



EMN Ad-Hoc Query on 2019.2 Reasons for being excluded from the grant of international protection and criminal liability for incorrect or incomplete information

Requested by Adolfo SOMMARRIBAS on 14 January 2019

Protection

Responses from EMN NCP Austria, EMN NCP Luxembourg, EMN NCP Norway, EMN NCP Italy, EMN NCP Estonia, EMN NCP Hungary, EMN NCP Lithuania (7 in total)

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The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.



Background information:

In order to collect information for possible legislative measures in the near future in Germany, concerning the penalty of false statements etc. given within the asylum procedure, we ask EMN Member States:

Questions

1. 1. Does your legal system provide that asylum seekers who were convicted in the host country during the period before taking the decision for committing a “particularly serious crime” (Article 14) or a “serious crime” (Article 17) are excluded from being granted international protection within the meaning of Directive 2011/95/EU (Qualification Directive)?

Available choices:

Yes, No

2. a. If you answer YES to Q.1, to which requirements is this exclusion subject (in particular: which degree of penalty and / or which type of criminal offense leads to an exclusion) and in what extent were the conditions of the Geneva Refugee Convention and the Directive 2011/95/EU (Qualification Directive) considered in the draft of this provision?

3. b. Is an exclusion dependent on just the degree of penalty or also on the legal right infringed and/or the modalities of the commission of the offense (if so, please clarify)?

4. 2. Does your legal system foresee a criminal liability for asylum seekers who, during the process of asylum application and/or in legal proceedings give incorrect or incomplete information or use such in order to be granted an asylum status or to avert its withdrawal (if so, please clarify)?

Responses

EMN NCP Austria

Wider Dissemination: Yes

Martin Stiller, EU Member State Officials

1. Yes

Clarification:

Yes. In Austria, a person seeking asylum is ineligible for asylum status if he/she has been convicted, by final judgment of an Austrian court, of a particularly serious felony and, by reason of such punishable act, represents a danger to the community. A conviction by a foreign court which meets the requirements set out in Art.73 of the Penal Code shall be deemed equivalent to a conviction by an Austrian court (Art. 6 para 1 subpara 4 Asylum Act 2005). The legal wording of the law implies that granting subsidiary protection is not excluded per se. However, according to Art. 8 para 3a Asylum Act 2005 the application for international protection in regard to the granting of subsidiary protection status shall be dismissed if a reason for the withdrawal of subsidiary protection status (Art. 9 para 2 Asylum Act

2005) exists. According to Art. 9 para 2 subpara 3 Asylum Act 2005 the subsidiary protection status shall be withdrawn if the alien has been finally sentenced by a domestic court for a felony (Art. 17 Criminal Code). In such a case the rejection is to be linked with the conclusion that a rejection at the border, a forcible return or a removal is inadmissible. The alien is consequently only tolerated on the federal territory.

2. The exclusion of granting asylum requires a final judgment of a particularly serious felony by an Austrian court and, by reason of such punishable act, that the alien represents a danger to the community. A conviction by a foreign court which meets the requirements set out in Art. 73 of the Penal Code shall be deemed equivalent to a conviction by an Austrian court (Art. 6 para 1 subpara 4 Asylum Act 2005). - Felony: In accordance with Art. 17 para 1 Penal Code, felonies are intentional offences that are punishable by imprisonment for life or by imprisonment for more than three years. - Particularly serious felony: Whether a felony qualifies as “particularly serious” is evaluated based on the criminal classification of the offence committed and the specific circumstances of the individual case. Usually, the offence must qualify as capital crimes (as is the case, for example, with murder, arson, rape and robbery). There is no exhaustive list since the ground for the exclusion from the non-refoulement protection is not the offence committed, but the danger posed by the offender (Schrefler-König and Szymanski, Art. 6 Asylum Act 2005 comment 8). - Danger to the community: Aside from the offence committed, a negative assessment of the offender’s future dangerousness is required. The assessment must conclude that there is a risk of the offender committing a particularly serious crime again. Only the dangerousness posed by the individual has to be assessed – general prevention considerations shall not be taken into account (Schrefler-König and Szymanski, Art. 6 Asylum Act 2005 comment 8). - Convictions by foreign courts shall also be considered if the offender was convicted of an offence which would also be punishable under Austrian law, and were rendered in a trial in accordance with Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The grounds for ineligibility for asylum status according to Art. 6 Asylum Act 2005 are in line with the provisions of the Geneva Refugee Convention (Schrefler-König and Szymanski, Art. 6 Asylum Act 2005 comment 8). In Austrian legal terminology, a “serious crime” (in accordance with Art. 17 Qualification Directive) means the conviction by final judgement because of a felony (Art. 17 Penal Code; Schrefler-König and Szymanski Art. 9 Asylum Act 2005, comment 6).

