: the ‘degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin’. States must identify the interests at stake and in light of those, analyse the degree of the threat and the personal and family situation of the person concerned. Finally Article 31 Citizenship Directive re-affirms the principle of proportionality, stating that the redress procedure ‘shall ensure that the decision is not disproportionate’.⁷⁹

Regarding the particular situation of the affected, the measure envisioned shall not go beyond what is strictly necessary to achieve the objective, taking into account the ‘impact of expulsion on the economic, personal and family life of the individual’, the ‘seriousness of the difficulties which the spouse/partner and any of their children risk facing in the country of origin of the person concerned’,

⁷³ Commission of the European Communities, ‘Communication of the Commission on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States’ COM(2009)313 final, p 13.

⁷⁴ CJEU Case C-30/77 *Bouchereau* [1977], para 28.

⁷⁵ Ibid, para 29. See also CJEU Joined Cases C-482/01 and C-493/01 *Orphanopoulos and Oliveri* [2004], para 82 and 100 and CJEU Case C-348/09 *P.I.* [2012], para 30.

⁷⁶ CJEU Case C-67/74 *Bonsignore* [1975], para 5 and CJEU C-348/96 *Calfa* [1999], paras 17-27 regarding the automatic expulsion for life following a criminal conviction.

⁷⁷ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Free Movement of EU Citizens and Their Families: Five Actions to Make a Difference’, COM(2013)837 final, p 9.

⁷⁸ CJEU Case C-408/03 *Commission v Belgium* [2006], paras 68-72.

⁷⁹ Art 30(3) Citizenship Directive.

the ‘strength of ties (...) with the Member State of origin and with the host Member State, the ‘length of residence in the host Member State’, and the ‘age and state of health’ of the person.⁸⁰

2.3 Application of Article 12(2) Qualification Directive to Article 27 Citizenship Directive

As evidenced by the foregoing sections, Article 27 Citizenship Directive and Article 12(2) Qualification Directive are two distinct provisions with different purposes. Article 27 Citizenship structures the restrictions on the right of free movement and residence of all Union citizens, with the aim to ‘ensure a tighter definition of the circumstances and procedural safeguards’ of the restrictions based on public policy, public security and public health.⁸¹ In contrast, Article 12(2) Qualification Directive excludes from protection undeserving individuals, with the primary *ratio* of the rule being to preserve the credibility and integrity of the asylum system,⁸² and avoids that serious criminals would make use of the system to evade prosecution for their crimes.

This results in provisions that are opposed substantively. Article 27 Citizenship Directive focuses on the question whether the ‘personal conduct of the individual’ poses a ‘genuine, present and sufficiently serious threat’ to ‘public policy’ and ‘public security’. restrictions under Article 27 Citizenship Directive are conditional on an individual being assessed as a present threat, no matter the past crimes. Although Member States are afforded a degree of flexibility, they have an obligation of strict interpretation.⁸³ Member States are thereby required to apply restrictions exclusively based on the personal conduct of the individual.⁸⁴ This case-by-case assessment must result in the personal conduct of the individual concerned representing a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.⁸⁵ In relation to the present nature of the threat, the CJEU clarified in *Bouchereau* that previous criminal convictions must be an indication of future behaviour, a propensity to act in the same way in the future.⁸⁶

In contrast Article 12(2) Qualification Directive centres on a person’s past commitment or involvement in a ‘crime against peace, war crime and crime against humanity’, ‘serious non-political crime’ and ‘acts contrary to the purposes and principles of the UN. As confirmed in the CJEU’s judgment in *B and D*, it follows that exclusion from international protection under Article 12(2) Qualification Directive is not conditional on the person concerned representing a present danger to the host Member State.⁸⁷

In sum, it is not possible to imply from the purpose, scope and criteria of Article 12(2) Qualification Directive and Article 27 Citizenship Directive that when there are ‘serious reasons for considering’ a person guilty of a crime against peace, a war crime or a crime against humanity his personal conduct is forever to constitute a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ regardless of developments in time and place. This does not mean that it is impossible for a person’s past crime to be linked to the ‘genuine, present and

⁸⁰ Ibid p 13. These factors are outlined in Art 28(2) Citizenship Directive as an indicative.

⁸¹ Recital 22 of the Preamble to the Citizenship Directive.

⁸² See J Hathaway and M Foster, *The Law of Refugee Status, Second Edition* (Cambridge, Cambridge University Press, 2014) p 525 and CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 104: ‘the purpose of Art. 1(F) is to maintain the credibility of the protection system’ and UNHCR Handbook, para 147.

⁸³ CJEU Case 36/75 *Rutilli* [1975], para 27.

⁸⁴ Art 27(2) and CJEU Case 67/74 *Bonsignore* [1975], paras 5-6.

⁸⁵ Art 27(2) Citizenship Directive; CJEU Case 30/77 *Bouchereau* [1977.] para 35.

⁸⁶ ECJ Case 30/77 *Bouchereau* [1977], para 29. See also CJEU Joined Cases C-482/01 and C-493/01 *Orphanopoulos and Oliveri* [2004], paras 82 and 100 and CJEU Case C-348/09 P.I. [2012], para 30.

⁸⁷ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 105.

sufficiently serious threat' condition of Article 27 Citizenship Directive, but rather that this conclusion cannot be reached without an individual assessment of the nature of his present conduct.

3. Dutch Application of 1(F) Refugee Convention and Article 27 Citizenship Directive

The 1951 Refugee Convention and the 1967 Protocol to the Convention have autonomous status in the Dutch legal order.⁸⁸ European Union law has primacy⁸⁹ over national law and also direct effect.⁹⁰ There is an extensive national body of law that has incorporated the (for this context) relevant international and European provisions. The main act regulating the law concerning aliens is the Aliens Act 2000 (*Vreemdelingenwet*). This act is supplemented by the Aliens Decree (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Circular (*Vreemdelingencirculaire*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applies to proceedings under the Aliens Act 2000, unless indicated otherwise by the Aliens Act, which is the *lex specialis* to the General Administrative Law Act. This body of law has refugees and grounds for possible exclusion of refugee status.

This section will first give a brief summary of the relevant Dutch policy and provisions containing the application of the 1(F) exclusion clause and its European law equivalent Article 12(2) Qualification Directive. After that the Dutch application of Article 27 Citizenship Directive will be discussed. Finally this section will focus on the restriction of free movement rights of persons who are excluded from refugee status on the basis of Article 1(F).

3.1 Law and practice on Article 1(F): exclusion from international protection⁹¹

Aliens are only eligible for admission on the basis of directly applicable international agreements, if their presence serves an essential Dutch interest or for compelling reasons of a humanitarian nature.⁹² Article 29(1) Aliens Act provides for two grounds on the basis of which an asylum permit can be granted: the person qualifies as a refugee or he fulfils the EU law definition of subsidiary protection.⁹³ Furthermore family members of a person with an asylum permit can obtain an asylum status on the basis of Article 29(2) Aliens Act.

