

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010 (\*)

(Directive 2004/83/EC – Minimum standards for the grant of refugee status or of subsidiary protection – Article 12 – Exclusion from refugee status – Article 12(2)(b) and (c) – Notion of ‘serious non-political crime’ – Notion of ‘acts contrary to the purposes and principles of the United Nations’ – Membership of an organisation involved in terrorist acts – Subsequent inclusion of that organisation on the list of persons, groups and entities which forms the Annex to Common Position 2001/931/CFSP – Individual responsibility for part of the acts committed by that organisation – Conditions – Right of asylum by virtue of national constitutional law – Compatibility with Directive 2004/83/EC)

In Joined Cases C-57/09 and C-101/09,

REFERENCES for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany), made by decisions of 14 October and 25 November 2008, received by the Court on 10 February and 13 March 2009 respectively, in the proceedings

**Bundesrepublik Deutschland**

v

**B** (C-57/09),

**D** (C-101/09),

intervening parties:

**Vertreter des Bundesinteresses beim Bundesverwaltungsgericht** (C-57/09 and C-101/09),

**Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge** (C-101/09),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, A. Borg Barthet, M. Ilešič, U. Löhmus and L. Bay Larsen (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 9 March 2010,

after considering the observations submitted on behalf of:

- B, by R. Meister, Rechtsanwalt,
- D, by H. Jacobi and H. Odendahl, Rechtsanwälte,

- the German Government, by M. Lumma, J. Möller and N. Graf Vitzthum, acting as Agents,
- the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the Netherlands Government, by C. Wissels, acting as Agent,
- the Swedish Government, by A. Falk and A. Engman, acting as Agents,
- the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Eicke, Barrister,
- the European Commission, by M. Condou-Durande and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2010,

gives the following

### **Judgment**

- 1 These references for a preliminary ruling concern (i) the interpretation of Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; ‘Directive 2004/83’) and (ii) the interpretation of Article 3 of that directive.
- 2 The references have been made in proceedings between, on the one hand, the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), in turn represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees; ‘the Bundesamt’), and, on the other, B (C-57/09) and D (C-101/09), Turkish nationals of Kurdish origin. The proceedings concern the Bundesamt’s rejection of B’s application for asylum and recognition of refugee status and its revocation of D’s refugee status and right of asylum.

#### **Legal context**

##### *International law*

##### The Convention Relating to the Status of Refugees

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

- 4 Article 1A of the 1951 Geneva Convention defines, inter alia, the term 'refugee' for the purposes of that act, and Article 1F states:

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

...

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

- 5 Article 33 of the 1951 Geneva Convention, entitled 'Prohibition of expulsion or return ("*refoulement*")', provides:

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

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

The European Convention for the Protection of Human Rights and Fundamental Freedoms

- 6 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Resolutions of the UN Security Council

- 7 On 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, the UN Security Council adopted Resolution 1373 (2001) on the basis of Chapter VII of the Charter of the United Nations.

- 8 The preamble to Resolution 1373 (2001) reaffirms 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts'.

- 9 Under point 5 of that resolution, it is declared that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and ... knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

- 10 On 12 November 2001, the UN Security Council adopted Resolution 1377 (2001), in which it '*stresses* that acts of international terrorism are contrary to the purposes and

principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]’.

*European Union (‘EU’) legislation*

Directive 2004/83

- 11 Recital (3) in the preamble to Directive 2004/83 states that the 1951 Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.
- 12 Recital (6) to Directive 2004/83 states that the main objective of that directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.
- 13 Recital (9) to Directive 2004/83 is worded as follows:

‘Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.’
- 14 Recital (10) to Directive 2004/83 states that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights. In particular it seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum.
- 15 Recitals (16) and (17) to that directive are worded as follows:

‘(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention.’
- 16 Recital (22) to Directive 2004/83 states:

‘Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that “acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations” and that “knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.’
- 17 In accordance with Article 1 of Directive 2004/83, the purpose of that directive is, inter alia, to lay down minimum standards in relation to the conditions which third country nationals or stateless persons must meet in order to receive international protection and in relation to the content of the protection granted.

