Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

19 December 2024*

(Reference for a preliminary ruling – Area of freedom, security and justice – Border controls, asylum and immigration – Asylum policy – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Application for international protection – Grounds for inadmissibility – Article 2(q) – Concept of 'subsequent application' – Article 33(2)(d) – Rejection of an application for international protection as inadmissible by a Member State due to the rejection of a previous application made in another Member State or the discontinuation of the procedure by another Member State in respect of the previous application)

In Joined Cases C-123/23 and C-202/23 [Khan Yunis and Baabda],[i]

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Minden (Administrative Court, Minden, Germany), made by decisions of 28 October 2022, received at the Court on 1 March 2023 (C-123/23) and 28 March 2023 (C-202/23), in the proceedings

N.A.K.,

E.A.K.,

Y.A.K. (C-123/23),

M.E.O. (C-202/23)

v

Bundesrepublik Deutschland,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Gratsias (Rapporteur) and E. Regan, Judges,

Advocate General: N. Emiliou,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written procedure and further to the hearing on 29 February 2024,

* Language of the case: German.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.

after considering the observations submitted on behalf of:

– the German Government, by J. Möller, A. Hoesch and R. Kanitz, acting as Agents,

– the French Government, by R. Bénard and J. Illouz, acting as Agents,

– the European Commission, by A. Azéma, J. Hottiaux, B. Schima and J. Vondung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2024,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 33(2)(d) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60), read in conjunction with Article 2(q) thereof.

2 The requests have been made in two sets of proceedings between N.A.K., E.A.K. and Y.A.K. (Case C-123/23) and M.E.O. (Case C-202/23) and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the legality of two decisions of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) ('the Federal Office') rejecting their applications for asylum as inadmissible.

Legal context

European Union law

Directive 2011/95/EU

3 Article 2 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), entitled 'Definitions', provides:

'For the purposes of this Directive the following definitions shall apply:

(a) "international protection" means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) "beneficiary of international protection" means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

…

(d) "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;

(e) "refugee status" means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) "subsidiary protection status" means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) "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;

…'

Directive 2013/32

4 Recital 13 of Directive 2013/32 states:

'The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive [2011/95] in Member States.'

5 Article 2 of that directive, entitled 'Definitions', is worded as follows:

'For the purposes of this Directive:

…

(b) “application for international protection” or “application” 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 Directive [2011/95], that can be applied for separately;

…

(e) “final decision” means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive [2011/95] and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome;

(f) “determining authority” means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases;

…

(q) “subsequent application” means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).’

6 Article 6 of that directive, which is headed ‘Access to the procedure’, states:

‘1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

…

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

…’

7 Article 28 of that directive, entitled 'Procedure in the event of implicit withdrawal or abandonment of the application', provides:

'1. When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive [2011/95], to reject the application.

Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for international protection in particular when it is ascertained that:

(a) he or she has failed to respond to requests to provide information essential to his or her application in terms of Article 4 of Directive [2011/95] or has not appeared for a personal interview as provided for in Articles 14 to 17 of this Directive, unless the applicant demonstrates within a reasonable time that his or her failure was due to circumstances beyond his or her control;

(b) he or she has absconded or left without authorisation the place where he or she lived or was held, without contacting the competent authority within a reasonable time, or he or she has not within a reasonable time complied with reporting duties or other obligations to communicate, unless the applicant demonstrates that this was due to circumstances beyond his or her control.

…

2. Member States shall ensure that an applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his or her case be reopened or to make a new application which shall not be subject to the procedure referred to in Articles 40 and 41.

Member States may provide for a time limit of at least nine months after which the applicant's case can no longer be reopened or the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41. Member States may provide that the applicant's case may be reopened only once.

Member States shall ensure that such a person is not removed contrary to the principle of *non-refoulement*.

Member States may allow the determining authority to resume the examination at the stage where it was discontinued.

3. This Article shall be without prejudice to Regulation (EU) No 604/2013 [of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; "the Dublin III Regulation")].'