An application for a residence permit can be denied when there are serious reasons for considering that the alien is a threat to public order or national security.⁹⁴ Art 3.77(1)(a) of the Aliens Decree 2000 states that an application for a residence permit can in any case be rejected on grounds of danger to public order if there are serious reasons for considering that the alien has committed crimes within the meaning of Article 1(F) Refugee Convention. The Aliens Circular 2000 contains further details as to what is to be considered a crime within the meaning of Article 1(F) Refugee Convention and Article 12(2) Qualification Directive.⁹⁵

⁸⁸ HR, NJ 1919 [3 March 1919] *Grenstractaat Aken*.

⁸⁹ CJEU Case 6/64 *Costa/ENEL* [1964].

⁹⁰ CJEU Case 26/62 *Van Gend en Loos* [1963]; Art 93 and 94 of the Constitution of the Kingdom of the Netherlands.

⁹¹ See for a comprehensive overview of the relevant Dutch law and practice: ECtHR 30 June 2015, *A.A.Q. v The Netherlands*, Appl No 42331/05, paras 46-52.

⁹² Art 13 of the Aliens Act 2000.

⁹³ Art 29 of the Aliens Act 2000.

⁹⁴ Art 30a(1)(j) of the Aliens Act 2000.

⁹⁵ Chapter C2/7.10.2.2 of the Aliens Circular 2000.

3.1.1 Justification of the exclusion policy

According to a policy statement from the Deputy Minister of Justice⁹⁶, the Dutch authorities do not want the Netherlands to be a place of refuge for war criminals or human rights offenders. They consider it undesirable that victims who have been granted protection in the Netherlands feel unsafe by the presence in the same country of those who are responsible for the fact that they were forced to flee their country of origin in the first place.⁹⁷ Responsible authorities have taken this to heart; according to a 2008 report of the Advisory Committee Alien Affairs (*Adviescommissie Vreemdelingenzaken*, hereinafter ACVZ) the Netherlands has one of the strictest policies with regard to Article 1(F).⁹⁸

3.1.2 Assessment of the 1(F) presumption

If in the context of an application for asylum (and the subsequent grant of a residence permit) there is any indication that crimes or acts as referred to in Article 1(F) have been committed by the applicant, a special unit of the IND will investigate whether the applicant can be excluded on the basis of Article 1(F).⁹⁹ The IND will need to prove that the alien can be held accountable for certain acts or crimes. The alien must have had knowledge of ('knowing participation') and have participated in ('personal participation') the crimes in question.¹⁰⁰

For 'knowing participation', the alien must have worked for an organisation of which the IND has indicated systematic or widespread commission of 1(F) crimes or must have participated in actions which the person should have recognised as crimes according to Article 1(F). For 'personal participation', the alien must have committed, ordered, facilitated or contributed to a crime mentioned in Article 1(F).¹⁰¹ In order to assume contribution, the alien must have done more than merely be present. The person must, individually, have had an essential contribution with direct effect. For facilitation, it must be established that the alleged crimes could not have been committed without the person's interference.¹⁰²

Personal and knowing participation are presumed if an individual belongs to a category of persons which, according to the Minister, has committed crimes which fall within the scope of Article 1(F). In such a situation it is considered unlikely that members of for example a certain organisation could remain unaware of the crimes committed by the organisation. A reversed burden of proof exists, as the alien needs to prove that his case constitutes a 'significant exception'. Only in those situations where exceptional circumstances can be proven, will an excusable ignorance of committed crimes be considered.¹⁰³

⁹⁶ Kamerstukken II 1999/98, 19 637, no 295.

⁹⁷ ECtHR 13 November 2014, *H. and J. v. the Netherlands*, Appl Nos 978/09 and 992/09, para 56.

⁹⁸ ACVZ, Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid, Den Haag: ACVZ January 2008, p 11.

⁹⁹ Human Rights Watch, *EU Asylum and War Criminals: No Place to Hide* (18 September 2014) euobserver.com/opinion/125664 accessed 10 April 2016 and Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (September 2014)

www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and accessed 10 April 2016

¹⁰⁰ Para C2/7.10.2.4 Aliens Circular 2000.

¹⁰¹ Para C2/7.10.2.4 Aliens Circular 2000.

¹⁰² AJD 16 January 2004, ECLI:NL:RVS:2004:AO2496.

¹⁰³ Para C2/7.10.2.4 Aliens Circular 2000.

In the case of the Afghan KhAD/WAD security services, such a ‘categorical exclusion’ is in place for those who have worked in certain positions, mainly (non-commissioned) officers.¹⁰⁴ The asylum claims of these persons in the Netherlands were, and still are, excluded. It is presumed that they have taken part in arrests, interrogations, torture and executions, to show commitment to the regime, in order to be promoted to the rank of officer or higher.¹⁰⁵ It is noteworthy that this presumption is primarily based on a country of origin information report of the Ministry of Foreign Affairs¹⁰⁶ dating from 29 February 2000.¹⁰⁷ In 2004 the regional Court in ‘s-Gravenhage questioned the absolute authority of this report.¹⁰⁸ However, the AJD reversed this judgment in appeal.¹⁰⁹

3.1.3 Consequence of a legally confirmed 1(F) presumption

The Aliens Decree states that if the exclusion clause under Article 1(F) is held against an asylum seeker, the alien concerned loses any protection that might have been available under the Convention and, consequently, is not eligible for a residence permit for asylum under Section 29 of the Aliens Act 2000.¹¹⁰ A rejection of an asylum application is also considered to be a return decision.¹¹¹ Following this decision, the alien is obliged to leave the Dutch territory¹¹², save in the circumstance where expulsion would constitute a violation of Article 3 or 8 ECHR. Appeal against the rejected asylum application and the enclosed return decision is, however, still possible.¹¹³ In addition to the exclusion from international protection, the alien receives an entry ban¹¹⁴ for a maximum of 10 or even 20 years.¹¹⁵

In exceptional circumstances, 1(F) persons can, under a policy called ‘durability and proportionality test’ (*Duurzaamheids- proportionaliteitstoets*), get a new chance to receive a permit based on a lasting inability to return to the country of origin or to go to a third country.¹¹⁶ Durability can be assumed after a period of 10 years.¹¹⁷ However, the ACVZ has found that in practice, the durability and proportionality test has only led to the grant of a residence permit in a few cases in which the applicant was terminally ill.¹¹⁸

¹⁰⁴ Kamerstukken II 1997/98, 19 637, no 295; Kamerstukken II 1999/2000, 19 637, no 520; Kamerstukken II 2001/02, 19 637, no 672.

¹⁰⁵ M P Bolhuis and J van Wijk, ‘Alleged war criminals in the Netherlands: Excluded from refugee protection, wanted by the prosecutor’ *European Journal of Criminology* (2014) p 5; MinBuZa, *Veiligheidsdiensten in communistisch Afghanistan (1978-1992)* (29 February 2000), www.migratiweb.nl/f/Afghanistan%20-%20veiligheidsdiensten%20-%202029%20Feb%202000%20%5Bve02001091%5D.pdf accessed 25 June 2016.