18 Article 2 of Directive 2004/83 states that, for the purposes of that directive:

(a) “international protection” means the refugee and subsidiary protection status as defined in (d) and (f);

...

(c) “refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) “refugee status” means the recognition by a Member State of a third country national or a stateless person as a refugee;

...

(g) “application for international protection” means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

...’

19 Article 3 of Directive 2004/83 provides:

‘Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.’

20 Paragraphs 2 and 3 of Article 12 of Directive 2004/83, which is entitled ‘Exclusion’ and forms part of Chapter III of the directive, itself entitled ‘Qualification for being a refugee’, provide:

‘2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

...

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

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

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

21 Articles 13 and 18 of Directive 2004/83 state that Member States are to grant refugee status or subsidiary protection status to a third country national who satisfies the conditions laid down in Chapters II and III or Chapters II and V, respectively, of that directive.

22 Article 14 of Directive 2004/83, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and forms part of Chapter IV of the directive, itself entitled 'Refugee status', provides:

'1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

...

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

...'

23 Paragraphs 1 and 2 of Article 21 of Directive 2004/83, which forms part of Chapter VII of the Directive, entitled 'Content of international protection', provide:

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

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

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

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

24 In accordance with Articles 38 and 39 of that directive, Directive 2004/83 entered into force on 9 November 2004 and had to be transposed into national law by 10 October 2006 at the latest.

Common Position 2001/931/CFSP

25 In order to implement Resolution 1373 (2001), the Council of the European Union adopted, on 27 December 2001, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

- 26 Under Article 1(1) of Common Position 2001/931, that act applies to ‘persons, groups and entities involved in terrorist acts’ and listed in the Annex thereto.
- 27 Paragraphs 2 and 3 of Article 1 of Common Position 2001/931 provide that, for the purposes of that act:
- ‘2. ... “persons, groups and entities involved in terrorist acts” shall mean:
- persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,
  - groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.
3. ... “terrorist act” shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:
- ...
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
- ...
- (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.
- ...’
- 28 Common Position 2001/931 includes an Annex entitled ‘First list of persons, groups and entities referred to in Article 1 ...’. Initially, neither the DHKP/C nor the PKK were on that list.
- 29 The content of that annex was updated by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L 116, p. 75).
- 30 In that annex, as updated, the list set out in Section 2 (‘Groups and entities’) names as entries 9 and 19, respectively, the ‘Kurdistan Workers’ Party (PKK)’ and the ‘Revolutionary People’s Liberation Army/Front/Party (DHKP/C), (a.k.a. Devrimci Sol (Revolutionary Left), Dev Sol)’. Those organisations have subsequently been retained on the list referred to in Article 1(1) and (6) of Common Position 2001/931 by subsequent Council Common Positions, and most recently by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931 (OJ 2010 L 178, p. 28).

Framework Decision 2002/475/JHA

31 Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3) requires Member States to take the necessary measures to ensure that the intentional acts referred to in that provision – which, given their nature or context, may seriously damage a country or an international organisation where committed with one of the aims also listed in that provision – are deemed to be terrorist offences.

32 Paragraph 2 of Article 2 of Framework Decision 2002/475, which is entitled ‘Offences relating to a terrorist group’, provides:

‘Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

...

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.’

#### *National legislation*

33 Article 16a(1) of the Grundgesetz (Basic Law) provides:

‘Persons persecuted on political grounds shall have the right of asylum.’

34 Paragraph 1 of the German Law on asylum procedure (Asylverfahrensgesetz; ‘the AsylVfG’), in the version published on 2 September 2008 (BGBl. 2008 I, p. 1798), states that that Law applies to foreigners who apply for protection from political persecution in accordance with Paragraph 16a(1) of the Basic Law, or for protection from persecution in accordance with the 1951 Geneva Convention.

35 Paragraph 2 of the AsylVfG provides that, in the Federal territory, persons entitled to asylum are to have the legal status defined by the 1951 Geneva Convention.

36 Refugee status was initially governed by Paragraph 51 of the Law on the entry and stay of foreigners on Federal territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet; ‘the Ausländergesetz’).