8 Pursuant to Article 33 of Directive 2013/32, entitled 'Inadmissible applications':

'1. In addition to cases in which an application is not examined in accordance with [the Dublin III Regulation], Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive [2011/95] where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

…

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive [2011/95] have arisen or have been presented by the applicant; …

…'

9 Article 40 of that directive, entitled 'Subsequent application', provides:

'1. Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, in so far as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive [2011/95].

…

5. When a subsequent application is not further examined pursuant to this Article, it shall be considered inadmissible, in accordance with Article 33(2)(d).

…

7. Where a person with regard to whom a transfer decision has to be enforced pursuant to [the Dublin III Regulation] makes further representations or a subsequent application in the transferring Member State, those representations or subsequent applications shall be examined by the responsible Member State, as defined in that Regulation, in accordance with this Directive.'

10 Article 41 of that directive, entitled 'Exceptions from the right to remain in case of subsequent applications', states, in paragraph 1 thereof:

'Member States may make an exception from the right to remain in the territory where a person:

(a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or

(b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State's international and Union obligations.'

The Dublin III Regulation

11 The first paragraph of Article 48 of the Dublin III Regulation repealed Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), which had replaced, in accordance with Article 24 thereof, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1).

12 According to Article 1 thereof, entitled 'Subject matter', the Dublin III Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, referred to as 'the Member State responsible'.

13 In Chapter II of that regulation, entitled 'General principles and safeguards', Article 3 of that regulation, entitled 'Access to the procedure for examining an application for international protection', states, in paragraph 1 thereof:

'Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

14 Article 17 of that regulation, entitled 'Discretionary clauses', provides, in the first and second subparagraphs of paragraph 1 thereof:

'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. …'

15 Article 18 of that regulation, entitled 'Obligations of the Member State responsible', is worded as follows:

'1. The Member State responsible under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State;

(b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document;

(c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

2. …

In the cases falling within the scope of paragraph 1(c), when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive [2013/32]. In such cases, Member States shall ensure that the examination of the application is completed.'

16 Article 27 of the Dublin III Regulation, entitled 'Remedies', states in paragraph 1 thereof:

'The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.'

17 Article 29 of that regulation, entitled 'Modalities and time limits', provides, in paragraphs 1 and 2 thereof:

'1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person

concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

…

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.'

German law

The AsylG

18 Paragraph 26a of the Asylgesetz (Law on asylum) (BGBl. 2008 I, p. 1798), in the version applicable to the facts in the main proceedings ('the AsylG'), entitled 'Safe third countries', provides in subparagraph 2 thereof:

'In addition to the Member States of the European Union …, safe third countries are those listed in Annex I.'

19 Paragraph 29 of the AsylG, entitled 'Inadmissible applications', provides in subparagraph 1 thereof:

'An application for asylum shall be inadmissible if:

…

5. in the case of a subsequent application under Paragraph 71 or a second application under Paragraph 71a, a further asylum procedure need not be conducted.'

20 Paragraph 31 of the AsylG, entitled 'Decisions by the Federal Office on asylum applications', provides in subparagraph 2 thereof:

'In decisions on admissible asylum applications … it shall be expressly determined whether the foreign national is granted refugee status or subsidiary protection and whether he or she is granted asylum. …'

21 Paragraph 71 of the AsylG, entitled 'Subsequent application', provides in subparagraph 1 thereof:

'If, after withdrawal or unchallengeable rejection of a previous asylum application, the foreign national files a new asylum application (subsequent application), a new asylum procedure shall be conducted only if the conditions of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz (Law on administrative procedure (BGBl. 2003 I, p. 102); 'the VwVfG') are met; that examination is the responsibility of the Federal Office. …'

22 Paragraph 71a of the AsylG, entitled 'Second application', provides in subparagraph 1 thereof:

'If the foreign national makes an asylum application (second application) in the federal territory following unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a) in which [EU] law on the responsibility for conducting asylum procedures applies or which has concluded an international agreement thereon with the Federal Republic of Germany, a further asylum procedure shall only be conducted if the Federal Republic of Germany is responsible for conducting the asylum procedure and the conditions of Paragraph 51(1) to (3) of [the VwVfG] are met; that examination is the responsibility of the Federal Office.'