¹⁰⁶ The original version of this report has been removed from the website of the Ministry of Foreign Affairs, a scanned copy is available at: cdn1.tekenvoorrechtaardigheidinnederland.nl/uploads/Editor/2000-02-29-aab-veiligheidsdiensten-afghanistan.pdf

¹⁰⁷ AJD 24 September 2009 ECLI:NL:RVS:2009:BJ8654; see for a recent example Regional Court The Hague 8 March 2016, ECLI:NL:RBDHA:2016:2503.

¹⁰⁸ Regional Court ‘s-Gravenhage 8 April 2004, ECLI:NL:RBSGR:2004:AP1289.

¹⁰⁹ AJD 30 November 2004, ECLI:NL:RVS:2004:AR7346.

¹¹⁰ Art 3.107 Aliens Decree 2000 and para C1/4.6.4 Aliens Circular 2000.

¹¹¹ Art 45 Aliens Act 2000.

¹¹² Art 61 of the Aliens Act 2000.

¹¹³ Chapter 8 General Administrative Law Act; Chapter 7 Aliens Act 2000.

¹¹⁴ Art 66a(1)(a) Aliens Act 2000.

¹¹⁵ Art 6.5a(5)(c) and Art 6.5a(6) Aliens Decree 2000.

¹¹⁶ AJD 2 June 2004, ECLI:NL:RVS:2004:AP2043

¹¹⁷ Kamerstukken II 2007/08, 31 300 VI, no 160, p 26; AJD 18 July 2007, ECLI:NL:RVS:2007:BB1436.

¹¹⁸ ACVZ, *Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid* (January 2008), p 16.

3.1.4 Law and practice on Article 27 Citizenship Directive: the restriction of free movement

Article 27 Citizenship Directive is implemented in Article 8.8(1) and 8.22(1) Aliens Decree 2000. These articles provide for the denial or ending of lawful stay, as well as a denial of entry, on grounds of public policy or public security, if the personal conduct of the alien forms a genuine, present and sufficiently serious threat to a fundamental element of society.¹¹⁹ Union citizens or their family members derive their 'lawful stay' from the Citizenship Directive.¹²⁰ Moreover, the responsible (deputy) minister can declare the alien an 'undesired person' based on grounds of public policy or national security if the alien does not enjoy regularised stay.¹²¹

What may be considered to be a threat to public security or public policy is not explained as such in the law or in the implementation guidelines. But being a member of or participating in activities of an organisation whose activities have been identified as a threat to society by a Member State of the EU, the European Economic Area (EEA) or by Switzerland, can be a ground for expulsion.¹²² Previous membership of certain organisations that have been placed on a list, in accordance with Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, is a factor which can lead to the consequence that a person is still considered an actual threat, even if involvement with the organisation has ended a long time ago.¹²³ The appeal against the restriction of free movement rights is ex nunc. National judges take into account events which have taken place after the responsible national authority took the most recent decision in the particular case. These events can diminish the actuality of the threat the person represents.¹²⁴

Past drug-related convictions are considered, by their nature, to be sufficiently severe to constitute a genuine, present and sufficiently serious threat in the present.¹²⁵ However, the mere fact that a person has committed a crime which has caused financial damage and feelings of unease and insecurity on the victims, and which carries a rather severe maximum sentence is in itself not enough to constitute such a threat.¹²⁶

3.2 Article 1(F) and the 'genuine, present and sufficiently serious' threat

The current policy in the Netherlands is not only to exclude those suspected of crimes under 1(F) Refugee Convention from international protection, but also to completely exclude them from Dutch territory. This also applies if the person concerned falls under the scope of the Citizenship Directive, either based on his own status or on the status of his spouse or child(ren).

Section 2.2 explained that there must be a genuine, present and sufficiently serious threat in order to exclude a person based on public security or public policy. The AJD has developed a method for the assessment of these criteria, which becomes clear from the judgment that inspired this expert opinion.¹²⁷ The following section contains the crucial considerations of this judgment.

¹¹⁹ ARRvS 24 March 1983, AB 1983/566; ARRvS 31 January 1984, AB 1984/434; ARRvS 9 June 1986 AB 1987/378.

¹²⁰ Art 8.8(1) and Art 8.22(1) Aliens Decree 2000.

¹²¹ Art 67(1)(c) Aliens Act 2000.

¹²² Kamerstukken II, 19 637, no 971) in line with ECJ Case-41/74 *Van Duyn* [1974].

¹²³ AJD 12 September 2008, ECLI:NL:RVS:2008:BF1415.

¹²⁴ *Ibid* para 78.

¹²⁵ Court of appeal 's-Gravenhage 16 April 2014, ECLI:NL:GHDHA:2014:1375.

¹²⁶ AJD 7 August 2015, ECLI:NL:RVS:2015:2627.

¹²⁷ AJD 16 June 2015, ECLI:NL:RVS:2015:2008.

3.2.1 The AJD judgment explained

In its judgment of 16 June 2015 the AJD first repeats the national, European and International principles governing the exclusion of those that have been suspected of having committed crimes in accordance with 1(F). With regard to the application of Article 27 Citizenship Directive to persons excluded on the basis of Article 1F the AJD refers to the exceptional gravity of the nature of 1(F) crimes. It holds that the presence on Dutch territory of an alien whose exclusion on the basis of Article 1F has become final, presents a direct threat to the Dutch legal order and the calm of the Dutch population.¹²⁸ Here, the AJD makes a reference to the CJEU judgments *Tsakouridis* and *P.I.* It concludes that the refusal of permission to stay to aliens who fall under the scope of 1(F) protects a fundamental interest of society within the meaning of Article 27(2) Citizenship Directive.¹²⁹ The AJD finds that the fact that European law excludes persons suspected of crimes under 1(F) from international protection, establishes the genuine and sufficiently serious threat.¹³⁰

In order to analyse whether the threat is also ‘present’, the AJD interprets the 2010 the CJEU’s judgment in *B and D* by analogy. Under Article 12(2) Qualification Directive exclusion is based on past conduct alone. The AJD argues that therefore, the threat to a fundamental interest of society caused by the presence of a person whose exclusion on the basis of Article 1(F) has become final, is by its nature ‘present.’ Here, the AJD refers to the judgment of the CJEU in *Bouchereau*. It interprets this judgment by stating that a previous criminal conviction is only relevant if it indicates personal conduct that constitutes a current threat. However, it is also possible that the crime or conduct in itself constitutes a present threat to public order.¹³¹ Therefore, the AJD finds no need to make an assessment to the future conduct of the alien. Here it again refers to the CJEU’s judgment in *P.I.*¹³²

The nature and gravity of the 1(F) crimes, together with the time, place and circumstances under which they were committed is fundamentally different from the crimes on which the case law concerning Article 27 was founded. The AJD concludes with the remark that the mere fact that another Member State has supplied the alien with a residence permit, is not sufficient to force the secretary of state to reassess the aliens’ ‘undesired person’ status, nor to assess the danger of recidivism in the light of Article 27 Citizenship Directive.¹³³

3.2.2 Criticising the AJD’s case law

There are some problematic aspects to the reasoning of the AJD:

1. The fact that the AJD relies on the CJEU’s judgment in *B and D* which concerned the interpretation of Article 12(2) Qualification Directive, in order to argue that persons excluded on the basis of Article 1F constitute a present threat under Article 27 Citizenship Directive is problematic.
2. The way in which the AJD uses *Bouchereau* in order to reject the obligation to assess future conduct or to do a proportionality test is not in line with how the CJEU envisioned it. The AJD’s judgment that 1(F) crimes are too grave to require an assessment on the proportionality of the measure used is not supported by EU law as it stands.