37 The Law on combating international terrorism of 9 January 2002 (Gesetz zur Bekämpfung des internationalen Terrorismus, BGBl. 2002 I, p. 361; ‘the Terrorismusbekämpfungsgesetz’) introduced, for the first time, in the second sentence of Paragraph 51(3) of the Ausländergesetz, with effect from 11 January 2002, grounds for exclusion reflecting those laid down in Article 1F of the 1951 Geneva Convention.

38 By the Law implementing European Union Directives on the right of residence and asylum of 19 August 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, BGBl. 2007 I, p. 1970), which entered into force on 28 August 2007, the Federal Republic of Germany transposed Directive 2004/83, among others, into national law.

39 Currently, the conditions for being considered a refugee are laid down in Paragraph 3 of the AsylVfG. Under Paragraph 3(1) and (2) of the AsylVfG:



'1. A foreign national is a refugee within the meaning of [the 1951 Convention] if, in his State of nationality, he is exposed to threats within the meaning of Paragraph 60(1) of the [Law on the residence, work and integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet; 'the Aufenthaltsgesetz')].

2. A foreign national shall not be accorded refugee status under subparagraph 1 if there are serious reasons for considering that:

...

(2) he has committed a serious non-political crime outside the Federal territory prior to his admission as a refugee, in particular a cruel action, even if committed with a purportedly political objective, or

(3) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The first sentence shall apply also to foreign nationals who have instigated, or otherwise participated in, the commission of those crimes or acts.'

40 The grounds for exclusion listed in Paragraph 3(2) of the AsylVfG replaced, with effect from 28 August 2007, the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, which had itself replaced the second sentence of Paragraph 51(3) of the Ausländergesetz.

41 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162), provides:

'Pursuant to the [1951 Geneva] Convention, a foreign national may not be deported to a State in which his life or liberty is under threat on account of his race, religion, nationality, membership of a certain social group or political convictions. ...'

42 The first sentence of Paragraph 73(1) of the AsylVfG provides that '[r]ecognition of a right of asylum and of refugee status shall be revoked without delay if the conditions on which such recognition is based are no longer satisfied'.

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

#### *Case C-57/09*

43 Born in 1975, B entered Germany at the end of 2002, where he applied for asylum and for protection as a refugee and, in the alternative, for an order prohibiting his deportation to Turkey.

44 In support of his application, B stated, inter alia, that, in Turkey, he had been a sympathiser of Dev Sol (now DHKP/C) when still a schoolboy and that, from the end of 1993 until the beginning of 1995, he had supported armed guerrilla warfare in the mountains.

45 After being arrested in February 1995, he had been subjected to serious physical abuse and had been forced to give a statement under torture.

- 46 In December 1995, he had been sentenced to life imprisonment.
- 47 In 2001, while he was in custody, B had been given another life sentence after he had confessed to killing a fellow prisoner suspected of being an informant.
- 48 In December 2002, B took advantage of a six-month conditional release from custody on health grounds to leave Turkey and make his way to Germany.
- 49 By decision of 14 September 2004, the Bundesamt rejected B's application for asylum as unfounded and found that the conditions laid down in Paragraph 51(1) of the Ausländergesetz were not satisfied. The Bundesamt took the view that, since B had committed serious non-political crimes, he fell into the second exclusion category, laid down in the second sentence of Paragraph 51(3) of the Ausländergesetz (referred to subsequently in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, then in Paragraph 3(2)(2) of the AsylVfG).
- 50 In the same decision, the Bundesamt also held that there were no obstacles to B's deportation to Turkey under the applicable law and declared him liable to deportation to that country.
- 51 By judgment of 13 June 2006, the Verwaltungsgericht Gelsenkirchen (Administrative Court, Gelsenkirchen) annulled the decision of the Bundesamt and ordered that authority to grant B asylum and to declare that his deportation to Turkey was prohibited.
- 52 By judgment of 27 March 2007, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia) dismissed the appeal brought by the Bundesamt against the judgment of the Verwaltungsgericht Gelsenkirchen, on the view that B should be granted a right of asylum in accordance with Paragraph 16a of the Grundgesetz, together with refugee status.
- 53 The Oberverwaltungsgericht found, in particular, that the exclusion clause relied upon by the Bundesamt must be understood to the effect that it does not seek only to punish a serious non-political crime committed in the past, but also to forestall the danger which the applicant could pose to the host Member State, and that the application of that clause requires an overall assessment of the particular case in the light of the principle of proportionality.
- 54 The Bundesamt appealed against that judgment on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court), relying on the second and third exclusion clauses laid down in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz (and subsequently in Paragraph 3(2)(2) and (3) of the AsylVfG) and arguing that, contrary to the approach adopted by the appeal court, those two exclusion clauses do not imply that there must be a danger to the security of the Federal Republic of Germany; nor do they entail the need for an assessment of proportionality with regard to the particular case.
- 55 Furthermore, according to the Bundesamt, the exclusion clauses laid down in Article 12(2) of Directive 2004/83 are among those principles from which, by virtue of Article 3 of that directive, Member States cannot derogate.