3. Ineligibility for asylum status is not solely based on the offence committed, but additionally requires a negative assessment of the offender’s future dangerousness (see Q1a).

4. Yes. According to Art. 120 para 2 subpara 2 Aliens Police Act 2005, persons seeking international protection are to be punished, if they knowingly provided false statements to the Federal Office for Immigration and Asylum or the Federal Administrative Court in the asylum procedure. Those false statements must be given in regards to their identity or their origin in order to be tolerated in the federal territory or to fraudulently obtain the right to – even if only temporarily – reside on the federal territory. Such persons are committing an administrative offence and shall be subject to a financial penalty of EUR 1,000 - 5,000 or, in the event of default thereon, up to three weeks’ imprisonment.

EMN NCP Luxembourg

Wider Dissemination: Yes

Adolfo SOMMARRIBAS, EMN statelessness platform

1. Yes

2. Article 47 (4) b) of the Law of 18 December 2015 on international protection and temporary protection (Asylum Law) states that the Minister in charge of Immigration and Asylum may revoke the refugee status when s/he, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State. Article 47 (5) states that in situations described in article 47 (4), Luxembourg may decide not to grant status to a refugee, where such a decision has not yet been taken. Finally article 50 (1) b) of the Asylum Law indicates that a third-country national or stateless person is excluded from being granted subsidiary protection where there are serious reasons for considering that he or she has committed a serious crime. The

Directorate of Immigration considers a serious crime as crimes committed for personal reasons (e.g. revenge, profit) but also, those accomplished for a political purpose, considering their particular gravity (e.g. assassinations, acts of terrorism). It is opposable to individuals who participated directly or indirectly in the decision, preparation or execution of the crime (See Judgement of the First instance Administrative Court, first chamber, n° 37391 of 27 July 2016).

3. See answer to Q.1.a.

4. 2. Articles 47 (3) b) and 52 (3) b) only foresee the revocation of the refugee and subsidiary status in case the applicant gives incorrect or incomplete information or use such in order to be granted an international protection status or to avert its withdrawal. Those articles do not foresee any criminal liability for the applicant.

EMN NCP Norway

Wider Dissemination: Yes

Kathleen CHAPMAN, EU Member State Officials

1. Yes
2. It is a reflection of the Geneva Convention article 33 second subparagraph and there is a requirement that the person ALSO constitute a danger to society. As a main rule the crime in question would need to carry a minimum of a 10-year penalty.
3. This will be subject to individual considerations.
4. Yes but it is not linked to exclusion. It is only a criminal offence.

EMN NCP Italy

Wider Dissemination: Yes

Viviana CAPRA, EMN NCP Italy

1. Yes
2. According to article 12 of Law 251/2007, refugee status can not be recognized (apart from cases in which there are not requirements established by artt. 7, 8) when the applicant: - is excluded from being a refugee (art. 10, art. 16 for subsidiary protection). In this case the applicant abstractly had be eligible for the refugee status, but it can not be recognized to him, because of there are reasonable grounds to believe that he has committed: 1) a crime against peace or humanity or a war crime; 2) a serious crime or particularly cruel actions (outside the Italian territory, before becoming an asylum applicant). The seriousness of the crime is assessed even taking into account the penalty of law, which should not be less than 4 years in the minimum and 10 years in the maximum; 3) he has been guilty of acts contrary to the purposes and principles of the United Nations. - is suspected to be a danger to the community or to the security of the State; - is a threat to public order e security, because of he has been convicted for acts of terrorism (art. 407, comma 2, letter a, Code of Criminal Procedure). Recently, the Law 132/2018 (art. 7) has increased number of crimes, which - in case of final judgement or when the applicant is considered socially dangerous - lead to a denial of refugee status of subsidiary protection (new art. 12 of law 251/2007). Among crimes mentioned there are: female genital mutilation; violence, threat and injuries to public officials; residential burglary, robbery committed with weapons or narcotic; extortion; kidnapping; exploitation of slavery or servitude; sexual violence; sex trafficking; exploitation of prostitution; human trafficking; underage pornography. In particular, after a conviction at first instance for these crimes, the international

protection process is suspended and the applicant is expelled. The sub mentioned regulation takes into account the principle of the Geneva Convention and the provision of the Qualification Directive, which is transposed in the national legislation without significant modifications. Article 20 of Law 251/2007 remarks the principle of non refoulement, according to which a person cannot be return to his Country of origin, if he runs the risk to suffer different forms of persecution, torture or other inhuman treatments (art. 33 of Geneva Convention, art 19 comma 1 of Law 286/1998).

3. See Q.2.

4. Yes. Article 13 letter b of law 251/2007 foresees the withdrawal of the international protection status if the beneficiary has obtained it thanks to an erroneous reconstruction of events, an omission of them or through a false submission of documents. Moreover, article 6 comma 2 letter d of Law 142/2015, dealing with cases in which an asylum applicant can be detained, states that the assessment of the existence of flight risk can be assumed from previous and systematic false misrepresentation or certificates aimed to avoid the adoption or the execution of an expulsion order.