¹²⁸ Ibid, para 7.6.

¹²⁹ Ibid.

¹³⁰ AJD 12 September 2008, ECLI:NL:RVS:2008:BF1415.

¹³¹ AJD 16 June 2015, ECLI:NL:RVS:2015:2008 para 7.7.

¹³² Ibid.

¹³³ Ibid para 7.8.

The analogous application of the CJEU's judgment in *B and D*.

The use of the CJEU's judgment in *B and D* which concerned the interpretation of Article 12(2) Qualification Directive, to establish a present threat under Article 27 Citizenship Directive is questionable. Article 12(2) Qualification Directive and Article 27 Citizenship Directive contain different legal concepts and have different purposes. It is important to note that the CJEU expressly stated in its judgment in *B and D* that exclusion from international protection under Article 12(2) Qualification Directive is not conditional on the person concerned representing a present threat to the host Member State.¹³⁴

Furthermore exclusion from international protection on the basis of 1(F) is not a criminal conviction, nor is the exclusion meant to actually prove the alleged crimes. Whether the CJEU in *B and D* anticipated that suspected crimes could also be considered as past conduct that can constitute a present threat is not clear. The analogous application of the judgment in *B and D* in the context of Article 27 Citizen Directive is therefore problematic.

The AJD's interpretation of *Bouchereau*

Bouchereau was a case which concerned a person who was repeatedly convicted for possession of drugs. With this kind of offences, there may be a greater chance that the person will commit similar offences in the future, given the addictive nature of drugs. However, a 'specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy' needs to be conducted.¹³⁵ Something 'which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction'.¹³⁶ As mentioned before, not only the nature of, but also the circumstances surrounding previous convictions need to be considered when deciding whether they constitute a present threat to public policy. Circumstances of a previous criminal conviction can give rise to a presumption that the person is likely to act in a similar manner in the future and it is possible that past conduct on itself may constitute a threat (meaning a propensity to act in the same way in the future) within the meaning of the public policy criteria.¹³⁷ Whether such a past conduct exists, needs to be established by the national authorities and courts on an individual basis and in light of the legal position of the person subject to EU law and also in light of the fundamental nature of the right of free movement.¹³⁸

Secondly, the AJD, when referring to *Bouchereau*, left out the paragraph 30 of the CJEU's judgment, containing the proportionality test. This omission is also visible from the fact that a consideration is missing with regard to the principle of the right to free movement of the person and his spouse on the one hand and the public policy consideration on the other hand.

¹³⁴ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 105.

¹³⁵ CJEU Case 30/77 *Bouchereau* [1977], para 27.

¹³⁶ CJEU Case 30/77 *Bouchereau* [1977], para 27. See also para 28.

¹³⁷ Ibid para 29.

¹³⁸ Ibid para 30.

4 Perspectives from Germany, Belgium and the United Kingdom

It follows from section 3 of this expert opinion that Dutch law with regard to the restriction of the right of free movement for persons excluded from international protection on the basis of Article 1F Refugee Convention, is not in conformity with EU law. In order to provide a point of comparison, the following section will briefly explore the practice in Belgium, Germany and the United Kingdom. It will address the alternative status granted to people excluded from refugee status and the interpretations of Article 27 Citizenship Directive. For a complete overview on the topic we refer to the Annex with this expert opinion.

4.1 Belgium

In Belgium 'in practice authorities are not keen to grant a residence permit to someone excluded on the basis of article 1F of the Refugee Convention'.¹³⁹ Such persons do not qualify for a temporary residence permit. However, according to Belgian law they can get an alternative form of residence, such as family reunification.¹⁴⁰

Furthermore, a restricted entry on the basis of Article 27 Citizenship Directive always comes down to a sufficiently motivated decision. This includes an assessment of the conduct of an individual, which must constitute a genuine, present and sufficiently serious threat.¹⁴¹

The Council for Alien Law Litigation¹⁴² (hereinafter CALL) has stressed that the concept of public order, as used in the Citizenship Directive, is a derogation from the fundamental principle of free movement of persons, which must be interpreted strictly and whose scope cannot be determined unilaterally by the Member States.¹⁴³ The CALL has therefore rigorously interpreted the grounds of entry restrictions. The existence of a European entry ban or past criminal conviction is not enough to refuse a residence permit.¹⁴⁴ More importantly, the CALL underscores that the fact that authorities have applied Article 1(F) Refugee Convention, because the applicant committed crimes in the country of origin, cannot *ipso facto* lead to the conclusion that the applicant constitutes a genuine, present and sufficiently serious threat to a fundamental interest of Belgian society within the meaning of Article 43(2) Belgian Aliens Act.¹⁴⁵

4.2 Germany

In Germany individuals excluded from international protection are provided with alternative forms of residence permits.¹⁴⁶ In response to the preliminary questions referred by a German court, the CJEU

¹³⁹ M Bolhuis and J Van Wijk, 'Study on the Exchange of Information between European Countries Regarding Persons Excluded from Refugee Status in Accordance with Article 1F of the Refugee Convention' (Norwegian Directorate of Immigration 2015) pp 13-14. See Annex II for more details on Belgian law.

¹⁴⁰ *Ibid.*

¹⁴¹ Art 27 is transposed into Art 43 of the Law of 15 December 1980 on access to the territory, stay, establishment and removal of aliens (Belgian Aliens Act).

¹⁴² Known as the Raad voor Vreemdelingenbetwistingen (RvV) / Conseil du Contentieux Etrangers (CCE), the CALL is an independent administrative court which can be seized to appeal decisions of the general Commissariat for refugees and stateless persons, against decisions of the Office for foreigners and all other individual decisions taken under the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners.

¹⁴³ RvV, no 135.627, of 19 December 2014, para 3.15.

¹⁴⁴ RvV, no 159.789 of 13 January 2016; RvV no 161.549 of 8 February 2016; RvV, no 135.627 of 19 December 2014; RvV, no 52.575 of 7 December 2010; RvV, no 4.8.259 of 20 December 2010; RvV, no 112.790 of 25 October 2013.

¹⁴⁵ RvV 27 March 2013, no 99.921, para 3.14.

¹⁴⁶ See Annex I with this expert opinion for more details.

ruled in *B and D* that alternative status could be granted to 1(F) individuals only if it is clearly distinct from refugee status.¹⁴⁷ Therefore, persons excluded from international protection on the basis of Article 1(F) cannot qualify for asylum under Article 16(a) Basic Law since the status provided by that provision is broadly the same as a refugee status. Furthermore these persons neither qualify for a prohibition of deportation¹⁴⁸ nor for temporary protection.¹⁴⁹

The right of entry and residence of Union citizens and their family members can be restricted if the personal conduct of the individual concerned constitutes a genuine, present and sufficiently serious threat affecting the fundamental interests of society within Section 6 FreizüG/EU. However, on the basis of section 7 FreizüG/EU every restriction to the freedom of movement must be renewed within an adequate time interval in order to assess whether the personal conduct still represents a genuine, present and sufficient serious threat.