- 56 Since May 2001, D, who was born in 1968, has resided in Germany where, on 11 May 2001, he applied for asylum.
- 57 In support of his application, he stated, inter alia, that, in 1990, he had fled to the mountains where he joined the PKK. He had been a guerrilla fighter for the PKK and one of its senior officials. At the end of 1988, the PKK had sent him to northern Iraq.
- 58 Because of political differences with its leadership, D had left the PKK in May 2000 and since then had been under threat. He had stayed on in northern Iraq for about one more year, but had not been safe there.
- 59 In May 2001, the Bundesamt granted D asylum and recognised his right to refugee status under the national law in force at that time.
- 60 Following the entry into force of the Terrorismusbekämpfungsgesetz, the Bundesamt initiated a revocation procedure and by decision of 6 May 2004, pursuant to Paragraph 73(1) of the AsylVfG, it revoked the decision granting D a right of asylum and refugee status. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside Germany before being admitted to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the United Nations.
- 61 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled that revocation decision.
- 62 The appeal brought by the Bundesamt was dismissed by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen by judgment of 27 March 2007. On grounds similar to those underpinning the judgment handed down on the same day in the case concerning B, the Oberverwaltungsgericht held that the exclusion clauses laid down in the German legislation did not apply in D's case either.
- 63 The Bundesamt appealed that judgment on a point of law ('Revision'), its grounds of appeal being, in substance, analogous to those relied upon in support of the appeal in the case concerning B.

*The questions referred and the procedure before the Court*

- 64 The Bundesverwaltungsgericht points out that, according to the findings of the appeal court, by which it is bound, B and D would not, in the event of their return to their country of origin, be sufficiently safe from renewed persecution. The Bundesverwaltungsgericht infers from this that the positive conditions for being considered a refugee are satisfied in both cases. Nevertheless, B and D will not be able to have their refugee status recognised if one of the exclusion clauses laid down in Article 12(2) of Directive 2004/83 applies.
- 65 The Bundesverwaltungsgericht states that, if one of those exclusion clauses were to apply, B and D would be entitled to have their right of asylum recognised under Article 16a of the Grundgesetz, which does not exclude any category of persons from that right.
- 66 Lastly, the Bundesverwaltungsgericht points out that neither exclusion under Article 12 of Directive 2004/83 nor a finding that Article 16a of the Grundgesetz is incompatible with Directive 2004/83 would necessarily lead B and D to lose the right to remain in Germany.

