Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 15 April 2021 [1]

Case C-18/20

XY
intervener:
Bundesamt für Fremdenwesen und Asyl

(Request for a preliminary ruling
from the Verwaltungsgerichtshof (Upper Administrative Court, Austria))

(Reference for a preliminary ruling – Area of freedom, security and justice – Asylum policy – Application for international protection – Reliance on circumstances which already existed before the previous asylum procedure was definitively concluded – National legislation under which new facts which were not presented in the previous procedure through the fault of the applicant cannot be taken into account – Directive 2013/32/EU – Subsequent application – Article 40(1) to (4) – Article 42(2) – Admissibility – Procedural rules – Time limits – Article 13(1) – *Res judicata* – Directive 2005/85/EC – Article 34(2)(b) – Directive 2011/95/EU – Article 4(2))

I. Introduction

1. This request for a preliminary ruling has been made by the Verwaltungsgerichtshof (Upper Administrative Court, Austria) and concerns the interpretation of Article 40(2) to (4) and Article 42(2) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection. [2] Those first provisions set out, inter alia, the requirements which Member States may lay down in order for a subsequent application for international protection [3] to be declared inadmissible on the ground of *res judicata*.

2. That request was made in an appeal on a point of law (*Revision*) in proceedings between XY, an Iraqi national, and the Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum, Austria, 'the Federal Office') concerning the legality of a decision of the Bundesverwaltungsgericht (Federal Administrative Court, Austria) declaring a subsequent application by XY inadmissible under Austrian law on the ground of *res judicata*. In essence, that court held that the fact on which XY relied in support of his subsequent application – the fact that

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60).

[3] As explained in point 26 and footnote 7 of this Opinion, a subsequent application is a further application for international protection made after a final decision has been taken on a previous application for international protection.

he has always been homosexual – already existed at the time of the procedure relating to his first application for international protection but was not relied on by XY during that procedure, with the result that that circumstance was not new.

3. In the dispute in the main proceedings, the referring court is called upon to rule on the legality of that declaration of inadmissibility. In that regard, it has doubts as to whether the Austrian law relating to *res judicata*, which led to that declaration, and the derogations from that principle provided for in Austrian law, which allow new facts and evidence to be relied on, are compatible with the abovementioned provisions of Directive 2013/32. In that connection, it has referred three questions to the Court for a preliminary ruling.

4. At the end of my analysis, I shall explain why I consider, first of all, that, pursuant to Article 40(2) and (3) of Directive 2013/32, a subsequent application may be based on new elements and findings which *already* existed at the time of the procedure relating to the previous application for international protection, but which were not relied on in the context of that previous application (first question referred).

5. Next, Article 40(3) of Directive 2013/32 does not prevent the substantive examination of a subsequent application from being carried out in the context of a *reopening* of the procedure relating to the previous application, such as that provided for under Austrian law, provided that the requirements arising from Chapter II of that directive are fulfilled, which it is for the referring court to verify in the main proceedings. Moreover, Article 42(2), read in conjunction, in particular, with Article 40(2) to (4) of that directive, prohibits the setting of time limits such as those laid down in Austrian law (second question referred).

6. Lastly, should the referring court consider that the *reopening* provided for under Austrian law does not fulfil the requirements arising from Chapter II of Directive 2013/32, with the result that a subsequent application must be examined in a *new administrative procedure*, I consider that Article 40(4) of Directive 2013/32 precludes the application in that new procedure of a condition relating to the absence of fault on the part of the defendant, unless that condition is expressly laid down in national law in a manner that satisfies the requirements of legal certainty. Subject to verification by the referring court, this does not appear to be the case in a situation such as that at issue in the main proceedings (third question referred).

II. Legal framework

A. EU law

1. Directive 2013/32

7. Recital 36 of Directive 2013/32 states:

‘Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.’

8. Article 33(2) of that directive, entitled 'Inadmissible applications', reads as follows:

'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/EU have arisen or have been presented by the applicant; [4] or

…'

9. Article 40 of that directive, entitled 'Subsequent application', provides in paragraphs 1 to 4 thereof:

'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, insofar 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].

3. If the preliminary examination referred to in paragraph 2 concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive [2011/95], the application shall be further examined in conformity with Chapter II. Member States may also provide for other reasons for a subsequent application to be further examined.

4. Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.'

10. Article 42 of that directive, entitled 'Procedural rules', provides in paragraph 2 thereof:

'Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

4 Directive 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).

(b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6).

Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.'

2. Directive 2005/85/EC

11. With effect from 21 July 2015, Directive 2013/32 repealed and replaced Directive 2005/85/EC.[5] In Directive 2005/85, the provision corresponding to Article 42(2) of Directive 2013/32 was set out in Article 34(2). That provision stated:

'Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) require submission of the new information by the applicant concerned within a time limit after he/she obtained such information;

(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.'

3. Directive 2011/95

12. Article 4 of Directive 2011/95, entitled 'Assessment of facts and circumstances', provides in paragraphs 1 and 2 thereof:

'1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.'

[5] Council Directive of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13), repealed by Article 53 of Directive 2013/32.

B. Austrian law

1. General Law on administrative procedure

13. Paragraphs 68 and 69 of the Allgemeines Verwaltungsverfahrensgesetz (General Law on administrative procedure, 'the AVG') provide:

'Paragraph 68:

(1) Applications by interested parties who, except in the cases referred to in Paragraphs 69 and 70, seek the modification of a decision which is not, or is no longer, subject to appeal shall be dismissed on the ground of *res judicata*, unless the administrative authority has grounds for making an order in accordance with subparagraphs 2 to 4 of this Paragraph.

…

Reopening of the procedure

Paragraph 69:

(1) An application by an interested party for the reopening of a procedure which has been concluded by means of a decision shall be granted where that decision cannot, or can no longer, be appealed against, and:

…

2. where new facts or evidence emerge which, through no fault of the person concerned, could not have been adduced in the previous procedure and which, considered in isolation or in conjunction with the other results of the proceedings, would likely have resulted in a decision with a different operative part; or

…

(2) An application for reopening must be submitted within two weeks to the administrative authority which issued the decision. The time limit shall start to run from the moment when the applicant became aware of the grounds for reopening; however, where this occurs after oral communication of the decision but before service of the written version of the decision, the time limit shall start to run only from the time of such service. After a period of three years from the adoption of the decision, an application for reopening may no longer be submitted. It is for the applicant to provide evidence of circumstances demonstrating compliance with the statutory time limit.