According to German case law, the freedom of movement of Union citizens and their family members cannot be restricted if they have never committed criminal offences in Germany. Hence, the person's criminal conduct in another country does not constitute a basis for the restriction of movement.¹⁵⁰

4.3 The United Kingdom

In the United Kingdom the Home Office is to grant a so-called 'Restricted Leave' if the removal of an individual, who is excluded from international protection, would violate Article 3 ECHR.¹⁵¹ This six-months renewable permission implies several limitations for the holder: the permanent settlement of an individual holding a Restricted Leave is possible only after a continuous period of residence of at least 10 years. Furthermore, the holder is not expressly entitled to family reunification, travel documents or access to public funds.¹⁵²

With regard to Article 27 Citizenship Directive, Union citizens and their family members have the right to enter the country unless a decision is taken under Regulation 19 and 21 (2006) EEA Regulations. According to a widespread interpretation of these provisions, a threat to one of the fundamental interests of society must be a conduct that is explicitly prohibited by law.

Furthermore, a genuine, present and sufficiently serious threat must be found on the basis of specific evidence. The fact that a person has committed a criminal offence in another country does not in itself show that the person concerned poses a genuine, present and sufficiently serious threat.¹⁵³

¹⁴⁷ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], paras 119 and further.

¹⁴⁸ Section 25(3) Residence Act (*AufenthG*); Federal Office for Migration and Refugees (BAMF)

www.bamf.de/DE/Migration/AsylFluechtlings/Asylverfahren/Rechtsfolgen/rechtsfolgen-node.html accessed 12 May 2016.

¹⁴⁹ Directive 2001/55/EC, section 24(2) Residence Act (*AufenthG*).

¹⁵⁰ VG Düsseldorf, Az. K 6836 [11 November 2014], para 74.

¹⁵¹ See Annex III with this expert opinion for more details.

¹⁵² UK Home Office, *Asylum Policy Instruction - Restricted leave (v 1.0)*, (23 January 2015) www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf accessed 12 May 2016.

¹⁵³ United Kingdom Home Office, *Asylum Policy Instructions - Revocation of refugee status (v 4.0)*, published on 19 January 2016.

4.4 Conclusion

It follows from this section that Germany, Belgium and the United Kingdom do not agree with the Dutch authorities that the fact that there are 'serious reasons for considering' a person guilty of a crime against peace, a war crime or a crime against humanity constitutes a 'genuine, present and sufficiently serious threat in the meaning of the Citizenship Directive. In these countries past criminal behaviour cannot in itself justify the restriction of the freedom of movement of a Union citizen's family member. These countries assess whether it is likely that the alien will commit similar crimes in the future. A person's criminal conduct in another country does not trigger a present threat within the meaning of Article 27 Citizenship Directive. In Belgium, for instance, the explicit distinction between Article 1(F) Refugee Convention and Article 27 Citizenship Directive clearly underscores the difference between a past crime and present threat. In Germany, restrictions to the freedom of movement must be renewed within an adequate time interval in order to assess whether the personal conduct *still* represents a genuine, present and sufficient serious threat. Combined with Britain's requirement for specific evidence, it is evident that in Germany, Belgium and the United Kingdom a rejected asylum application under Article 1(F) Refugee Convention does not form grounds to restrict the entry and residence of Union citizens and their family members. Finally in Belgium, Germany and the United Kingdom an alternative residence permit is available.

5 Conclusion

According to Dutch policy and case law the fact that there are 'serious reasons for considering' a person guilty of crimes defined in Article 1F Refugee Convention implies that his personal conduct is deemed forever to constitute a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' in the meaning of the Citizenship Directive. This conclusion is usually reached without any individual assessment of the nature of his or her present conduct, since it is assumed that the exclusion under Article 1(F) conveys in itself a presumption of the individual constituting a direct threat to the Dutch public order and security, which are interests protected by Article 27 Citizenship Directive. This leads the Dutch authorities to not only deny to the applicant the international protection provided by the Refugee Convention, but also any other type of residence permit. This applies even to EU citizens and their family members who want to make use of their freedom of movement and residence. The present expert opinion examined whether this Dutch policy and case law is in conformity with EU law.

It has been shown that Article 12(2) Qualification Directive (which transposed Article 1F Refugee Convention) and Article 27 Citizenship Directive have a different meaning, purpose and range of application. Article 27 Citizenship Directive gives the authority to restrict the right of free movement and residence of all Union citizens in order to protect public policy, public security and public health. In contrast Article 12(2) Qualification Directive prevents serious criminals and other underserving persons from gaining international protection, thus preserving the credibility and integrity of the asylum system. It was concluded on the basis of the CJEU's judgment in *B and D* that a person excluded under Article 1(F) Refugee Convention cannot automatically be considered a threat as defined by Article 27 Citizenship Directive.

Indeed, it is widely agreed that the restrictions under Article 27 Citizenship Directive must be based on a case-by-case assessment of whether an individual represents a genuine, present and sufficiently serious threat to a fundamental interests of the host society. This expert opinion has shown that Belgium, Germany and the United Kingdom do not automatically link the individual responsibility pursuant to Article 12(2) Qualification Directive to the meaning of 'present threat' of the Citizenship Directive. These countries assess whether an individual is likely to commit similar acts in the future. In this assessment they include the time elapsed in the meanwhile and the particular circumstances of each case. In these States, decisions on restricting entry of a European citizen and members of his family are thus strictly based on the assessment of the personal conduct of the concerned individual. Furthermore an alternative residence permit can be granted to those excluded from international protection.

The expert opinion therefore concludes that the fact that there are 'serious reasons for considering' a person guilty of a crime defined in Article 12(2) Qualification Directive does not imply that his or her personal conduct is deemed forever to constitute a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' in the meaning of Article 27 Citizenship Directive. National authorities must always have regard to developments in time and place. An automatic and blanket rejection of the right of freedom of movement, as is applied in the Dutch legal context, is therefore not compatible to Article 27 Citizenship Directive and the freedom of movement of EU citizens and their family members guaranteed in Article 21 TFEU.

Annex I: Germany

1. Legislative Overview

The Citizenship Directive has been transposed into German law by the Freedom of Movement Act (*Freizügigkeitsgesetz*). Section 6 thereof reflects Article 27 and 28 Citizenship Directive. The Qualification Directive is largely implemented into the German legal framework by the Asylum Act (*Asylgesetz*). Section 3(2) Asylum Act provides for the 1(F) exclusion grounds. The different kinds of residence permits are primarily enumerated in Article 25 Residence Act (*AufenthG*).