The VwVfG

23 Paragraph 51 of the VwVfG provides in subparagraphs 1 and 2 thereof:

'(1) The authority must, at the request of the individual concerned, decide to annul or amend an administrative act which is no longer open to challenge if:

1. the factual or legal position on which the administrative act was based has subsequently changed in favour of the individual concerned;

2. new evidence has come to light which would have led to a more favourable decision for the individual concerned;

…

(2) The request is admissible only if, without committing a serious fault, the individual concerned was not able to rely on the ground for re-examination in the prior procedure, including by way of appeal.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

Case C-123/23

24 N.A.K. is the mother of E.A.K. and Y.A.K., minor children for whom she is the legal representative. They are stateless Palestinians from the Gaza Strip. According to their declarations, they entered Germany on 11 November 2019 and applied for asylum on 15 November 2019. Their applications were registered on 22 November 2019. In support of those applications, N.A.K. claimed that she and her children had been persecuted by Hamas as a result of her husband's political activities. Her parents also wanted to force her to give her children to her husband's family and return by herself to her parents' home.

25 It is apparent from the statements made by N.A.K. and the investigations carried out by the Federal Office that N.A.K. had previously submitted applications for asylum with the competent authorities of the Kingdom of Spain and of the Kingdom of Belgium. A take-back request by the Federal Office to the Spanish competent authority was refused by that authority. No take-back request was made to the Belgian competent authority.

26 In response to a request for information from the Federal Office, the Belgian competent authority stated, on 5 March 2021, that the application for international protection lodged by N.A.K. on 21 August 2018 had been rejected by decision of 5 July 2019, against which no appeal had been brought. The Belgian competent authority found, inter alia, that it had not been demonstrated that it was likely that N.A.K. was at risk, in her country of origin, of being persecuted or suffering serious harm.

27 By decision of 25 May 2021, the Federal Office rejected the applications for asylum by N.A.K., E.A.K. and Y.A.K. on the ground, in essence, that Paragraph 71a of the AsylG was applicable and that the conditions capable of justifying the opening of a new asylum procedure had not been met. N.A.K., E.A.K. and Y.A.K. brought an action before the Verwaltungsgericht Minden (Administrative Court, Minden, Germany), the referring court, against that decision on 9 June 2021.

28 That court notes that it is apparent from the judgments of 20 May 2021, *L.R. (Application for asylum rejected by Norway)* (C-8/20, EU:C:2021:404), and of 22 September 2022, *Bundesrepublik Deutschland (Application for asylum rejected by Denmark)* (C-497/21, EU:C:2022:721), that a provision such as Paragraph 71a of the AsylG cannot apply where a first application for asylum by the same person has been rejected, respectively, by a third State or by a Member State other than that to which a second application is made which does not apply Directive 2011/95. On the other hand, the Court expressly left open the question whether such a provision may apply where a first application for asylum is rejected by another Member State which applies that directive. That question is decisive for the outcome of the dispute in the main proceedings, since, in the present case, the applicants have not submitted any new elements or findings capable of justifying the examination of their application, in accordance with Article 33(2)(d) of Directive 2013/32 and Paragraph 71a(1) of the AsylG, read in conjunction with Paragraph 51(1) and (2) of the VwVfG.

29 In that regard, the referring court considers that the concept of 'subsequent application', within the meaning of Article 2(q) of Directive 2013/32, also covers the case of an application for international protection lodged after the adoption, by another Member State of the European Union, of a final decision in respect of a previous application of a similar nature by the same applicant, with the result that Article 33(2)(d) of that directive applies to such an application.

30 In the light of those circumstances, the Verwaltungsgericht Minden (Administrative Court, Minden) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 33(2)(d) of Directive [2013/32], read in conjunction with Article 2(q) of that directive, be interpreted as precluding legislation of a Member State under which an application for international protection lodged in that Member State is to be rejected as inadmissible if an application for international protection previously lodged in another Member State has been finally rejected by that other Member State as unfounded?'

Case C-202/23

31 On 2 March 2020, M.E.O., a Lebanese national, entered Germany and lodged an application for asylum, which was registered by the Federal Office on 30 April 2020. An investigation carried out by that office revealed that, prior to his entry into Germany, M.E.O. had applied for international protection in Poland.