…'

2. The Law on the proceedings of administrative courts

14. Paragraph 32 of the Verwaltungsgerichtsverfahrensgesetz (Law on the proceedings of administrative courts, 'the VwGVG') states:

'(1) An application by a party for the reopening of a procedure which has been concluded by means of a judgment of the administrative court shall be granted where

…

2. new facts or evidence emerge which, through no fault of the party, could not have been adduced in the previous procedure and which, considered in isolation or in conjunction with the other results of the proceedings, would have likely resulted in a judgment with a different operative part; or

…

(2) An application for reopening must be submitted within two weeks to the administrative court which issued the decision. The time limit shall start to run from the moment when the applicant became aware of the grounds for reopening; however, where this occurs after oral communication of the judgment but before service of the written version of the judgment, the time limit shall start to run only from the time of such service. After a period of three years from delivery of the judgment, an application for reopening may no longer be submitted. It is for the applicant to provide evidence of circumstances demonstrating compliance with the statutory time limit.

…'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

15. On 18 July 2015, XY, an Iraqi national of the Shia Muslim faith, lodged a first application for international protection. By decision of 29 January 2018, the Federal Office dismissed that application. By judgment of 27 July 2018, the Bundesverwaltungsgericht (Federal Administrative Court) dismissed as unfounded the appeal brought by XY against the decision of the Federal Office. That judgment became final. [6]

16. During the administrative procedure leading to the adoption of the decision of 29 January 2018 by the Federal Office and in the proceedings brought by him before the Bundesverwaltungsgericht (Federal Administrative Court), XY on several occasions justified his application for international protection, in essence, on the sole ground that he would risk being killed if he returned to Iraq because he had refused the order of Shiite militias to fight for them and because of the internal situation in Iraq, which was very bad on account of the war.

17. On 4 December 2018, XY made a subsequent application for international protection.

[6] XY lodged an appeal against the judgment of the Bundesverwaltungsgericht (Federal Administrative Court) of 27 July 2018 before the Verfassungsgerichtshof (Constitutional Court, Austria). The latter refused, by order of 25 September 2018, to uphold the appeal and, by order of 25 October 2018, following a subsequent application, it transferred jurisdiction to the Verwaltungsgerichtshof (Upper Administrative Court) to rule on the appeal. No appeal on a point of law against that judgment was lodged at the Verwaltungsgerichtshof (Upper Administrative Court).

18. In the course of that procedure, he argued that, in his first application, he had not stated the real grounds on which he was seeking international protection. He claimed that he had been a homosexual all his life, which is prohibited in Iraq and 'in his religion', and asserted that he had not been able to put forward those real grounds until now because he feared for his life. Only since his arrival in Austria has he understood, thanks to support from an association which he has been in contact with since at least June 2018, that he has nothing to fear if he declares his homosexuality.

19. By decision of 28 January 2019, the Federal Office ruled, inter alia, that XY's subsequent application was inadmissible on the ground of *res judicata*, pursuant to Paragraph 68(1) of the AVG.

20. XY appealed against that decision before the Bundesverwaltungsgericht (Federal Administrative Court). That appeal, in so far as it challenged the dismissal of the subsequent application, was itself dismissed by judgment of 18 March 2019.

21. The sole ground on which the Bundesverwaltungsgericht (Federal Administrative Court) upheld the decision of the Federal Office is that XY's homosexuality already existed at the time of the first asylum procedure and that, although XY was aware of his homosexuality, he had not relied on it as early as that first procedure. Consequently, according to the Bundesverwaltungsgericht (Federal Administrative Court), the force of *res judicata* of the decision on the first asylum application also covered that factual element.

22. An appeal on a point of law was brought before the Verwaltungsgerichtshof (Upper Administrative Court), the referring court.

23. In that appeal, XY challenges the declaration of inadmissibility of his subsequent application, inter alia on the ground that the law in force in Austria in that regard is contrary to Article 40 of Directive 2013/32.

24. In those circumstances, by decision of 18 December 2019, received at the Court on 16 January 2020, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the phrases "new elements or findings" that "have arisen or have been presented by the applicant" in Article 40(2) and 40(3) of Directive [2013/32] also cover circumstances that already existed before the previous asylum procedure was definitively concluded?

If the answer to Question 1 is in the affirmative:

(2) In a case in which new facts or evidence come to light which could not have been relied on in the earlier procedure through no fault of the foreign national, is it sufficient that an asylum applicant is able to request the reopening of a previous procedure which has been definitively concluded?

(3) If the applicant is at fault for not having relied in the previous asylum procedure upon the newly invoked grounds, is the authority allowed to deny substantive examination of a subsequent application on the basis of a national standard laying down a principle which is generally applicable in the administrative procedure, even though, in the absence of the adoption of special standards, the Member State has not correctly transposed Article 40(2)

and 40(3) of [Directive 2013/32] and, as a consequence, has also not made express use of the possibility granted by Article 40(4) of [Directive 2013/32] to provide for an exception from substantive examination of the subsequent application?'

25. The Austrian, Czech, German, French, Hungarian and Netherlands Governments and the European Commission have submitted written observations. The same interested parties, with the exception of the French Government, replied to the Court's written questions of 12 November 2020.

IV. Analysis

26. A 'subsequent application' is defined as a further application for international protection made after a final decision has been taken on a previous application for international protection.[7] As stated in the introduction to this Opinion, the conditions which Member States may lay down in order for a subsequent application to be declared inadmissible on the ground of *res judicata* are set out in Article 40(2) to (4) of Directive 2013/32.

27. It is clear from the request for a preliminary ruling that the Austrian legislature has not adopted any special rules implementing Article 40 of Directive 2013/32. The general provisions of Austrian law governing administrative procedure must therefore be applied in order to assess whether an application for subsequent protection is inadmissible on the ground of *res judicata*.[8] By the three questions which it has raised, the referring court is, in essence, seeking to ascertain whether Directive 2013/32 conflicts with that Austrian law.

28. In order to answer the questions raised, it seems to me useful, at the outset, to explain the Austrian law at issue, as I understand it on the basis of the request for a preliminary ruling and the clarifications made by the Austrian Government in that regard.

A. The Austrian law at issue

29. The Austrian provisions which should be applied in order to assess whether a subsequent application must be rejected as inadmissible on the ground of *res judicata* are, first, Paragraph 68(1) of the AVG and, secondly, Paragraph 69(1), point 2, and (2) of the AVG. Those provisions apply in administrative procedures. Similar provisions apply in proceedings before the administrative courts.[9]

[7] See Article 2(q) of Directive 2013/32, which defines the concept of 'subsequent application' as '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)'. The concept of 'final decision', as contained in that definition, is defined in Article 2(e) as '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'.

[8] The Austrian Government stated that the Austrian legislature had considered that it was not necessary to adopt specific provisions concerning the processing of subsequent applications for international protection, since the Austrian rules on administrative procedures set out measures which made it possible to fulfil the requirements of Article 40 of Directive 2013/32.

