

## Exclusion from International Protection for Terrorist Activities under EU Law: from B & D to Lounani

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**Introduction**

In this article, I will discuss the evolving interpretation of the exclusion clauses at EU law over the course of time between the judgments of the Court of Justice in Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B & D* [1], 9 November 2010 and that in Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani* [2], 31 January 2017.

The inclusion of exclusion clauses, it has been argued, is rooted in the promulgation of morality and for states not to be forced to *protect undesirable refugees?* [3]. The application of the exclusion clauses is mandatory; states have no discretion. The main pieces of legislation come from two sources, the [1951 Refugee Convention](#) [4] and the EU Qualification Directives. The exclusion clauses in the 1951 Refugee Convention contained in Article 1F provide that persons shall be excluded from persecution where the applicant has committed a war crime or crime against the peace, a serious non-political crime, or an act contrary to the principles and purposes of the United Nations.

In 2003, UNHCR published a [Background Note on the Application of the Exclusion Clauses: Article 1F](#) [5]. UNHCR advocated a narrow interpretation of the clauses in Article 1F, *triggered only in extreme circumstances by activity which attacks the very basis of the international community's co-existence under the auspices of the United Nations?* [para. 47].

In EU legislation, Articles 12(2) and (3) of the [2004 Qualification Directive](#) [6] (QD), and similarly in the [2011 recast Qualification Directive](#) [7] (rQD), set out the exclusion clauses based on personal conduct almost identical to those in the Refugee Convention ? for the sake of ease of reference, when I refer to the QD, I mean both Directives. The most noticeable departure from Article 1F of the Refugee Convention is at 12(2)(b) where the Directive clarifies the statement, *prior to his or her admission as a refugee?* and [significantly widens](#) [8] the scope of the serious non-political crime clause. The next addition to the text of the Refugee Convention is Article 12(3) of the QD which issues a clarification that the clauses apply to those who incite or otherwise commit any of the prescribed acts.

**Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B & D***

[Bundesrepublik Deutschland v. B & D](#) [9] was one of the first asylum-related judgments of the CJEU and the first time the Court was tasked with interpreting the exclusion clauses (the questions to the Court from Germany?s Federal Administrative Court can be found [here](#) [9]).

The Court held that terrorist acts by the very nature of their targeting of civilian populations can be regarded as a non-political crime, regardless of the political objective of the act [para. 81] ? it is worth noting that in the [proposed Qualification Regulation](#) [10], , this becomes a mandatory rather than a discretionary finding, as [criticised by ECRE](#) [11]. The Court emphasised the ?serious reasons? threshold and required national authorities to conduct an individual assessment from facts within knowledge [para. 87]. To be excluded from protection under Article 12 of the QD, there must be serious reasons for considering that a person had a ?*share of the responsibility for the acts committed by the organisation in question while that person was a member?* [para. 95], however prominent their position in the organisation is. While not referred to by the Court, this recalls the interpretation of UNHCR in their 2003 Note relating to the gravity of the act in question [at para. 47].

The test for exclusion is both objective and subjective. The authority must assess:

- (i) *the true role played by the person concerned in the perpetration of the acts in question;*
- (ii) *his position within the organisation;*
- (iii) *the extent of the knowledge he had, or was deemed to have, of its activities;*
- (iv) *any pressure to which he was exposed; or*
- (v) *other factors likely to have influenced his conduct* [para. 97].

As a result of Article 12 referring to past events rather than present ones, where a person presents a continuing threat to the security of a Member State, the authorities can either revoke the status of a refugee under Article 14(4)(a) (even though such lines are blurred by Article 14(5) QD) or *refoule* a refugee who presents such a threat under Article 21(2), which is the equivalent of Article 33(2) of the Refugee Convention.