67 It is against that background that the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases before it, the following five questions – the first and fifth of which differ slightly on account of the particular facts of each of those cases – to the Court for a preliminary ruling:

- '(1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of [Directive 2004/83] if
  - the person seeking asylum was a member of an organisation which is included in the list of persons, groups and entities annexed to the ... Common Position [2001/931] and employs terrorist methods, and the appellant has actively supported that organisation's armed struggle? (Case C-57/09)
  - a foreign national was for many years involved as a combatant and an official – including for a time as a member of its governing body – in an organisation (in this case, the PKK) which repeatedly employed terrorist methods in the armed struggle waged against the State (in this case, Turkey) and is included in the list of persons, groups and entities annexed to the ... Common Position [2001/931], and the foreign national thereby actively supported its armed struggle in a prominent position? (Case C-101-09)
- (2) If Question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83] ... require that the foreign national continue to constitute a danger?
- (3) If Question 2 is to be answered in the negative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83]... require that a proportionality test be undertaken in relation to the individual case?
- (4) If Question 3 is to be answered in the affirmative:
  - (a) Is it to be taken into account in considering proportionality that the foreign national enjoys protection against deportation under Article 3 of the [ECHR] or under national rules?
  - (b) Is exclusion disproportionate only in exceptional cases having particular characteristics?
- (5) Is it compatible with Directive 2004/83, for the purposes of Article 3 of [Directive 2004/83] ..., if
  - the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied? (Case C-57/09)
  - the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied and refugee status under Article 14(3) of the directive is revoked? (Case C-101/09)'

68 By order of the President of the Court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and of the judgment.

### **Jurisdiction of the Court**

69 In the cases before the referring court, the Bundesamt adopted the contested decisions on the basis of the legislation applicable before the entry into force of Directive 2004/83, that is to say, before 9 November 2004.

70 As a consequence, those decisions, which have given rise to the present references for a preliminary ruling in the present case, do not fall within the scope *ratione temporis* of Directive 2004/83.

71 It should nevertheless be borne in mind that where the questions referred by national courts concern the interpretation of a provision of Community law, the Court is in principle obliged to give a ruling. In particular, neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that those responsible for framing the EC Treaty intended to exclude from the jurisdiction of the Court references for a preliminary ruling on a directive in the specific case where the national law of a Member State refers to the content of provisions of an international agreement which have been re-stated in that directive, in order to determine the rules applicable to a situation which is purely internal to that State. In such a case, it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply (see, by analogy, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 48).

72 The Bundesverwaltungsgericht points out, in the cases before it, that the Terrorismusbekämpfungsgesetz introduced into the national law grounds for excluding a person from refugee status which correspond in substance to those laid down in Article 1F of the 1951 Geneva Convention. Given that the grounds for exclusion laid down in Article 12(2) of Directive 2004/83 also correspond in substance to those laid down in Article 1F of that Convention, it follows that the exclusion clauses which were considered and applied by the Bundesamt in both the decisions at issue before the referring court, which were adopted before Directive 2004/83 entered into force, correspond in substance to the exclusion clauses subsequently inserted in the directive.

73 Moreover, as regards the decision of the Bundesamt to revoke the decision according refugee status to D, it should be noted that Article 14(3)(a) of Directive 2004/83 requires the competent authorities of a Member State to revoke refugee status if ever they establish, after according that status, that the person 'should have been or is excluded' from being a refugee, in accordance with Article 12 of the directive.

74 In contrast with the ground for revocation laid down in Article 14(1) of Directive 2004/83, the ground laid down in Article 14(3)(a) is not subject to transitional arrangements and cannot be limited to applications made or decisions taken after the directive entered into force. Nor is its application discretionary, like the grounds for revocation laid down in Article 14(4).

75 Accordingly, the questions referred for a preliminary ruling must be answered.

## Consideration of the questions referred

### *Preliminary observations*

- 76 One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.
- 77 Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (*Salahadin Abdulla and Others*, paragraph 52, and Case C-31/09 *Bolbol* [2010] ECR I-0000, paragraph 37).
- 78 Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54, and *Bolbol*, paragraph 38).

### *The first question*

- 79 By its first question in each case, the Bundesverwaltungsgericht asks, in substance, whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83.
- 80 In order to answer that question, which seeks to elicit the extent to which a person's membership of an organisation on that list can bring that person within the scope of points (b) and (c) of Article 12(2) of Directive 2004/83, it is necessary at the outset to ascertain whether the acts committed by such an organisation can, as the national court assumes, fall within the categories of the serious crimes and the acts referred to in those points.
- 81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).
- 82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts

identified in the UN Resolutions relating to 'measures combating international terrorism.'

