

6.4. Self-defence

Article 31(1)(c) of the Rome Statute sets out the ground of self-defence, stipulating that a person shall be excluded from criminal responsibility when:

“The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.”

When a situation of duress or state of emergency does not exist, courts may still need to assess whether there are justifications for individual responsibility on the grounds of self-defence. This was highlighted by the Austrian Supreme Administrative Court in *Applicant* v *Federal Office for Immigration and Asylum* (26 November 2024). In this case, the lower court had considered that the Afghan applicant should be excluded from protection as when he was 16 years old, two days before he left his home country and he shot and killed his paternal uncle and cousin after they became violent against his mother for her refusal to enter into a forced marriage with the uncle after her husband passed away. It found that the applicant never claimed that the situation would have been life-threatening, nor did this emerge following an assessment of the facts. The court considered that there was no excusable state of emergency within the meaning of Austrian law, as the uncle and cousin were unarmed. The court considered that shooting at two people could be considered a much more serious consequence than the acts of violence perpetrated by the uncle and cousin, especially considering the fatal consequences.

However, the Supreme Administrative Court found the lower court’s assessment to be insufficient as it failed to recognise the requirement to justify the application of the exclusion ground. The court noted that the federal court did not take into account all the circumstances of the event to clarify whether the conduct could be characterised as a serious, non-political crime. It described the federal court’s examination of an ‘exculpatory state of emergency’ as brief and considered that a comprehensive examination of whether the applicant acted in self-defence to prevent an unlawful attack on his mother was omitted. This case clearly sets out self-defence as a separate ground which merits its own independent analysis in the context of asylum.

The jurisprudence reviewed in these sections reveals a consistently cautious judicial approach to negating individual responsibility, particularly when the crimes in question are serious. Generally, the applicants report and substantiates negating factors to preclude their exclusion

from international protection. However, the Austrian court in this case also illustrates that when potential negating grounds are apparent from the facts, the obligation to assess them does not depend on the applicant having explicitly invoked them, and a failure to conduct that assessment may itself constitute an error.

When there are indicators of negating grounds, applicants must be given sufficient opportunity to substantiate this. This reasoning was upheld by the Supreme Administrative Court in Finland in *Applicant* v *Immigration Office* (18 December 2023). The determining authority considered that he had committed a serious, non-political crime by shooting his cousin in Iraq after he entered the applicant's family house and shot at him. On appeal before the lower court, the applicant's request for an oral hearing to elaborate on the shooting incident and clarify whether he acted out of self-defence or force majeure was refused. The higher court noted that the burden of proof belonged to the state and found that the lower court should have allowed the oral hearing to follow up sufficiently on the negating factors raised by the applicant, especially considering that the lower court's interpretation and assessment of the events differed from the applicant's own understanding and progress of the events, in addition to there being negating elements.

Negating factors must always be considered as part of the exclusion assessment, as the CJEU confirmed in *Lounani*. In practice, however, courts approach this stage cautiously, and it is rare for such a ground to succeed in negating individual responsibility. Superior orders provide little protection when the acts are manifestly unlawful. Duress requires proof of an immediate and unavoidable threat at the time the offence was committed, and courts have been reluctant to accept this defence even when the applicant faced real danger. Arguments based on the applicant's capacity have had more success, but only when there is clear evidence directly linking the applicant's condition to the acts in question.

Two practical points also emerge from the case law. As a general rule, courts tend to place the burden of proof on the applicant to raise and demonstrate any negating factors. However, as the Austrian Supreme Administrative Court's ruling demonstrates, when the facts of the case clearly suggest that a negating ground may exist, decision-makers are obliged to consider it even if the applicant has not raised it themselves, and failing to do so can amount to a legal error. Ensuring that this obligation is met consistently across Member States remains an important part of the wider effort to apply the exclusion clauses fairly and uniformly across the EU.

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