32 By letter of 29 April 2020, the Polish authorities agreed to take back M.E.O. By decision of 25 June 2020, which was notified to M.E.O. on 1 July 2020, the Federal Office rejected his application for asylum as inadmissible and ordered his removal to Poland. M.E.O. brought an action against that decision, together with an application for interim measures. The application for interim measures was rejected on 31 July 2020. It is apparent, however, from the information provided by the referring court that the decision to remove M.E.O. to Poland could not be enforced without a finding that M.E.O. had absconded within the meaning of Article 29(2) of the Dublin III Regulation.

33 On 2 February 2021, the Federal Office annulled the decision of 25 June 2020 on the ground that the time limit for the transfer of M.E.O. to Poland had expired. Furthermore, in response to a request from the Federal Office, the Polish authorities informed that office that the procedure relating to the application for international protection lodged by M.E.O. in Poland had been discontinued on 20 April 2020 on the ground that M.E.O. was residing in Germany. The referring court states that, in accordance with Polish legislation, that procedure could have been resumed, at M.E.O.'s request, within nine months of the date on which it was discontinued, that is to say, until 20 January 2021.

34 By decision of 14 July 2021, the Federal Office rejected M.E.O.'s asylum application as inadmissible and threatened him with removal to Lebanon. On 27 July 2021, M.E.O. brought an action challenging that decision before the referring court. By decision of 31 August 2021, that court suspended the removal decision.

35 The referring court states that, in the light of the facts in the main proceedings, the conditions for the application of Paragraph 71a of the AsylG have been met, with the result that M.E.O.'s application for asylum should be rejected as inadmissible. First, the referring court considers that that provision must be interpreted as meaning that it applies where the asylum procedure in a safe third country, within the meaning of Paragraph 26a of the AsylG, was discontinued on the date on which responsibility for processing the application for international protection was transferred to the Federal Republic of Germany, in accordance with Article 29(2) of the Dublin III Regulation. That was the case here, since the time limit for resuming the procedure concerning the application for international protection lodged by M.E.O. in Poland had expired on 20 January 2021, whereas the Federal Republic of Germany became responsible for processing M. E.O.'s application for international protection after the expiry of the time limit of six months from the decision, taken on 31 July 2020, on M.E.O.'s application for interim relief against the decision ordering his removal to Poland, laid down in Article 29(1) of the Dublin III Regulation, namely 31 January 2021.

36 Secondly, Paragraph 51(1) and (2) of the VwVfG does not apply in the present case, in so far as the application for asylum lodged by M.E.O. in Germany is based on facts prior to his departure from Lebanon. Yet, it must be assumed that M.E.O. relied on the same facts in support of the application for international protection which he lodged in Poland, or at least he could have done so, with the result that those facts cannot be regarded as new evidence on which he was unable to rely without committing a serious fault.

37 However, the referring court considers that, if it should emerge that EU law precludes a provision such as Article 71a of the AsylG, on the ground that a new application for international protection cannot be regarded as a 'subsequent application' within the meaning of Article 2(q) of Directive 2013/32, where a final decision on a previous application by the same applicant has been taken by another EU Member State, M.E.O.'s action will have to be upheld.

38 Should it be held that a new application for international protection may be classified as a 'subsequent application', within the meaning of Article 2(q), even where the procedure relating to a previous application made by the same applicant in another Member State has been discontinued by that other Member State on the ground that it was not pursued by the applicant, the referring court is uncertain whether Article 33(2)(d) of Directive 2013/32 precludes the rejection of the new application as inadmissible for as long as it is still possible to reopen the proceedings on the previous application. If that is the case, the referring court asks whether the determination of the period within which the applicant may request that the procedure on his or her previous application be reopened is a matter for national or EU law and, if it falls within the scope of EU law, what is the time limit laid down by EU law.

39 In those circumstances, the Verwaltungsgericht Minden (Administrative Court, Minden) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 33(2)(d) of Directive [2013/32] in conjunction with Article 2(q) thereof to be interpreted as precluding a provision of a Member State under which an application for international protection made in that Member State is to be rejected as inadmissible if the applicant previously made an application for international protection in another Member State and the procedure was discontinued by the other Member State because the applicant abandoned the application in that Member State?