[9] According to the referring court, in proceedings before the administrative courts, Paragraph 68(1) of the AVG applies by analogy, whereas a provision similar to Paragraph 69(1), point 2, and (2) of the AVG is provided for in Paragraph 32(1), point 2, and (2) of the VwGVG, cited in point 14 of this Opinion. In the interest of clarity, in the following analysis I refer only to the provisions of the AVG.

30. Pursuant to Paragraph 68(1) of the AVG, applications by interested parties seeking modification of a decision which is not or is no longer subject to appeal must be rejected on the ground of *res judicata*. An exception to that principle is provided for in Paragraph 69(1), point 2, of the AVG. Thus, in order for it to be possible to take into account facts and evidence which already existed at the date of the final decision but which, through no fault of the person concerned, were not relied on, that provision, under the conditions laid down therein and those set out in Paragraph 69(2) of the AVG, provides for the reopening of a procedure which has already been concluded. Such a reopening of the procedure which has been concluded thus makes it possible to override the principle of *res judicata*.

31. Where those provisions are applied in the context of subsequent applications, two aspects relevant to the present case follow from this.

32. *First*, in order to determine whether a subsequent application is inadmissible on the ground of *res judicata* for the purposes of Paragraph 68(1) of the AVG, it is important to know whether that subsequent application is based on facts or evidence which already existed *before* the procedure relating to the previous application was concluded (called '*nova reperta*' in Austrian law) or on facts or evidence which arose only *after* the first procedure was concluded (called '*nova producta*' in Austrian law).

33. A subsequent application which is based on facts or evidence which arose only *after* the procedure relating to the first asylum application was concluded ('*nova producta*') is not affected by the force of *res judicata* for the purposes of Paragraph 68(1) of the AVG. Such facts and evidence are not covered by the decision on the previous application and can therefore be relied on in the context of a new procedure as a new case.

34. By contrast, facts or evidence which already existed *before* the procedure relating to the first application was concluded ('*nova reperta*') are, in principle, covered by the force of *res judicata* for the purposes of Paragraph 68(1) of the AVG, whether or not they were relied on in the context of that procedure. However, new facts or evidence which, although they already existed at the time of that procedure, were, through no fault of the applicant, not relied on by him in that procedure may be relied on in the context of a reopening of the previous procedure, provided that the conditions laid down in Paragraph 69(1), point 2, and (2) of the AVG are fulfilled.

35. *Secondly*, this results in a difference in the ways in which new elements or findings may be relied on, according to whether the subsequent application is based on '*nova producta*' or '*nova reperta*'. Thus, in the case of a subsequent application which is based on '*nova producta*', the examination of the subsequent application takes place in the context of a *new administrative procedure*. By contrast, in the case of a subsequent application which is based on '*nova reperta*', the subsequent application will be examined, provided that it is admissible pursuant to the requirements set out in Paragraph 69(1), point 2, and (2) of the AVG, in the context of a *reopening* of the first procedure.

36. It is in the light of those two aspects of Austrian law that the questions referred for a preliminary ruling should be answered.

B. Interpretation of the concept of 'new elements or findings [that] have arisen or have been presented by the applicant', as used in Article 40(2) and (3) of Directive 2013/32 (first question referred)

37. By its first question, the referring court asks, in essence, whether the concept of 'new elements or findings [that] have arisen or have been presented by the applicant', as used in Article 40(2) and (3) of Directive 2013/32, must be interpreted as meaning that it covers only elements or findings which arose *after* the procedure relating to the previous asylum application was definitively concluded, or if that concept also includes elements or findings which *already* existed before that procedure was definitively concluded, but which were not relied on by the applicant in the context of that procedure.

38. At the outset, I note that Article 40 of Directive 2013/32 establishes a two-stage examination procedure. Thus, pursuant to Article 40(2) of that directive, the subsequent application is to be subject first to a preliminary examination as to whether it is admissible under Article 33(2)(d) of that directive, read in conjunction with Article 40(2) and (3) thereof.

39. That preliminary examination consists in determining whether new elements or findings have arisen or have been presented by the applicant which significantly increase the likelihood that that applicant qualifies as a beneficiary of international protection under Directive 2011/95. If the subsequent application is admissible in accordance with that assessment, it is then subject, under Article 40(3) of Directive 2013/32, to a substantive examination in order to establish whether the application for international protection should actually be granted under Directive 2011/95.

40. It is therefore in the context of that first examination of admissibility that the concept of 'new elements or findings [that] have arisen or have been presented by the applicant' is set out in Article 40(2) and (3) of Directive 2013/32. If the subsequent application contains no new elements or findings, it is considered inadmissible under the *res judicata* principle. That point is clarified in recital 36 of that directive, which states that, where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure, and Member States should therefore be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.[10]

41. It is thus in the light of the *res judicata* principle that, by its first question, the referring court is seeking, in essence, to ascertain whether, under Directive 2013/32, a subsequent application is regarded as admissible only if it is based on findings or elements which arose *after* the conclusion of the first procedure. If that is the case, it would follow that Directive 2013/32 conflicts neither with the Austrian law at issue nor, consequently, with the contested declaration of inadmissibility in the main proceedings. Accordingly, as explained in point 33 of this Opinion, the Austrian law at issue imposes no limitations on the admissibility of subsequent applications which are based on findings and elements that arose only *after* the conclusion of the first procedure ('*nova producta*'). In so far as the fact on which XY relied in support of his subsequent application – the fact that he has always been homosexual – already existed at the time of the procedure relating to his first application for international protection but was not relied on by XY in that procedure, that situation is therefore not affected by Directive 2013/32.

[10] Thus, the Court has recognised the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (see judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 52)).

42. In my view, and that of all the interested parties with the exception of the Hungarian Government, there is no doubt that the concept of 'new elements or findings [that] have arisen or have been presented by the applicant', as used in Article 40(2) and (3) of Directive 2013/32, includes elements and findings which *already* existed before the previous asylum procedure was definitively concluded, but which were not relied on by the applicant in the context of that procedure, with the result that a subsequent application, such as that of XY, based on such elements and findings may be admissible.

43. On the one hand, the wording of Article 40(2) and (3) of Directive 2013/32 supports this. Accordingly, it draws no distinction on the basis of when the newly alleged findings or elements 'arose'. By contrast, those provisions use the broad expression 'new elements or findings [which] have arisen or have been presented by the applicant', which may include, according to the normal meaning of that expression, both new elements and findings which arise *after* the final decision on the previous application and elements or findings which *already* existed at the time of the procedure relating to the previous application, but which were not relied on by the applicant in the context of that procedure.