EMN NCP Estonia

Wider Dissemination: Yes

Barbara ORLOFF, EU Member State Officials

1. Yes
2. According to Act on Granting International Protection to Aliens (AGIPA) a TCN shall not be recognized as a refugee among others if: there is good reason to believe that he or she has committed a serious non-political crime outside Estonia before arrival to Estonia. However, a particularly cruel act committed with an allegedly political objective is also deemed to be a serious non-political crime (AGIPA article 22 clause 1(4) and clause 2). The exact degree of penalty or type of criminal offence leading to exclusion is not specified in the Estonian legislation. Regarding subsidiary protection, the AGIPA stipulates that the TCN shall not be recognized as a person eligible for subsidiary protection among others if: there is good reason to believe that he or she has committed a serious crime (AGIPA article 22 clause 3(2)). The type of the crime is not specified. Aforementioned applies to TCN who has incited the specified acts or crimes or participated in the specified acts in whatever manner (AGIPA article 22 clause 4). Additionally the AGIPA regulates that the TCN shall not be recognized as a person eligible for subsidiary protection if he or she has left the country of origin on the ground that he or she has committed an act other than those specified in previous clauses for which imprisonment is prescribed (AGIPA article 22 clause 3 p 5).
3. See answer to question 1 a.
4. The Estonian legal system does not foresee a criminal liability for asylum seekers who, during the asylum procedure give incorrect or incomplete information. However, giving false information is a ground for considering the application to be clearly unfounded and also for revocation of international protection.

EMN NCP Hungary

Wider Dissemination: Yes

Gabor Veto, EU Member State Officials

1. Yes

2. Due to decision nr. C-369/17. of the Court of Justice of the European Union, (preliminary ruling) the asylum authority shall assess the seriousness of the crime at issue by carrying out a full investigation into the facts of the case concerned. In accordance with the above mentioned CJEU decision, from 1st January 2019. the Hungarian law specifies the categories of serious crime which is defined as follows. - Refugee status or subsidiary protection cannot be granted to a person who has been sentenced to imprisonment for a term of five years or more as a punishment of an intentional crime - Refugee status or subsidiary protection cannot be granted to a person who has been sentenced to imprisonment for committing crime as a recidivist, multiple recidivist, or violent multiple recidivist. - Refugee status or subsidiary protection cannot be granted to a person who has been sentenced to imprisonment for a term of three years or more as a punishment of convicted a crime against life, bodily health, health, human freedom, freedom of sexual life, sexual morality, public peace, public security or public order. The above mentioned rule can only be used by examining an application lodged after 1st January 2019 or review/revocation processes started after this time.

3. See answer to Q 1/a.

4. No. Such provision of information does not foresee any criminal liability.

EMN NCP Lithuania

Wider Dissemination: Yes

Vytautas EÅ½ERSKIS, EMN NCP Lithuania

1. Yes

2. The refugee status is not granted in accordance with Article 88 (Refusal of Asylum) Part 2, Paragraph 5 of the Law on the Legal Status of Aliens of the Republic of Lithuania: if there are serious ground for believing that an asylum seeker who fulfills the requirements of Article 86 (1) of this Law (refugee status) but his / her presence in the Republic of Lithuania threatens the security of the state or he / she has been convicted of a particularly serious crime and threatening the public by a valid court judgment. Subsidiary protection is not granted in accordance with Article 88 (Refusal of Asylum) Part 2, Paragraph 3 of the Law: if there are serious grounds for believing that an asylum seeker who fulfills the requirements of Article 87 (1) of this Law (subsidiary protection) has committed a serious or a particularly serious crime or has instigated or otherwise was involved in such an offense. When assessing whether a criminal offense committed by an alien is equivalent to committing a serious or very serious crime, the Criminal Code of the Republic of Lithuania (hereinafter referred to as the LR Criminal Code) shall be followed. The Qualification Directive and the Geneva Refugee Convention use the concepts of a "serious crime" and a "particularly serious crime", LR Criminal Code meanwhile defines a serious crime and a very serious crime, therefore, the Law states that asylum may not be granted because of commission of a serious or a very serious crime. Article 11 of the Criminal Code of the Republic of Lithuania states that: • A serious crime is a deliberate crime for which the maximum penalty provided for in the Criminal Law exceeds six years of imprisonment, but does not exceed ten years' imprisonment. • A very serious crime is a deliberate crime for which the maximum penalty provided for in the Criminal Law exceeds ten years of imprisonment.

3. Whether a criminal offense is equivalent to a serious or a very serious crime, is determined on the basis of definitions provided in the LR Criminal Code, therefore, it can be stated that the exclusion from being granted international protection depends only on the degree of punishment.

4. No.