(2) If Question 1 is to be answered in the negative:

Is Article 33(2)(d) of Directive [2013/32] in conjunction with Article 2(q) thereof to be interpreted as precluding a provision of a Member State under which an application for international protection made in that Member State is to be rejected as inadmissible if the applicant previously made an application for international protection in another Member State and the procedure was discontinued by the other Member State because the applicant abandoned the application in the other Member State, even though the asylum procedure in the other Member State can still be reopened by the other Member State if the applicant makes an application to that effect in the other Member State?

(3) If Question 2 is to be answered in the affirmative:

Does EU law stipulate what is the relevant date, in connection with the decision on an application for international protection, for determining whether an asylum procedure previously discontinued in another Member State can still be reopened or is this a matter governed solely by national law?

(4) If Question 3 is to be answered to the effect that EU law does contain such stipulations:

What is the relevant date under EU law, in connection with the decision on an application for international protection, for determining whether an asylum procedure previously discontinued in another Member State can still be reopened?'

Procedure before the Court

40 In Case C-123/23, the referring court requested that priority be given to the case, pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice. By decision of 18 April 2023, the President of the Court decided that it was not appropriate to grant that request.

41 By decision of the President of the Court of 10 May 2023, Cases C-123/23 and C-202/23 were joined for the purposes of the written and oral parts of the procedure and the judgment.

The question in Case C-123/23

42 By its question in Case C-123/23, the referring court asks, in essence, whether Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) of that directive, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application for international protection made to another Member State has been rejected by a final decision taken by that Member State.

43 According to the settled case-law of the Court, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem), C-435/22 PPU, EU:C:2022:852, paragraph 67 and the case-law cited).

44 As regards, in the first place, the wording of Article 33(2) of Directive 2013/32, which sets out an exhaustive list of situations in which the Member States may consider an application for international protection to be inadmissible (judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)*, C-8/20, EU:C:2021:404, paragraph 31 and the case-law cited), it should be noted that Article 33(2)(d) provides that Member States may adopt such a decision where that application is a 'subsequent application', where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 have arisen or have been presented by the applicant.

45 The concept of 'subsequent application' is defined in Article 2(q) of Directive 2013/32 as 'a further application for international protection made after a final decision has been taken on a previous application'.

46 That definition accordingly uses the terms 'application for international protection' and 'final decision', which are also defined in Article 2(b) and (e) of that directive, respectively.

47 As regards, first, the term 'application for international protection' or 'application', it is defined in Article 2(b) of Directive 2013/32 as an application for protection 'from a Member State' made by a third-country national or a stateless person, who can be understood to seek refugee status or subsidiary protection status, within the meaning of Directive 2011/95.

48 Secondly, in accordance with Article 2(e) of Directive 2013/32, the concept of 'final decision' covers any decision on whether the third-country national or stateless person is to be granted refugee or subsidiary protection status by virtue of Directive 2011/95 and which is no longer subject to a remedy within the framework of Chapter V of Directive 2013/32.

49 It must therefore be held that the wording of Article 33(2)(d) of Directive 2013/32, read in conjunction with the provisions referred to in paragraphs 45 to 48 above, does not require that, in order to be classified as a 'subsequent application' and rejected as inadmissible in the absence of new elements or findings, a further application for international protection must have been made to the authorities of the same Member State which took the final decision on a previous application by the same applicant.

50 In the second place, that interpretation is supported by the context of that provision.

51 Article 40 of Directive 2013/32, which sets out the procedure that applies to subsequent applications, provides, in paragraph 7 thereof, inter alia, that where a person with regard to whom a transfer decision has to be enforced pursuant to the Dublin III Regulation makes a subsequent application in the transferring Member State, that application is to be examined by the responsible Member State, as defined in that regulation.

52 It is apparent from Article 17(1) of the Dublin III Regulation that a transfer decision under that regulation cannot be adopted where the Member State in which the person concerned is present has itself examined an application for international protection lodged by that person, since the fact that that Member State has carried out such an examination makes it the 'Member State responsible', within the meaning of that regulation, and no longer able to request the transfer of the applicant to another Member State.