44. On the other hand, that interpretation is particularly clear in the light of Article 40(4) of Directive 2013/32. Indeed, that provision allows Member States to incorporate into their national law a provision providing that the subsequent application is admissible only if the applicant was, through no fault of his or her own, incapable of asserting, in the first procedure, the new elements and findings, within the meaning of Article 40(2) and (3) of that directive. No fault can be attributed to an applicant for not having relied on elements which did not exist at the time of the first procedure. Accordingly, the new elements or findings to which Article 40(4) of Directive 2013/32 refers must necessarily include those which already existed before the first procedure was definitively concluded. The latter provision presupposes, in other words, that the new elements and findings within the meaning of Article 40(2) and (3) of that directive already existed at the time of the first asylum procedure.

45. In the light of the foregoing, the answer to the first question referred should be that Article 40(2) and (3) of Directive 2013/32 also covers elements or findings which already existed at the time of the procedure relating to the previous application, but which were not relied on by the applicant in the context of that procedure.

46. In the light of point 41 of this Opinion, that answer does not make it possible to determine whether Directive 2013/32 conflicts with the Austrian law at issue. It follows that it is necessary to answer the second question referred, which was raised in the event of that answer.

C. The interpretation of Article 40(3) and Article 42(2) of Directive 2013/32 (second question referred)

47. As explained in points 38 and 39 of this Opinion, Article 40(2) and (3) of Directive 2013/32 establishes a two-stage examination procedure: a preliminary examination as to whether the subsequent application is admissible and, where appropriate, a substantive examination as to whether that subsequent application should actually be granted under Directive 2011/95. The second question referred relates in particular to that second stage of the examination. Thus, by this question, the referring court is essentially asking whether Article 40(3) of Directive

2013/32[11] must be interpreted as meaning that the substantive examination of a subsequent application referred to in that provision may be carried out in the context of a *reopening* of the procedure relating to the previous application for international protection, or whether that provision requires a *new procedure* to be opened for that purpose.

48. The second question referred for a preliminary ruling is raised in view of the fact that, as explained in point 35 of this Opinion, under Austrian law, it is only where a subsequent application is based on '*nova producta*' that the substantive examination of that application is carried out in the context of a *new administrative procedure*. Thus, in the case of a subsequent application based on '*nova reperta*', the substantive examination is carried out in the context of a *reopening* of the first procedure. In the dispute in the main proceedings, XY claims that that reopening would be contrary to Directive 2013/32. By its question, the referring court therefore seeks, in essence, to ascertain whether a *reopening* of the earlier procedure, as provided for in Paragraph 69(1), point 2, of the AVG, is consistent with Article 40(3) of Directive 2013/32.

49. In my view, in order to establish whether such a reopening is compatible with Directive 2013/32, it is necessary to assess not only whether that reopening is compatible with Article 40(3) of that directive (Section 1), but also whether the requirements relating to the examination of admissibility necessary for that reopening are consistent with the requirements arising from Directive 2013/32 in that respect[12] (Section 2).

1. Substantive examination

50. With regard to the substantive examination of a subsequent application, it is necessary to determine whether Directive 2013/32 requires the opening of a *new procedure* for that purpose, or whether a *reopening*, such as that provided for in Paragraph 69(1), point 2, of the AVG, is sufficient.

51. I consider that Directive 2013/32 does not in principle require any specific procedure for the substantive examination of a subsequent application.

52. It is true, as the Netherlands Government points out, that Article 42(2) of the directive specifically refers to 'a new procedure' for the substantive examination of a subsequent application. However, there is no provision in that directive which defines what is meant by 'a new procedure'. By contrast, the scope of that expression may, in my view, be inferred from Article 40(3) of Directive 2013/32, in that the latter provision requires that the substantive examination of the subsequent application be conducted in conformity with Chapter II of that directive.

[11] The question referred, as formulated by the referring court, makes no reference to any provision of EU law. It is nevertheless apparent from the request for a preliminary ruling that the referring court raises the question of the interpretation of Article 40(3) of Directive 2013/32.

[12] As I shall explain, the latter examination involves an assessment of compatibility, first, with Article 40(2) to (4), read in conjunction with Article 33(2)(d), of Directive 2013/32 and, secondly, with Article 42(2) of that directive. According to settled case-law, the Court may, in order to provide a satisfactory answer to the referring court, consider provisions of EU law to which the national court has not referred in the wording of its question. See, in particular, judgments of 27 March 1990, *Bagli Pennacchiotti* (C-315/88, EU:C:1990:139, paragraph 10); of 8 November 2007, *ING. AUER* (C-251/06, EU:C:2007:658, paragraph 38); and of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 39).

53. In essence, Chapter II sets out the basic principles and fundamental guarantees which Member States must respect when examining applications for international protection. It therefore follows from Article 40(3) of Directive 2013/32 that the national procedure relating to the substantive examination of the subsequent application must ensure that those guarantees and principles are taken into account.

54. Apart from that requirement, that directive does not require Member States to adopt a specific procedure for that purpose. Member States therefore have a margin of discretion and may transpose Article 40(3) of Directive 2013/32 in the light of the specific features of their national law. [13]

55. As the Commission rightly argues, Directive 2013/32 therefore does not, in principle, prevent the national legislature from, on the one hand, providing for a new administrative procedure for subsequent applications based on new elements or findings which arose only *after* the first procedure was definitively concluded or, on the other hand, providing for the reopening of the closed procedure for subsequent applications based on elements or findings which *already* existed at the time of the first procedure, but which were not presented in the course of that procedure.

56. That said, the next question which arises is whether a reopening, such as that provided for by Paragraph 69(1), point 2, of the AVG, complies with the requirements arising from Chapter II of Directive 2013/32.

57. The file available to the Court does not contain sufficient information concerning the detailed rules governing the reopening procedure in that respect and it is therefore not possible to carry out such an assessment, which it is, in any event, for the referring court to carry out.

58. I note, however, that it seems clear from the request for a preliminary ruling that the referring court entertains doubts as to whether the reopening provided for in Paragraph 69(1), point 2, of the AVG is compatible with the principles and guarantees referred to in Chapter II of Directive 2013/32. In particular, the referring court notes that the legal status of a foreign national who has submitted an application for international protection, even if it is a subsequent application, differs from the legal status of a foreign national seeking the reopening of a procedure which has already been concluded, for example as regards temporary protection against removal during the procedure.

59. The way in which that observation is to be understood may raise uncertainties. In my view, the difference in legal status mentioned by the referring court may be understood as relating to the difference under Austrian law according to whether a subsequent application is based on '*nova reperta*' or '*nova producta*', and thus as indicating that an applicant who has submitted a subsequent application falling within the second category is subject to more favourable rules than an applicant who has submitted a subsequent application falling within the first category.