2. Alternative Status

Article 16(a) Basic Law (*Grundgesetz*) stipulates that politically persecuted people have an entitlement to asylum.¹⁵⁴ Moreover, asylum is only granted under that national law to persons who did not enter Germany via the EU or a safe third country. Thus, the scope of the application of Article 16(a) Basic Law is very narrow. This provision exists besides the refugee status implemented into German Law in Article 3 of the Asylum Act.¹⁵⁵ Asylum granted under Article 16(a) Basic Law offers in essence the same scope of protection as refugee status.¹⁵⁶

The CJEU ruled in *B and D* that an alternative status¹⁵⁷ could be granted to persons excluded from refugee status on the basis of Article 1(F) only if it is clearly distinct from refugee status.¹⁵⁸ As the status based on Article 16(a) Basic Law is broadly the same as a refugee status, such persons cannot qualify for asylum under this provision. Furthermore such persons do not qualify for a prohibition of deportation,¹⁵⁹ nor for temporary protection under German law.¹⁶⁰

Any other status that is not comparable to the refugee status can be granted, especially for reasons of *non-refoulement*. Following human rights, including the prohibition of *refoulement*, people excluded from refugee status are granted subsidiary protection in Germany, if applicable.¹⁶¹

3. Article 27 Citizenship Directive

Section 6 FreizügG/EU implies the legal basis for the determination of the loss of the right to entry into Germany and the loss of the right to residence in Germany for Union citizens and their family members. The regulations for the restriction on the right of entry and the right of residence under section 6 FreizügG/EU mirrors the provisions of Article 27 Citizenship Directive. Thus, the German authorities may restrict the entry and residence of Union citizens and their family members on

¹⁵⁴ The Basic law is the German Constitution, Art 16 (a) Basic Law has been implemented in Art 25(1) Residence Act (*AufenthG*). Recognition rates are very low: less than 2%. Available at www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Flyer/flyer-schlueszahlen-asyllhalbjahr-2015.pdf;jsessionid=D2A06425E7310B6EEC2C65BB05035CA3.1_cid359?blob=publicationFile accessed 12 May 2016.

¹⁵⁵ English version available at www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0020 accessed 27 April 2016.

¹⁵⁶ Federal Administrative Court Germany (*BVerwG*) 10 C 2.10 [2011], para 32.

¹⁵⁷ Compare Art 2(g) and 3 Qualification Directive.

¹⁵⁸ CJEU Joined Cases C-57/09 and C-101/09 *Germany v B and D* [2011], para 119 and further.

¹⁵⁹ Section 25(3) Residence Act (*AufenthG*); Federal Office for Migration and Refugees (*BAMF*)

www.bamf.de/DE/Migration/AsylFluechtlinge/Asylverfahren/Rechtsfolgen/rechtsfolgen-node.html accessed 12 May 2016.

¹⁶⁰ Under Directive 2001/55/EC, section 24(2) Residence Act (*AufenthG*).

¹⁶¹ Section 25(2) Residence Act (*AufenthG*).

grounds of public policy, public security or public health. The determination shall be exclusively based on the personal conduct and not on previous criminal convictions of the individual concerned. It has to be attested that the personal conduct constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In the assessment, the authorities should take into consideration the duration of the stay as well as the age, health, cultural, family and economic ties of the individual concerned and his or her tie to the country or origin.¹⁶²

In this context it is necessary to analyse what 'a genuine, present and sufficiently serious threat' entails according to German law. Furthermore, the German interpretation of 'the fundamental interests of society' has to be addressed.

A genuine, present and sufficiently serious threat

German case law shows that the determination of 'a genuine, present and sufficiently serious threat' must be premised on an actual and factual basis.¹⁶³ In addition, the examination of a possible harm that derives from the individual concerned and the likelihood that harm will occur shall comply with the principle of proportionality and reasonableness.¹⁶⁴

A threat complies with the requirement of 'being present' if the danger exists at the time of the expulsion.¹⁶⁵ 'A genuine and sufficiently serious threat' means that the assessment must result in showing an adequate probability that the individual concerned will affect public policy, public security or public health within the meaning of Article 27 Citizenship Directive.¹⁶⁶ This requirement is not satisfied if the individual never committed criminal offences within German territory.¹⁶⁷ The behaviour of the individual concerned in another country is not enough to conclude that the individual represents a genuine, present and sufficiently serious threat.¹⁶⁸

If the authorities demonstrated that a genuine, present and sufficiently serious threat derives from the individual concerned, they need to show that this threat affects one of the fundamental interests of society. German Courts defined fundamental interests of society as the peaceful coexistence between the inhabitants of one state and the compliance with the law applicable.¹⁶⁹

The period of the restriction is laid down in section 7 *FreizügG/EU*.¹⁷⁰ Every Union citizen and their family members are entitled to a renewed assessment of the restriction within an adequate time interval.¹⁷¹ The period shall comply with the principle of proportionality and reflect the reason for the restriction.¹⁷² In order to renew the assessment the authorities must look at the current risk

¹⁶² § 6 (1)- (3) *Freizügigkeitsgesetz/EU*; VG Düsseldorf 11 November 2014, Az. K 6836, paras 54, 59; VG Berlin 10 April 2015, Az. 19 K 82.13, para 25 f.

¹⁶³ VGH Baden-Württemberg 23 July 2008, Az. 11 S 2889/07, para 40.

¹⁶⁴ VG Düsseldorf 11 November 2014, Az. K 6836, para 66.

¹⁶⁵ VGH Baden-Württemberg 23 July 2008, Az. 11 S 2889/07, para 40.

¹⁶⁶ VG Düsseldorf 11 November 2014, Az. K 6836, para 74; VG Oldenburg 4 July 2011, Az. 11 A 623/11, para 26.

¹⁶⁷ VG Düsseldorf 11 November 2014, Az. K 6836, para 74.

¹⁶⁸ *Ibid*, para 75.

¹⁶⁹ *Ibid*, para 63.

¹⁷⁰ German Federal Administrative Court (BVerwG) 25 March 2015, 01 C 18.14, para 10; German Federal Administrative Court (BVerwG) 4 September 2007, 01 C 21.17, para 17; VG Berlin, 10 April 2015, Az. 19 K 82.13, para 39; VGH Baden-Württemberg, 23 July 2008, Az. 11 S 2889/07, para 38.

¹⁷¹ German Federal Administrative Court (BVerwG) 25 March 2015, 01 C 18.14, para 23; VGH Baden-Württemberg 23 July 2008, Az. 11 S 2889/07, para 39.

¹⁷² VGH Baden-Württemberg 23 July 2008, Az. 11 S 2889/07, para 39.

of the personal conduct having regard to changes in the behaviour of the individual after the expulsion.¹⁷³

¹⁷³ German Federal Administrative Court (BVerwG) 25 March 2015, 01 C 18.14, para 23; German Federal Administrative Court (BVerwG) 4 September 2007, 01 C 21.17, para 18 and further; VGH Baden-Württemberg 23 July 2008, Az. 11 S 2889/07, para 41.