53 It follows logically that the 'subsequent application' referred to in Article 40(7) of Directive 2013/32 is a further application made in the Member State that requested the transfer after a decision has been taken by the Member State to which the person concerned is to be transferred on a previous application by the same applicant. That provision thus confirms that the concept of 'subsequent application', as defined in Article 2(q) of that directive, also covers the case of a further application made after a decision has been taken by another Member State on a previous application by the same applicant.

54 Article 40(1) of Directive 2013/32, which refers, inter alia, to any submission, by a person who has applied for international protection in a given Member State, of a 'subsequent application in the same Member State', also confirms the interpretation set out in paragraph 49 above. If, in order to be classified as a 'subsequent application' within the meaning of Article 2(q) of that directive, an application for international protection must have been made to the competent authorities of the same Member State which had taken a decision on a previous application made by the same applicant, the reference, in Article 40(1) of that directive, to a subsequent application made 'in the same Member State' would have been superfluous.

55 In the third place, it is also consistent with the objective of limiting the secondary movements of applicants for international protection between Member States, pursued by that directive, as is apparent from recital 13 thereof, for Article 33(2)(d) of Directive 2013/32 to be interpreted as meaning that a Member State may classify a further application for international protection

made by an applicant whose previous application has been rejected by a final decision taken by another Member State as a 'subsequent application' and reject it as inadmissible if it is not supported by new elements or findings.

56 As the Advocate General observed, in essence, in points 82 to 84 of his Opinion, the interpretation of Article 33(2)(d) of Directive 2013/32 as meaning that a further application for international protection made to the competent authorities of a Member State can be classified as a 'subsequent application' and, in the absence of new elements or findings, can be rejected as inadmissible only if a previous application by the same applicant has been rejected by a final decision of the same Member State, might prompt applicants whose applications for international protection have been definitively rejected by the competent authorities of a Member State to move to a second or even third Member State in order to make a new application of a similar nature, in the hope that the full examination of that application, which, according to that interpretation, would be the responsibility of the authorities of those other Member States, would lead to a result that is favourable to them.

57 It should also be noted that the possibility of rejecting as inadmissible a further application for international protection which is not based on new elements or findings and does not reveal such elements or findings, where a previous application by the same applicant has been rejected by a decision taken by another Member State, is consistent with the principle of mutual trust between the Member States, on which, according to the Court's case-law, the Common European Asylum System is based and which is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained (see, to that effect, judgment of 10 December 2020, *Minister for Justice and Equality (Application for international protection in Ireland)*, C-616/19, EU:C:2020:1010, paragraph 48 and the case-law cited).

58 Furthermore, it should be noted that the interpretation of Article 33(2)(d) of Directive 2013/32 set out in paragraph 55 above is consistent with the Court's case-law arising from the judgment of 22 September 2022, *Bundesrepublik Deutschland (Application for asylum rejected by Denmark)* (C-497/21, EU:C:2022:721).

59 It is true that, in that judgment, the Court held that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof and Article 2 of the Protocol (No 22) on the position of Denmark annexed to the EU Treaty and to the FEU Treaty, must be interpreted as precluding legislation of a Member State other than the Kingdom of Denmark which provides for the possibility of rejecting as inadmissible an application for international protection within the meaning of Article 2(b) of that directive, which has been made to that other Member State by a third-country national or a stateless person whose previous application for international protection, made to the Kingdom of Denmark, has been rejected by that latter Member State.

60 However, as is apparent from paragraphs 35 and 43 above, the Court based that interpretation of Article 33(2)(d) of Directive 2013/32 on the special status enjoyed, under the protocol mentioned in the preceding paragraph, by the Kingdom of Denmark as regards Title V of Part Three of the FEU Treaty, which covers, inter alia, policies on border checks, asylum and immigration. In accordance with that protocol, Directive 2011/95 does not apply to that Member State, with the result that an application for international protection made to the competent authorities of that Member State cannot constitute an application 'seek[ing] refugee status or subsidiary protection status' within the meaning of Directive 2011/95.

61 Moreover, in paragraph 46 of the judgment of 22 September 2022, *Bundesrepublik Deutschland (Application for asylum rejected by Denmark)* (C-497/21, EU:C:2022:721), the Court pointed out that the interpretation of Article 33(2)(d) of Directive 2013/32 in that judgment was without prejudice to the separate question whether the term 'subsequent application' applies to a further application for international protection made to a Member State after another Member State which is not the Kingdom of Denmark has rejected, by a final decision, a previous application.