60. If that reading is correct, I note that Chapter II of Directive 2013/32 does not necessarily preclude such a difference in legal status. On the one hand, under Article 5 of that directive, there is nothing to prevent Member States from introducing more favourable standards than those deriving from Directive 2013/32, provided that those standards are compatible with that directive. On the other hand, with regard to the protection of an applicant against removal

[13] See, to that effect, judgment of 28 July 2011, *Samba Diouf* (C-69/10, EU:C:2011:524, paragraph 29).

during the examination of a subsequent application, Chapter II of Directive 2013/32 allows Member States to provide a lower level of protection for that applicant than that provided for an applicant who has lodged a first application for international protection. [14]

61. Accordingly, although Austrian law introduces more favourable standards for subsequent applications based on '*nova producta*' than the standards which are laid down in Directive 2013/32 for subsequent applications, that directive does not preclude such rules, provided that, as regards subsequent applications based on '*nova reperta*', those rules (also) comply with the (minimum) requirements arising from Chapter II of Directive 2013/32.

62. Moreover, in its answer to a question from the Court, the Austrian Government stated in that regard that, when a subsequent application is examined on the merits in the context of a reopening, the administrative decision which concluded the procedure or the corresponding judicial decision is declared ineffective and the procedure is reopened at the stage prior to the adoption of that administrative or court decision and is conducted anew, with the result that the new arguments are fully examined on the merits. It therefore makes no difference whether the new elements or findings were relied on before, or only after, the first procedure ended. The safeguards and principles laid down in Chapter II of Directive 2013/32 are complied with in full, both in the new (second) procedure and in the (first) reopened procedure.

63. In the light, in particular, of that answer, the reopening provided for by Paragraph 69(1), point 2, of the AVG therefore appears to be compatible with the requirements set out in Chapter II of Directive 2013/32. However, it is for the referring court to verify whether this is the case.

2. The examination of admissibility

64. Directive 2013/32 exhaustively sets out the conditions of admissibility which Member States may lay down for a subsequent application. [15] Those conditions are the ones which I have referred to in points 38 to 39 and 44 of this Opinion and which are provided for in Article 40(2) to (4), read in conjunction with Article 33(2)(d), of that directive. To those conditions must be added Article 42(2) of that directive, which sets out the procedural rules which Member States may lay down when examining the admissibility of the subsequent application.

65. As explained in point 34 of this Opinion, the conditions of admissibility under Austrian law are laid down in Paragraph 69(1), point 2, and (2) of the AVG. Paragraph 69(1), point 2, provides that proceedings that have been concluded must be reopened where new facts or evidence emerge which, through no fault of the person concerned, could not have been adduced in the previous procedure and which, considered in isolation or in conjunction with the other results of those proceedings, would have likely resulted in a decision with a different operative part. Under Paragraph 69(2), an application for reopening must be submitted within two weeks of an

[14] Thus, in accordance with Article 9(1) of Directive 2013/32, an applicant who has lodged a first application for international protection is, in principle, allowed to remain in the Member State until the determining authority has made a decision on his or her application. However, in the case of an applicant who has lodged a subsequent application for international protection, Article 41(1), read in conjunction with Article 9(2) of that directive, allows Member States, under the conditions laid down therein, to derogate from that rule laid down in Article 9(1) of Directive 2013/32.

[15] That point follows, in essence, from Article 33(2)(d) of Directive 2013/32, which provides that Member States may consider a subsequent application inadmissible only in the situation referred to in that provision, which must therefore be read in conjunction with the conditions of admissibility laid down in Article 40(2) to (4) of that directive. See, to that effect, Opinion of Advocate General Hogan in *LH (New elements or findings)* (C-921/19, EU:C:2021:117, point 33).

applicant becoming aware of the grounds for reopening and an application for reopening may no longer be submitted after a period of three years from the adoption of the final administrative decision.

66. The relevant Austrian provision therefore contains, in essence, three conditions: (i) the condition of a likelihood of a change in the outcome of the concluded first procedure in the light of those new elements or findings, (ii) the absence of fault on the part of the applicant and (iii) the time limits.

67. As regards the compatibility of such conditions with Directive 2013/32, the first two appear to be clearly compatible with the conditions of admissibility provided for in Article 40 of that directive.

68. Thus, the first condition of the national provision seems to correspond to that set out in Article 40(3) of Directive 2013/32, namely that the new elements or findings significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection. As to the second condition of the national provision, it seems to correspond to Article 40(4) of Directive 2013/32, which provides that Member States may provide that the substantive application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the new elements or findings in the previous procedure. [16]

69. However, as regards the third condition of Paragraph 69 of the AVG, that is to say the time limits, some uncertainties remain, in the light of Article 42(2) of Directive 2013/32, rather than in the light of Article 40 of that directive.

70. As a rule, time limits may be regarded both as a condition of admissibility, the compatibility of which must be assessed under Article 40, and as a procedural rule, the compatibility of which must be assessed under Article 42(2) of Directive 2013/32, which sets out the procedural rules that Member States may lay down when examining admissibility.

71. In my view, the starting point for assessing that condition is Article 40 of that directive. The interpretation of that provision is clear since it lays down exhaustive conditions of admissibility [17] and contains no condition relating to the setting of time limits. It therefore appears, at first sight, that the third condition provided for in Austrian law is contrary to Directive 2013/32.

72. However, it is also important to examine that third condition in the light of Article 42(2) of Directive 2013/32, in order to determine whether that provision actually allows Member States to set time limits, as is claimed, in essence, by the Austrian and German Governments.

73. First of all, I accept that a literal reading of Article 42(2) of Directive 2013/32 might suggest that it allows time limits to be set.

[16] As I shall explain in points 93 to 101 of this Opinion, Article 40(4) of Directive 2013/32 is an optional provision and therefore must be transposed into national law for it to be possible to apply the condition relating to the absence of fault laid down therein. In that regard, according to settled case-law, the adoption of such a provision of a directive is not necessarily required in order to implement new provisions, in so far as national law already contains a rule corresponding to such a provision (see, to that effect, judgment of 23 March 1995, *Commission* v *Greece* (C-365/93, EU:C:1995:76, paragraph 9 and the case-law cited), which is the case here according to the Austrian Government (see footnote 8 of this Opinion).

[17] See point 64 and footnote 15 of this Opinion.

74. Indeed, the first subparagraph of that provision provides that Member States may lay down in national law rules on the preliminary examination pursuant to Article 40 of Directive 2013/32 and non-exhaustively sets out two examples of rules which Member States may lay down in that regard.[18] Moreover, the second subparagraph of Article 42(2) of that directive states that Member States must not render impossible the access of applicants to a new procedure or effectively annul or severely curtail such access. The wording of Article 42(2) of Directive 2013/32 therefore allows the Member States a measure of discretion in laying down procedural rules.[19]

75. Having said that, I nonetheless note that, as the Commission rightly points out, the origin of Article 42(2) of Directive 2013/32 – and the context of that provision in relation to the earlier directive – makes it clear that the EU legislature did not wish to afford the Member States the possibility of making the admissibility of subsequent applications subject to compliance with a time limit.