In addition, the Court stated that a proportionality test was not required because an application of the exclusion clauses should not automatically lead to that applicant?s deportation (the Court, for the first time, interpreted Article 3 of the QD and concluded that it would be impermissible to allow the grant of refugee status under the QD to someone excluded from such under Article 12(2) and at paras. 118-121, and held that a person is not precluded from applying for a status outside of the QD, as long as another status is not confused with refugee status). Respect must still be had for ECHR protections against *refoulement* ? for example see the line of jurisprudence relating to [Othman \(Abu Qatada\) v. U.K](#) [12]., application no. 8139/09. This too is under threat with the new proposal for a Qualification Regulation, where the Commission proposes making a finding on exclusion mandatory before a finding on international protection. Again, this was [criticised by ECRE](#) [11] as contradicting *B & D* and the nature of international protection..

### **The application of *B & D***

*Bundesrepublik Deutschland v. B & D* was included in [a study](#) [13] conducted by the Hungarian Helsinki Committee, which found that following on from the judgment, no legislative changes were made in Member States and the only real jurisprudential change took place in Germany [p. 39]. Importantly, the study found that policies relating to the ?automatic? exclusion for membership of a terrorist organisation in numerous countries were reversed, but that in others, such as the Netherlands, Austria, the UK and France, the judgment confirmed existing practice [pp 39-40]. However, case law, particularly from the UK has taken somewhat differing approaches, particularly on the issue of membership of a terrorist organisation leading to automatic exclusion.

The UK's Supreme Court held in [Al-Sirri v. Secretary of State for the Home Department](#) [14] [2012] UKSC 54 that exclusion clauses should be *interpreted restrictively and applied with caution*, that there should be a high threshold *defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security*? (see [UNHCR's 2003 Background Note](#) [5]), and that there should be *serious reasons for considering that the person concerned bore individual responsibility for acts of that character*?. This approach is consistent with the positions of the UNHCR's 2003 Background Note, as well as the CJEU in *B & D*.

Recent case law from the Council for Alien Law Litigation in Belgium, [case no. 96933](#) [15], held that the provision of logistical support for terrorist networks, such as the production of counterfeit passports did not meet the threshold laid down in *B & D*.

However, this can be juxtaposed with the UK's Upper Tribunal in [AH \(Article 1F\(b\)\)](#) [2013] UKUT 00382 [16], which took guidance from *Al-Sirri* in dismissing an appeal against a decision to exclude a person from protection on the basis of conspiracy to promote terrorist activities. Furthermore, in the French case of [M.Z., no. 10004811](#) [17], the CNDA held that despite the applicant's lack of knowledge of operations, the fact that he was present for the rape and torture of people coupled with the belatedness of his defection meant that Article 1F could be applied to him.

There have, however, been worrying developments recently. Last year, the UK's Special Immigration and Asylum Commission (SIAC) in [N2 v. Secretary of State for the Home Department \(Rev 1\)](#) [18] [2016] UKSIAC SC\_125\_2015 held that a finding of exclusion from refugee status automatically results in an exclusion from humanitarian protection, which is clearly at odds with *B & D*. In addition however, after setting out in detail the findings of the Supreme Court in *Al-Sirri*, the SIAC found that as the appellant was convicted under the Terrorism Act 2000 for downloading terrorist-related materials from the Internet – an inchoate or preparatory offence, which seems a long way from *share[ing] the responsibility for the acts committed by the organisation in question while that person was a member*? (*B & D*) he could be excluded from protection. In finding that such preparatory acts amount to exclusion, the Commission entangled various other pieces of legislation and resolutions aimed at the prosecution of terrorist-related offences that the CJEU sought to disentangle from the humanitarian nature of the QD.

Recently, the UK's Upper Tribunal (Immigration and Asylum Chamber) delivered judgment in yet a further case in the *Al-Sirri* line of litigation – [Al-Sirri \(Asylum & Exclusion & Article 1F\(c\)\) Egypt](#) [19] [2016] UKUT 448 (IAC). The Tribunal here dismissed the Secretary of State's appeal, holding that the burden of proving that there were serious reasons for considering the Appellant falls within Article 1F(c) was not discharged. While not referring to *B & D*, the Tribunal did set out the provisions laid down by the Supreme Court in *Al-Sirri* and followed them.