62 In the light of the foregoing, the answer to the question in Case C-123/23 is that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) of that directive, must be interpreted as not precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application for international protection, made to another Member State to which Directive 2011/95 applies, has been rejected by a final decision taken in that latter Member State.

The questions in Case C-202/23

63 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 31 and the case-law cited).

64 The fact that the referring court has formally referred, in its questions, to certain specific provisions of EU law does not prevent the Court from providing it with all the elements of interpretation which may be useful for the judgment in the main proceedings, by extracting from the body of material provided by that court, and in particular from the statement of reasons for the order for reference, the elements of EU law which require interpretation in the light of the subject matter of the dispute (see, to that effect, judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 50 and the case-law cited).

65 In the present case, it is apparent from the information provided by the referring court, summarised in paragraphs 31 to 35 above, that M.E.O. first of all made an application for international protection to the Polish authorities, then, on 2 March 2020, entered Germany and made an application for asylum there, which was registered by the Federal Office on 30 April 2020. In the meantime, on 20 April 2020, the competent Polish authority had discontinued the procedure initiated by M.E.O.'s application on the ground that he was residing in Germany.

66 For its part, the Federal Office, by its decision of 14 July 2021, at issue in the main proceedings in Case C-202/23, rejected M.E.O.'s application for asylum as inadmissible on the ground that, on the date on which responsibility for processing the application for international protection was transferred to the Federal Republic of Germany, in accordance with Article 29(2) of the Dublin III Regulation, namely 31 January 2021, the competent Polish authority had already, by a final

decision, in accordance with Article 28(1) of Directive 2013/32, closed the procedure on that applicant's previous application for international protection, since that application had, according to that authority, been implicitly withdrawn.

67 It follows that, in order to reject M.E.O.'s application for international protection as inadmissible, the Federal Office relied on the premiss that, in circumstances such as those described in paragraphs 65 and 66 above, it was possible to classify M.E.O.'s further application as a 'subsequent application' within the meaning of Article 2(q) of Directive 2013/32 and to apply Article 33(2)(d) of that directive to it. The questions referred in Case C-202/23 are based on the same premiss.

68 In that context, the questions referred in Case C-202/23 must be reworded and it must be held that, by those questions, the referring court asks, in essence, whether Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) of that directive, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or by a stateless person who has already made an application for international protection with another Member State, where the further application was made before the competent authority of the second Member State had, in accordance with Article 28(1) of that directive, taken the decision to discontinue the examination of the previous application on account of its implicit withdrawal.

69 In that regard, it should be borne in mind that Article 2(q) of Directive 2013/32 expressly provides for the possibility of classifying a further application as a 'subsequent application' when it is 'made' after a final decision, within the meaning of Article 2(e) of that directive, has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority, within the meaning of Article 2(f) of that directive, has rejected an application following its implicit withdrawal, in accordance with Article 28(1) of that directive.

70 The first subparagraph of Article 28(1) of Directive 2013/32 provides that, when there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States are to ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive 2011/95, to reject the application.

71 Pursuant to point (b) of the second subparagraph of Article 28(1) of Directive 2013/32, Member States may presume that an applicant has implicitly withdrawn or abandoned his or her application for international protection where it is established that he or she has absconded or left without authorisation the place where he or she lived or was held, without contacting the competent authority within a reasonable time, or he or she has not within a reasonable time complied with reporting duties or other obligations to communicate, unless the applicant demonstrates that that was due to circumstances beyond his or her control.

72 Furthermore, the first subparagraph of Article 28(2) of Directive 2013/32 provides that Member States are to ensure that an applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of that article is taken, is entitled to request that his or her case be reopened or to make a new application which is not to be subject to the procedure referred to in Articles 40 and 41 of that directive. In accordance with the second

subparagraph of Article 28(2) of that directive, Member States may provide, first, for a time limit of at least nine months after which the applicant's case can no longer be reopened or the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41 of that directive and, secondly, provide that the applicant's case may be reopened only once.