76. Indeed, such a possibility was provided for in the provision preceding Article 42(2) of Directive 2013/32, namely Article 34(2)(b) of Directive 2005/85. Accordingly, the latter provision expressly allowed Member States to require an applicant to submit new findings or elements within a time limit based on when he or she obtained such information. However, that provision was not reproduced in Article 42(2) of Directive 2013/32 and, accordingly, the legislature wished to eliminate that possibility. This clearly follows from the *travaux préparatoires* for Directive 2013/32.

77. On the one hand, it is apparent from a document annexed to the initial proposal for Directive 2013/32, in which the Commission set out its reasons for the amendment concerned, that the previous provision allowing Member States to set a time limit, namely Article 34(2)(b) of Directive 2005/85, would be deleted to avoid possible tension with the principle of non-refoulement.[20]

78. On the other hand, it seems that the EU legislature – in the course of the legislative negotiation relating to Directive 2013/32 – expressly rejected the introduction of such a possibility into that directive. The German, French and United Kingdom delegations of the

[18] According to Article 42(2)(a) of Directive 2013/32, Member States may oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure. According to Article 42(2)(b), Member States may permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6) of Directive 2013/32.

[19] That said, contrary to what the German Government essentially argues, I do not consider that Article 42(2) of Directive 2013/32 is an expression of the principle of the procedural autonomy of Member States, with the result that it follows from that provision that it is left to the Member States, by virtue of their procedural autonomy, to set time limits, subject to compliance with the principles of equivalence and effectiveness. Although it is true that the wording of the second subparagraph of Article 42(2) of that directive is similar to the formulation of the principle of the procedural autonomy of the Member States, the context of that provision is different: that principle applies in relation to the detailed procedural rules governing *actions* safeguarding the rights which individuals derive from EU law (see, by way of example, the judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 47), whereas Article 42(2) of that directive is concerned with *a much earlier stage*, namely the (preliminary) examination of a subsequent application by the competent administrative authority.

[20] See Council's explanatory memorandum, Common Position adopted by the Council with a view to the adoption by the European Parliament and the Council of a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection of 23 October 2009, 14959/09 ADD 1, ASILE 82, CODEC 1231, Interinstitutional file 2009/0164 (COD). In the initial proposal for Directive 2013/32, the content of Article 42 of Directive 2013/32 was provided for in Article 36. With regard to the latter provision, it is apparent from the abovementioned annex that 'two changes are proposed with regard to the procedural rules applicable in a preliminary examination procedure. Firstly, the optional provision allowing Member States to require submission of the new information within a time limit is deleted to avoid possible tension with the principle of non-refoulement …'. As I understand that point, to the extent that the requirements for qualifying as a beneficiary of international protection under Directive 2011/95 are based on the principle of non-refoulement (see recital 3 and Article 21 of that directive), the Commission wished to avoid a situation in which a subsequent application would be rejected on the sole ground that it was not submitted within a particular time limit, even though the applicant could qualify as a beneficiary of international protection under Directive 2011/95.

Council of the European Union proposed the inclusion of such a possibility on the ground that it would make it easier to combat abusive further submissions.[21] However, that proposal did not result in an amendment of the provision as proposed by the Commission.

79. In my view, that interpretation deriving from the origin of Article 42(2) of Directive 2013/32 is also supported by the context of that provision. As explained in point 71 of this Opinion, Article 40 of that directive, read in conjunction with Article 33(2)(d) thereof, is already consistent with that interpretation, as is Article 41(1) of that directive.

80. Thus, as explained in footnote 14 of this Opinion, Article 41(1) of Directive 2013/32 relates to the situations in which Member States may make an exception from the right of the applicant to remain in the territory of the Member State concerned during the examination of his or her subsequent application. In that regard, it follows essentially from Article 41(1), read in conjunction with Article 9(2) of that directive, that, even if there is a risk that a subsequent application may be submitted on improper grounds, Member States may make an exception from the right of the applicant to remain in their territory *only where this does not lead to direct or indirect refoulement*. It seems to me reasonable to infer from the above that, under Article 42(2) of that directive, the mere fact that a subsequent application has not been submitted within a particular time limit cannot, a fortiori, justify the rejection of that application, in view of the risk of an infringement of that principle of non-refoulement.

81. Accordingly, although it would be desirable for Directive 2013/32 more clearly to prohibit the setting of a time limit, it cannot be argued that it is for the Member States to introduce such time limits. It was a deliberate choice on the part of the EU legislature to take the view that the use of such time limits was likely to undermine the principle of non-refoulement, which constitutes a fundamental principle in that directive,[22] and that that fundamental principle should prevail on account of that likelihood.

82. It follows that Article 42(2) of Directive 2013/32, read in conjunction with Article 40(2) to (4) and Article 33(2)(d) of that directive, must be interpreted as prohibiting the setting of time limits per se. Such time limits should therefore be disapplied. In the dispute in the main proceedings, however, the subsequent application brought by XY was rejected not on the basis of those time limits, but on the sole ground of *res judicata*.

83. In the light of all the foregoing considerations, the answer to the second question referred should be that Article 40(3) of Directive 2013/32 must be interpreted as not requiring a specific procedure for the substantive examination of subsequent applications, provided that the national procedure, including a reopening of the procedure relating to the previous application for protection, fulfils the requirements laid down in Chapter II of that directive, which it is for the referring court to ascertain in the context of the main proceedings. Moreover, Article 42(2) of that directive, read in conjunction with Article 40(2) to (4) and Article 33(2)(d) thereof, must be interpreted as prohibiting the setting of time limits.

[21] Joint contribution of the German, French and United Kingdom delegations regarding the proposals for a directive laying down standards for the reception of asylum seekers and for asylum procedures of 27 June 2011, 12168/11, ASILE 54. In point II.2 of that contribution, those delegations expressed concerns as to the problem of abusive further submissions. To that end, they argued that Directive 2013/32 should include provisions giving 'Member States the means better and more rapidly to respond to the hijacking of asylum procedures linked to abusive further submissions, for example by introducing a time limit within which asylum seekers must submit any new grounds'.

[22] See, to that effect, recital 3 of Directive 2013/32.

D. The interpretation of Article 40(4) of Directive 2013/32 (third question referred)

84. In view of the answer I propose to give to the second question, it seems to me that it is not necessary to answer the third question referred.