Annex II: Belgium

1. Legislative Overview

Belgium has transposed EU asylum and migration law, including the Qualification Directive and the Citizenship Directive, through two instruments: the Law of 15 December 1980 on access to the territory, stay, establishment and removal of aliens¹⁷⁴ (Belgian Aliens Act) and the Royal Decree of 10 August 1981 on access to the territory, residence, establishment and removal of aliens (Belgian Royal Decree).¹⁷⁵ Since they have been adopted, the Belgian Alien Act and the Belgian Royal Decree have been modified on numerous occasions.¹⁷⁶ Article 27 is transposed into Article 43 of Belgian Aliens Act.

2. Alternative Status

Individuals in Belgium who are excluded from international protection are not precluded from getting an alternative form of residence permit. When the Office of the Commissioner General for Refugees and Stateless persons (CGRS)¹⁷⁷ gives an Article 1(F) Refugee Convention decision,¹⁷⁸ the asylum department of the Immigration Office (DVZ)¹⁷⁹ issues an order to leave the territory.¹⁸⁰ This does not automatically result in excluded individuals receiving entry bans.¹⁸¹ However, the DVZ may issue entry bans if individuals are found to have remained in Belgium despite their orders to leave the territory. Furthermore, under Article 57/32 Belgian Alien Act, no temporary residence permit will be given to exclude individuals.¹⁸²

Though 'in practice authorities are not keen to grant a residence permit to someone excluded on the basis of article 1F of the Refugee Convention', it is legally possible 'for an excluded to be granted a residence permit on other grounds than asylum'.¹⁸³ Applications for residence permits are examined on a case-by-case basis.¹⁸⁴ Under Article 3(7) and 3(1)(8) of the Belgian Aliens Act, the Minister or his authorised representative may deny residence permit applications if 'the person in question might harm the public tranquillity, public order or the security of the country'.¹⁸⁵

¹⁷⁴ De wet van 15 December 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen / La loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers).

¹⁷⁵ Koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen / L'arrêté royal du 8 octobre 1981 concernant l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

¹⁷⁶ For more information see: European Migration Network, *Annual report on asylum and migration policy in Belgium 2015* (July 2015) ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/annual-policy-02a_belgium_apr_2014_part2_english_final.pdf accessed 12 May 2016, p 12; Aida, *Country Report: Belgium* (December 2015) www.asylumineurope.org/reports/country/belgium accessed 12 May 2016, p 9.

¹⁷⁷ The CGRS, or Commissariaat-generaal voor de Vluchtelingen en de Staatlozen in Flemish and Commissariat général aux réfugiés et aux apatrides in French, is made competent to deal with asylum claims under Art 57/6 Belgian Aliens Act.

¹⁷⁸ Based on Art 55/2 of the Belgian Alien Act.

¹⁷⁹ Dienst Vreemdelingenzaken / Office des étrangers is a department of the Minister of Interior.

¹⁸⁰ M Bolhuis and J Van Wijk, 'Study on the Exchange of Information between European Countries Regarding Persons Excluded from Refugee Status in Accordance with Article 1F of the Refugee Convention' (Norwegian Directorate of Immigration 2015) pp 13, 14.

¹⁸¹ Ibid p 14.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid pp 13, 14.

¹⁸⁵ Ibid p 14.

Finally, applications for residence permits on the basis of family reunification may be denied on the basis of Article 43 Belgian Alien Act. Although the elements, which have led to the exclusion on the basis of Article 1(F) will be taken into account, there will nevertheless be an individual examination on the public order threat the applicant represents, as well as a fair balance test.¹⁸⁶

3. Article 27 Citizenship Directive

A restricted entry on the basis of Article 27 Citizenship Directive, transposed into Article 43 Belgian Alien Act, always comes down to a sufficiently reasoned decision based on the personal assessment of the conduct of an individual, regardless of past crimes.

The Council for Alien Law Litigation¹⁸⁷ (hereinafter CALL)¹⁸⁸ stated that the failure to take into account the application for residence by a family member of an EU citizen must be considered as limiting the freedom of movement and residence of Union citizens and their family members.¹⁸⁹ It also has reiterated the rights of Member States to restrict entry and stay, as per Article 27 Citizenship Directive. It has stressed that the concept of public order, as used in the Citizenship Directive, is a derogation from the fundamental principle of the free movement of persons which must be interpreted strictly and whose scope cannot be determined unilaterally by the Member States.¹⁹⁰ That it has interpreted the grounds of entry restrictions under Article 43 narrowly is therefore not surprising. No matter the ground used to restrict entry under Article 43, such as the European entry bans or past criminal convictions,¹⁹¹ the CALL has consistently upheld the EU law principles and stressed the importance of sufficiently reasoned decisions.¹⁹²

A genuine, present and sufficiently serious threat

Therefore, the existence of a criminal conviction is not enough to refuse a residence permit, no matter whether the charges concern ordinary theft¹⁹³ or drugs crimes^{194 195}. The CALL requires an investigation into the personal conduct of the individual. The resulting restriction must be based on the cumulative effect of the three criteria: the threat must simultaneously be present, genuine and sufficiently serious for the fundamental interests of Belgium society.¹⁹⁶ In addition, the proportionality test and fair balance of interests should sufficiently take into account the right to family life,¹⁹⁷ and particularly the best interests of the child.¹⁹⁸ Although severity of a crime is not

¹⁸⁶ Ibid.

¹⁸⁷ Known as the Raad voor Vreemdelingenbetwistingen (RvV) / Conseil du Contentieux Etrangers (CCE), CALL is an independent administrative court which can be seized to appeal decisions of the general Commissariat for refugees and stateless persons, against decisions of the Office for foreigners and all other individual decisions taken under the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners.

¹⁸⁸ Raad van State (RvS) 7 November 2001, no 100.628; RvS 30 May 2006, no 159.298; RvS 12 January 2007, no 166.608; RvS 15 February 2007, no 167.848; RvS 26 June 2007, no 172.777.

¹⁸⁹ RvV 19 December 2014, no 135.627, para 3.15.

¹⁹⁰ Ibid.

¹⁹¹ RvS 7 November 2001, no. 100.628; RvS 30 May 2006, no 159.298; RvS 12 January 2007, no 166.608; RvS 15 February 2007, no 167.848; RvS 26 June 2007, no 172.777.

¹⁹² RvV 13 January 2016, no 159.789; RvV 8 February 2016, no 161.549; RvV 7 December 2010, no 52.575; RvV 20 September 2010, , no. 4 8.259, RvV 25 October 2013, no 112 790; RvV 19 December 2014, no 135.627.

¹⁹³ RvV 8 February 2016, no 161.549.

¹⁹⁴ RvV 13 January 2016, no 159.789.

¹⁹⁵ RvV 13 January 2016, no 159.789; RvV 8 February 2016, no 161.549; RvV 7 December 2010, no 52.575; RvV 20 December 2010, no. 4 8.259; RvV 25 October 2013, , no 112 790.

¹⁹⁶ RvV 8 February 2016, no 161.549, p 6.