- 83 Those include Resolutions 1373 (2001) and 1377 (2001) of the UN Security Council, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.
- 84 It follows that – as is argued in their written observations by all the Governments which submitted such observations to the Court, and by the European Commission – the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.
- 85 Next, the question arises as to what extent membership of such an organisation implies that the person concerned falls within the scope of Article 12(2)(b) and (c) of Directive 2004/83 where he has actively supported the armed struggle waged by that organisation, possibly occupying a prominent position within that organisation.
- 86 On that point, it should be noted that points (b) and (c) of Article 12(2) of Directive 2004/83 – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are 'serious reasons' for considering that 'he ... has committed' a serious non-political crime outside the country of refuge prior to his admission as a refugee or that 'he ... has been guilty' of acts contrary to the purposes and principles of the United Nations.
- 87 It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses.
- 88 As a consequence, first, even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.
- 89 There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to Article 12(2) of the directive, to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by Directive 2004/83 consistently with the 1951 Geneva Convention.
- 90 However, the inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that

group has committed acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83.

- 91 In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83.
- 92 Nor, secondly, and contrary to the submissions of the Commission, can participation in the activities of a terrorist group, within the meaning of Article (2)(2)(b) of Framework Decision 2002/475, come necessarily and automatically within the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83.
- 93 Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but the intentional act of participating in the activities of a terrorist group, which is defined in Article 2(2)(b) of that Framework Decision and which the Member States were required to make punishable under their national law, is not such as to trigger the automatic application of the exclusion clauses laid down in Article 12(2)(b) and (c) of the directive, which presuppose a full investigation into all the circumstances of each individual case.
- 94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.
- 95 Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.
- 96 That individual responsibility must be assessed in the light of both objective and subjective criteria.
- 97 To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.
- 98 Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a



decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

99 In the light of all the foregoing considerations, the answer to the first question referred in each of the two cases is that Article 12(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that:

- the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’;
- the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.

*The second question*

100 By its second question in each of the cases, the Bundesverwaltungsgericht wishes to know 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.

101 It is appropriate to point out first that, within the system of Directive 2004/83, any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) of that directive, pursuant to which Member States may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State.

102 Under points (b) and (c) of Article 12(2) of Directive 2004/83, which are analogous to points (b) and (c) of Article 1F of the 1951 Geneva Convention, a third country national is excluded from refugee status where there are serious reasons for considering that ‘he ... has committed’ a serious non-political crime outside the country of refuge ‘prior to his ... admission as a refugee’ or that he ‘has been guilty’ of acts contrary to the purposes and principles of the United Nations.

103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the Governments which submitted observations and by the Commission.

104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to

be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.

- 105 In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

*The third question*

- 106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.

- 107 In that regard, it should be borne in mind that it is clear from the wording of Article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.

- 108 Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive.

- 109 Since 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, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.

- 110 It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.

- 111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

*The fourth question*

- 112 In view of the answer given to the third question, there is no need to answer the fourth question referred by the Bundesverwaltungsgericht in each of these two cases.

*The fifth question*

- 113 By its fifth question in both cases, the Bundesverwaltungsgericht wishes, in substance, to know whether it is compatible with Directive 2004/83, for the purposes of

Article 3 of that directive, for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) of the directive has a right of asylum under its constitutional law.

- 114 In that regard, it should be borne in mind that Article 3 permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards are compatible with Directive 2004/83.
- 115 In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of the directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2).
- 116 However, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for 'another kind of protection' outside the scope of Directive 2004/83.
- 117 Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned.
- 118 The grant by a Member State of such national protection status, for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83 – that is to say, on a discretionary and goodwill basis or for humanitarian reasons – does not, as is stated in recital 9, fall within the scope of that directive.
- 119 That other kind of protection which Member States have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the Commission, amongst others, has rightly stated.
- 120 Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive.
- 121 In the light of those considerations, the answer to the fifth question referred is that Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

### **Costs**

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

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

1. **Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:**
  - **the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’;**
  - **the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.**
2. **Exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.**
3. **The exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.**
4. **Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.**

[Signatures]