85. This last question is raised in the event that it follows from the answer to the second question that the *reopening* provided for in Austrian law does not fulfil the requirements arising from Directive 2013/32, with the result that it would be necessary to examine all subsequent applications lodged in Austria in the context of a *new administrative procedure*. However, as I have explained, subject to verification by the referring court, a *reopening* is possible and, consequently, I do not consider that it is appropriate to answer the second question referred to that effect. [23]

86. It is therefore only in the event that the referring court does not confirm my assumption concerning Austrian law in that respect, or in the event that the Court should not agree with my interpretation of Directive 2013/32, that I shall answer the third question referred.

87. By this question the referring court asks whether, if the applicant is at fault for not having relied in the previous asylum procedure upon the newly invoked grounds, the authority is allowed to deny substantive examination of a subsequent application on the basis of a national standard laying down a principle which is generally applicable in the administrative procedure, even though, in the absence of the adoption of special standards, the Member State has not correctly transposed Article 40(2) and (3) of Directive 2013/32 and, as a consequence, has also not made express use of the possibility granted by Article 40(4) of that directive to provide for an exception from substantive examination of the subsequent application.

88. The context of this question, as I understand it, is as follows: as I have explained in this Opinion, Article 40(4) of Directive 2013/32 allows Member States to incorporate into their national law a provision providing that the subsequent application is admissible only if the applicant was, through no fault of his or her own, incapable of asserting the new elements and findings, within the meaning of Article 40(2) and (3) of that directive, in the previous procedure.

89. Under Austrian law, such a condition relating to the absence of fault is provided for in Paragraph 69(1), point 2, of the AVG. However, that provision does not apply to a new administrative procedure, since it applies only to the reopening of procedures which have already been definitively concluded.

90. Starting from the assumption set out in point 85 of this Opinion that a subsequent application based on '*nova reperta*' must be examined in a new administrative procedure, the referring court asks whether it is impossible in such a new procedure to assess whether there has been fault. The consequence of such an impossibility would be that a subsequent application, such as that at issue in the main proceedings, should also be considered admissible and be examined on the merits where the applicant was at fault in not relying in the previous procedure on the newly presented elements or findings. In the main proceedings, the referring court seems to consider that XY was at fault in omitting to rely on his sexual orientation in the procedure relating to his first application for international protection.

[23] It is true that I consider that Article 42(2), read in conjunction with Article 40(2) to (4) and Article 33(2)(d) of Directive 2013/32, precludes the time limits provided for in Austrian law. However, as stated in point 82 of this Opinion, Austrian law can be brought into line with Directive 2013/32 by leaving those time limits unapplied.

91. It is in that context that the referring court wishes to ascertain whether it is also possible to take into consideration the assessment as to whether there has been fault in the examination of the admissibility of subsequent applications based on '*nova reperta*' in the context of a new administrative procedure.

92. In my view, it is necessary, subject to verification by the referring court, to answer that question in the negative.

93. *In the first place*, I consider that Article 40(4) of Directive 2013/32 should be interpreted as an *optional* provision and therefore must be transposed into national law for it to be possible to apply the condition relating to the absence of fault laid down therein.

94. I therefore disagree with the interpretation put forward by the Netherlands Government in that regard. The Netherlands Government argues that the absence of fault provided for in Article 40(4) of Directive 2013/32 constitutes a requirement inherent in the concept of 'new elements or findings' within the meaning of Article 40(2) and (3) of that directive, so that Member States could decide that the application will *only* be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting those elements or findings in the previous procedure. According to that government, Article 40(4) of that directive is merely a clarification of that point, and transposition of that paragraph is therefore not necessary in order to apply a condition relating to the absence of fault. In support of its position, the Netherlands Government put forward a number of arguments based, in essence, first, on Article 40(4) and, secondly, on the obligation of the applicant to cooperate with the competent authorities.

95. In my view, those arguments cannot be accepted.

96. First of all, with regard to Article 40(4) of Directive 2013/32, I note that, while there is certainly a discrepancy between the different language versions of that provision, the vast majority of those versions suggest that it is an optional provision.

97. Thus, the vast majority of the language versions, that is to say 20 versions, including the French language version,[24] clearly and unequivocally lay down an optional provision. Thus, the French language version states that Member States 'peuvent prévoir' ('may lay down') a condition relating to the absence of fault on the part of the defendant, which makes it clear that this is *optional*.

98. Only the Czech language version of Article 40(4) of Directive 2013/32 has a contrary meaning, since in that version Article 40 provides, in essence, that Member States may decide that the application will *only* be further examined if the applicant concerned has not been at fault.[25] Two language versions are for their part ambiguous, in that they can be understood either in the same way as the French language version or in the same way as the Czech language version.[26]

[24] This includes all language versions with the exception of the Bulgarian, Czech and Italian language versions.

[25] That provision provides in Czech 'Členské státy mohou rozhodnout o dalším posuzování žádosti, pouze pokud dotyčný žadatel nemohl v předchozím řízení bez vlastního zavinění uvést skutečnosti uvedené v odstavcích 2 a 3 tohoto článku …'.

[26] Those versions are that in Bulgarian ('Държавите-членки могат да предвидят разглеждането на молбата да продължи само при условие че съответният кандидат не е имал възможност, без да има вина за това, да представи ситуациите, изложени в параграфи 2 и 3 от настоящия член, в предходната процедура …') and that in Italian ('Gli Stati membri possono stabilire che la domanda sia sottoposta a ulteriore esame solo se il richiedente, senza alcuna colpa, non è riuscito a far valere, nel procedimento precedente, la situazione esposta nei paragrafi 2 e 3 del presente articolo, in particolare esercitando …).

99. In my view, even if the Czech language version of Article 40(4) of Directive 2013/32 is not simply a translation error, with the result that a purely literal interpretation based on (all) the other language versions of that provision is not, in itself, definitive, an interpretation based on other interpretative criteria [27] does not, in any event, support the interpretation put forward by the Netherlands Government.

100. Indeed, it must be noted that the *travaux préparatoires* for Article 40(4) of Directive 2013/32 seems to indicate that the EU legislature did indeed intend to make that provision optional. [28]

101. The fact that Directive 2013/32 pursues a general objective of expediency [29] and that the examination of admissibility provided for in Article 33(2), read in conjunction with Article 40(2) to (4) of Directive 2013/32, is intended to relax the obligation of the Member State to examine a subsequent application on the merits, [30] cannot lead to a contrary result.

102. It is also necessary to dismiss the arguments based on the applicant's obligation to cooperate with the competent authorities. Those arguments are more specifically based on the fact that the applicant, pursuant to Article 13(2) of Directive 2013/32, is under an obligation to cooperate with the competent authorities with a view to establishing the elements referred to in Article 4(2) of Directive 2011/95, including the reasons for applying for international protection.