¹⁹⁷ RvV 8 February 2016, no. 161.549, p 6; RvV 13 January 2016, no 159.789, p 6.

usually a permissible ground, this may be the case in exceptional circumstances such as repetitive child abuse.¹⁹⁹

Similarly, a European entry ban is not a sufficient reason to limit a residence permit derived from the right of a Union family member.²⁰⁰ The basis on which the European entry ban has been placed, whether it be irregular stay²⁰¹ or Article 1(F) Refugee Convention²⁰², is equally unimportant. Indeed, the CALL underscores that the fact that authorities have applied Article 1(F) Refugee Convention, because the applicant committed crimes in the country of origin, cannot *ipso facto* be taken to mean that the applicant constitutes a genuine, present and sufficiently serious threat to a fundamental interest of Belgian society within the meaning of Article 43(2) Belgian Aliens Act.²⁰³

Equally notable is how the CALL underscores that the nature of Article 1(F) is to punish past crimes.²⁰⁴ In a judgement of 27 March 2013, the CALL had noted that the applicant was refused international protection because he worked for the KhaD and WAD in Afghanistan during 1986 and 1992. Though the seriousness of the crimes was undisputed, the CALL stated that these crimes were committed around 20 to 25 years before the proceedings of the present case. The immigration authorities posited that these crimes were still up to date due to their seriousness. However, no assessment was made as to whether the applicant intended to continue this behaviour in the future. As a result, the CALL determined it was not possible to ascertain that the applicant constitutes an actual, genuine and sufficiently serious threat to Belgian society.²⁰⁵

¹⁹⁸ Ibid.

¹⁹⁹ RvV 25 October 2013, no 112 790.

²⁰⁰ RvV 19 December 2014, no 135.627.

²⁰¹ Ibid para 3.16.

²⁰² See for example: RvV 26 November 2012, no 92 074 and RvV 27 March 2013, no 99 921. In a judgment of 26 November 2012, no 92 074, the applicant was declared undesirable by the Dutch authorities on the basis of Art 1(F), and subsequently issued a European entry ban. In its considerations, the CALL remarked the differences in Dutch law between a decision made on the basis on the interest of the State (Art 67 Subsection e Dutch Aliens Act) and a decision made on the basis of threat to public order or national security (Art 67 Subsection c Dutch Aliens Act).

²⁰³ RvV 27 March 2013, no 99 921, para 3.14.

²⁰⁴ Ibid para 3.13.

²⁰⁵ Ibid.

Annex III: United Kingdom

1. Legislative Overview

As clarified by the Home Office of the United Kingdom, most of the provisions of the Refugee Convention, the Qualification and Citizenship Directives have been transposed into UK legislation through primary and secondary laws and the Immigration Rules.²⁰⁶ Neither the UK nor Ireland opted in to the 2011 Recast Qualification Directive, thus remaining bound only by the original 2004 Qualification Directive. For the purpose of the present research this does not matter.

Under UK legislation, a person excluded from refugee status based on Article 12(2) Qualification Directive and Article 1(F) Refugee Convention the applicant is not entitled to the asylum status and his application has to be refused. In order to ensure that this issue will be properly considered in the possible appeal procedure, Section 55 of the '2006 Immigration, Nationality and Asylum Act' provides that the Secretary of State can issue a certificate to that effect. Indeed, under Section 92 of the Nationality, Immigration and Asylum Act 2002 (hereinafter NIA), the individual whose application has been turned down due to Article 1(F) exclusion clause, enjoys the same appeal rights as any other applicant. However, the Tribunal or the Special Immigration Appeals Commission (SIAC) must begin their substantive deliberations on the appeal by considering the certificate. In case these appeal bodies agree with its statements, they are bound to take into account the exclusion grounds first and, if they decide to uphold the certificate, they do not need to consider whether Article 1(A) Refugee Convention applies.

Moreover, in those cases where an exclusion decision under Article 1(F) has been taken on grounds of national security or otherwise in the public interest, it may be certified under Section 97 NIA. In such circumstances, the appeal lies only to the Special Immigration Appeals Commission and not to the Tribunal.

Article 27 Citizenship Directive is implemented within the UK legal framework through Regulation 19 and 21 of the Immigration (European Economic Area) Regulation 2006 (SI 1003/2006) (henceforth 2006 EEA Regulation).

2. Alternative Status

If the removal of an individual who is excluded from refugee status on the basis of Article 1F would violate Article 3 ECHR the policy of the Home Office is to grant the so-called 'Restricted Leave' (RL).²⁰⁷ This temporary renewable permission is usually issued for a period of six months at a time and implies several limitations for the holder.²⁰⁸ The permanent settlement of an individual holding a Restricted Leave is possible only after a continuous period of residence of at least 10 years.²⁰⁹ Other significant differences between who enjoys the status of international protection and who holds a Restricted Leave are that the latter is not expressly entitled to family reunification, travel documents or access to public funds.

²⁰⁶ United Kingdom Home Office, Asylum Policy Instructions - Revocation of refugee status (v 4.0), published on 19 January 2016.

²⁰⁷ This policy applies as of September 2011.

²⁰⁸ UK Home Office, *Asylum Policy Instruction - Restricted leave (v 1.0)*, (23 January 2015)

www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf
accessed 12 May 2016.

²⁰⁹ *Ibid*, para 4.12.1.

3. Article 27 Citizenship Directive

A Union citizen and his or her family members can be denied entry to the UK under Regulation 19 and in accordance with Regulation 21 (2006) EEA Regulations. Regulation 19 states that 'a person is not entitled to be admitted to the UK (...) if his exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21'. Hence, such exclusion is justified under Regulation 21 entailing, in particular, that 'the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society'.

A genuine, present and sufficiently serious threat

The decision to restrict a person's free movement rights must be based exclusively on the personal conduct of the person concerned. A person's previous criminal offences do not in themselves justify the decision. Moreover, the decision must comply with the principle of proportionality.²¹⁰

However, as for Article 27 Citizenship Directive, some interpretative problems remain. The judgment of the Asylum and Immigration Tribunal in dispute between GW, a Dutch national, and an Immigration Officer at Heathrow Airport clarifies some of these problems. In its judgment, the Tribunal concluded that a threat to one of the fundamental interests of society refers only to a conduct which is prohibited by law.²¹¹ In its reasoning, the Tribunal justified its conclusion by saying that 'if one wants to discover what interest are regarded as fundamental in a society it is appropriate to look at the legal provisions on that society'. Therefore, it would be 'highly unlikely that a matter which is not governed by law' is a matter regarded as the fundamental interest of that society.²¹²

Further, the Tribunal interpreted the meaning of 'a genuine, present and sufficiently serious threat' by saying that the assessment must be based on evidence.²¹³ A speculative assumption is not enough to conclude that a person would pose a genuine, present and sufficiently serious threat.²¹⁴ In addition, the Tribunal found that a criminal conviction of the person concerned in his country of origin does not, in itself, result in a threat that may justify the exclusion of a Union citizen and their family members.²¹⁵

²¹⁰ 21 of the Immigration (European Economic Area) Regulation 2006 (SI 1003/2006).

²¹¹ Asylum and Immigration Tribunal, UKAIT 00050 [12 October 2009], para 19.

²¹² Ibid para 17.

²¹³ Ibid para 27.

²¹⁴ Ibid para 29.

²¹⁵ Ibid para 31.