It appears from this short overview of national jurisprudence that courts were struggling with the threshold of conduct that comes within the scope of exclusion clauses and to what extent more *low-grade*? acts such as participation, etc. can also lead to a finding of exclusion. In a way it is a fitting backdrop for the CJEU's decision in *Lounani*. However, and as will be described below, it is unclear if the Court has fully clarified the confusion.

### **Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani***

The scope of the *acts*? in Article 12(2)(c) of the QD arose for interpretation recently in the case of *Lounani*. Mr. Lounani had been convicted of criminal offences in Belgium related to the participation in a terrorist organisation – which included partaking in the leadership of the group, providing logistical support in the form of false passports and organising a network to send

volunteers to Iraq (Please see the questions referred [here](#) [20] ? note, the Court answered the first question and the third and fourth questions combined).

The Court held that Article 12(2)(c) and Article 1F(c) could not be limited to Article 1(1) of the Framework Directive. Thus the scope of the exclusion clauses cannot be confined to acts of terrorism but must also extend to the *recruitment, organisation, transportation or equipment of individuals who travel to a State other than their States of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts.* The Court further held that, due to the variations in the thresholds of conduct, it is the decision of the national authorities as to whether such actions meet the *serious reasons* threshold set out in Article 12(2) ? it is thus likely that arbitrary findings will be made at the national level.

In *B & D*, the Court had sought to keep other instruments relating to terrorism separate to an interpretation of the Qualification Directive, a humanitarian instrument. However, in *Lounani*, the Court now actively uses Security Council Resolutions and the [Framework Decision 2002/475](#) [21] to determine the scope of Article 12(2). It is an interesting new departure from the international law of the Refugee Convention. Now, as a result of Article 12(3) of the Qualification Directive, the scope of Article 1F, in Europe at least, is greatly widened. It is entirely possible that more litigation will be generated in the future, as national courts, and perhaps the CJEU again at some stage will have to define more and more preparatory acts of terrorism to focus the meaning of the *Lounani* judgment.

## Conclusions

The recent judgment of the CJEU in *Lounani* highlights a new departure in the interpretation of the scope of the exclusion clauses from its previous decision in *B & D*, where the Court emphatically stated that there can be no exclusion for membership of a terrorist organisation alone.

While the exclusion clauses might seem ripe for use in the domestic fight against terrorism, it is imperative that they are not politicised ? Steve Peers [notes](#) [22] that this new approach is more in line with developments in criminal law at a Council of Europe level. Unfortunately, the CJEU's decision in *Lounani* allows for this to happen, creating a sliding scale of protection for exclusion clauses that will no doubt lead to variations in the scope of exclusion, and indeed arbitrariness, across the Member States. The Court has managed to take a relatively clear definition and muddy the waters.

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*This journal entry is an expression of the author's own views, and not those of EDAL or ECRE.*

## Keywords:

Exclusion from protection

Terrorism

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## Links:

[1] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-5709-and-c-10109-bundesrepublik-deutschland-v-b-and-d>

[2] <http://www.asylumlawdatabase.eu/en/content/case-c-57315-commissaire-g%C3%A9n%C3%A9ral-aux-r%C3%A9fugi%C3%A9s-et-aux-apatrides-v-mostafa-lounani>

[3] <http://admin.cambridge.org/academic/subjects/law/human-rights/law-refugee-status-2nd-edition?format=AR&isbn=9781139989626>

- [4] <http://www.unhcr.org/uk/3b66c2aa10>
- [5] <http://www.refworld.org/docid/3f5857d24.html>
- [6] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>
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- [12] <http://www.asylumlawdatabase.eu/en/content/ecthr-othman-abu-qatada-v-united-kingdom-application-no-813909>
- [13] <http://helsinki.hu/wp-content/uploads/The-Luxemburg-Court-06-04-2012-final.pdf>
- [14] <http://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-al-sirri-v-secretary-state-home-department-2012-uksc-54>
- [15] <http://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-12-february-2013-no-96933#content>
- [16] <http://www.asylumlawdatabase.eu/en/case-law/uk-upper-tribunal-asylum-and-immigration-chamber-ah-article-1fb-2013-ukut-00382#content>
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