103. In that regard, it cannot be maintained that that obligation is rendered meaningless in a situation where any element not relied on in the context of the first application for international protection – whether or not through the fault of the applicant – results in the subsequent application being further examined. Apart from the fact that such an interpretation would undermine the power conferred on Member States by Article 40(4) of Directive 2013/32, it is in any event not true that the obligation to cooperate would be rendered meaningless unless a condition relating to the absence of fault were applied. Directive 2011/95 and Directive 2013/32

[27] According to settled case-law, the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of European Union law (see judgment of 26 April 2012, *DR and TV2 Danmark* (C-510/10, EU:C:2012:244, paragraph 44 and the case-law cited). Where there is divergence between two language versions of a European Union legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see judgment of 26 April 2012, *DR and TV2 Danmark* (C-510/10, EU:C:2012:244, paragraph 45 and the case-law cited)).

[28] Accordingly, in the original proposal for Directive 2013/32, Article 35(6), which corresponds to Article 40(4) in the version adopted, was indeed formulated in the sense put forward by the Netherlands Government (Proposal for a Directive of the European Parliament and of the Council of 21 October 2009 on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009) 554 final). However, during the negotiations relating to Directive 2013/32, the Parliament proposed to delete that provision altogether, on the grounds that 'the Member States should not systematically refuse to examine a subsequent application on the pretext that the applicant could have brought forth the new elements or facts during the previous procedure or related appeal. An automatic refusal of this kind could result in a breach of the principle of non-refoulement' (see justification for amendment 88 in the Parliament's Report of 24 March 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (A7-0085/2011)). Subsequently, the Council, in its common position, amended the original wording of Article 40(4) to that of the version which was ultimately adopted (Position (EU) No 7/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, adopted on 6 June 2013 (OJ 2013 C 179 E, p. 27)). As far as I am aware, no specific explanation for that amendment appears in the *travaux préparatoires*. However, in view of the concerns expressed by the Parliament relating to the principle of non-refoulement, it seems reasonable to infer that this was the reason for the amendment of the wording of Article 40(4), to which the Commission and the Parliament then agreed.

[29] See, in that regard, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 100).

[30] See, to that effect, judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218, paragraph 29 and the case-law cited).

expressly set out a number of inferences which may be drawn by Member States from a failure to comply with that obligation, [31] but it does not follow that Member States are required to declare the subsequent application inadmissible.

104. It follows from all the foregoing considerations that Article 40(4) of Directive 2013/32 should be interpreted as an *optional* provision and therefore must be transposed into national law for it to be possible to apply the condition relating to the absence of fault laid down therein.

105. *In the second place*, it seems in that respect that, in the case of new administrative procedures, the condition relating to the absence of fault laid down in Article 40(4) of Directive 2013/32 has not been transposed into Austrian law in a manner which fulfils the requirements of EU law.

106. Indeed, it is settled case-law that, whilst the adoption of new national provisions is not necessarily required in order to implement a directive, it is essential that national law guarantee the effective application of that directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights. [32] Accordingly, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. [33]

107. In that regard, and subject to verification by the referring court, I consider that Article 40(4) of Directive 2013/32 has not been transposed into Austrian law in a manner consistent with those requirements in the case of new administrative procedures. Thus, it is not apparent from Paragraph 69(1), point 2, of the AVG that the condition relating to the absence of fault contained therein also applies to the examination of the admissibility of subsequent applications in specific procedures other than the reopening of a first procedure which had been definitively concluded.

108. *In the third place*, and above all, the Court has consistently held that a provision which has not been fully transposed into national law cannot be applied to the detriment of an individual. [34] Like the referring court, I take the view that this would be precisely the outcome of an interpretation to the effect that the condition relating to the absence of fault laid down in Article 40(4) of Directive 2013/32 should be applied in the context of a new administrative procedure, even though national law does not provide for this.

109. Contrary to what the German Government claims, the fact that the element of fault provided for in Paragraph 69(1), point 2, of the AVG enshrines a principle which is generally valid in Austrian administrative procedure, in that it expresses an aspect of the principle of *res judicata*, cannot lead to a contrary result. Indeed, it must be noted that Article 40(4) of Directive 2013/32 regulates that principle in the context of subsequent applications, since it follows from that provision, read in conjunction with Article 40(2) and (3) of that directive, that, in the case of new

[31] Thus, I note, first, that in accordance with Article 28(1)(a) of Directive 2013/32, Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for international protection when it is ascertained that 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. Secondly, pursuant to Article 4(3) of that directive, the fact that particular elements have not been previously relied on may, in my view, be taken into account when carrying out the assessment of an application for international protection on an individual basis.

[32] See judgment of 23 March 1995, *Commission* v *Greece* (C-365/93, EU:C:1995:76, paragraph 9 and the case-law cited).

[33] See judgment of 11 September 2014, *Commission* v *Portugal* (C-277/13, EU:C:2014:2208, paragraph 43 and the case-law cited).

[34] See, inter alia, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 65 and the case-law cited).

elements or findings which already existed at the time of the first procedure and, through the fault of the applicant, were not relied on in that procedure, the *res judicata* principle covers such new elements or findings only if national law so provides.

110. On the basis of the foregoing, Article 40(4) of Directive 2013/32 should be interpreted as meaning that the condition relating to the absence of fault laid down therein cannot be applied in the context of an administrative procedure unless that condition is expressly laid down in national law in a manner that satisfies the requirements of legal certainty, which, subject to verification by the referring court, does not appear to be the case in a situation such as that at issue in the main proceedings.

V. Conclusion

111. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Verwaltungsgerichtshof (Upper Administrative Court, Austria):

(1) The concept of 'new elements or findings [that] have arisen or have been presented by the applicant', as used in Article 40(2) and (3) 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, must be interpreted as meaning that it also covers elements or findings which already existed before the procedure relating to a previous application for international protection was definitively concluded, but which were not relied on by the applicant in the context of that procedure.

(2) Article 40(3) of Directive 2013/32 must be interpreted as meaning that the substantive examination of a subsequent application does not require a specific procedure, provided that the national procedure fulfils the requirements laid down in Chapter II of that directive. Article 42(2) of that directive, read in conjunction with Article 40(2) to (4) and Article 33(2)(d) thereof, must be interpreted as prohibiting the setting of time limits per se.

(3) Article 40(4) of Directive 2013/32 must be interpreted as meaning that the condition relating to the absence of fault laid down therein cannot be applied in the context of an administrative procedure unless that condition is expressly laid down in national law in a manner that satisfies the requirements of legal certainty. It is for the referring court to verify whether this is the case here.