73 Although Article 2(q) of Directive 2013/32 does not expressly refer to the situation where the Member State to which the applicant had made his or her application for international protection has taken the decision to discontinue the examination of that application following its implicit withdrawal, a further application made after the adoption of such a decision may also be classified as a 'subsequent application' within the meaning of that provision. If that were not the case, it would not have been necessary to provide, in the first subparagraph of Article 28(2) of that directive, that a further application made by an applicant who reports again to the competent authority after a decision to discontinue as referred to in Article 28(1) is taken will not be subject to the procedure referred to in Articles 40 and 41 of that directive, which concerns subsequent applications.

74 Nevertheless, it is apparent from the very wording of Article 2(q) of Directive 2013/32 that a further application for international protection, made by a third-country national or a stateless person who has already made such an application, cannot be regarded as a 'subsequent application' and be rejected as inadmissible, in accordance with Article 33(2)(d) of that directive, unless it has been made after a final decision has been taken on that previous application. Consequently, the classification of a further application by the same applicant as a 'subsequent application' is excluded where that further application was made before the adoption of a final decision on that applicant's previous application.

75 In that regard, it must be recalled that Article 6 of Directive 2013/32 distinguishes between the making of an application for international protection, the registration of that application, which is a matter for the Member State concerned pursuant to the first and second subparagraphs of paragraph 1 of that article, and the lodging of that application, which requires, in principle, an applicant for international protection to complete a form provided for that purpose, in accordance with paragraphs 3 and 4 of that article (see, to that effect, judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraphs 87 and 93).

76 As the Court has already held, the act of 'making' an application for international protection does not entail any administrative formalities, since those formalities must be observed when the application is 'lodged' (judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraph 93).

77 In the light of the use of the word 'made' in Article 2(q) of Directive 2013/32, it must be held that, for the purposes of classifying an application for international protection as a 'subsequent application' within the meaning of that provision, only the date on which it is made is relevant.

78 Furthermore, the decision taken by the determining authority, in accordance with Article 28(1) of Directive 2013/32, to discontinue the examination of an application for international protection on the ground that the applicant has implicitly withdrawn his or her application cannot be regarded as a final decision, within the meaning of Article 2(e) of that directive, as long as the applicant has the possibility, provided for in Article 28(2) of that directive, to request that his or her case be reopened or to make a new application which is not to be subject to the procedure

referred to in Articles 40 and 41 of Directive 2013/32. Therefore, a further application made by an applicant in that situation cannot be classified as a 'subsequent application' within the meaning of Article 2(q) of that directive and be rejected as inadmissible, in accordance with Article 33(2)(d) of that directive.

79 In the present case, it is apparent from the documents before the Court that M.E.O. made an application for asylum to the German authorities on 2 March 2020, whereas the decision of the competent Polish authority to discontinue the procedure on his application for international protection made to the Polish authorities was not adopted until 20 April 2020 and that procedure was, moreover, capable of being reopened. If that is indeed the case, which it is for the referring court to ascertain, it will be necessary to conclude that the classification of the application for asylum made to the German authorities by M.E.O. as a 'subsequent application' and the rejection of that application as inadmissible, since M.E.O. did not submit new elements or findings in relation to his previous application, does not comply with the provisions of Article 2(q) and Article 33(2)(d) of Directive 2013/32.

80 In the light of all the foregoing considerations, the answer to be given to the referring court is that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) of that directive, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or by a stateless person who has already made an application for international protection with another Member State, where the further application was made before the competent authority of the second Member State had, in accordance with Article 28(1) of that directive, taken the decision to discontinue the examination of the previous application on account of its implicit withdrawal.

Costs

81 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 (Fifth Chamber) hereby rules:

1. **Article 33(2)(d) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in conjunction with Article 2(q) thereof,**

   must be interpreted as not precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application for international protection, made to another Member State to which Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted applies, has been rejected by a final decision taken in that Member State.

2. Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof,

must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or by a stateless person who has already made an application for international protection with another Member State, where the further application was made before the competent authority of the second Member State had, in accordance with Article 28(1) of that directive, taken the decision to discontinue the examination of the previous application on account of its implicit withdrawal.

[Signatures]