Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 18 March 2021 [1]

Case C-8/20

L.R.
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany))

(Reference for a preliminary ruling – Area of freedom, security and justice – Asylum policy – Directive 2013/32/EU – Application for international protection – Article 33(2)(d) – Inadmissibility where a final decision has been taken on a previous application – Final decision taken by Norway – Article 2(q) – Concept of 'subsequent application' – Regulation (EU) No 604/2013 – Article 19(3) – Application for international protection lodged after the applicant has effectively been removed to his or her country of origin)

1. This request for a preliminary ruling, relating to an application for international protection, concerns the interpretation of the ground of inadmissibility under Article 33(2)(d) of Directive 2013/32. [2] That ground relates to 'subsequent applications', [3] where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection have arisen or have been presented by the applicant.

2. The request has been made in proceedings between an Iranian national, L.R., and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the legality of a decision of the Bundesamt für Migration und Flüchtlinge – Außenstelle Boostedt (Federal Office for Migration and Refugees, Boostedt branch office, Germany) ('the Office') rejecting as inadmissible the application for international protection of the person concerned. That decision was based on the fact that L.R. had, several years previously, made a first application to the Kingdom of Norway, which had been refused by a final negative decision.

[1] Original language: French.

[2] Directive 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). That directive is linked 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').

[3] The concept of 'subsequent application' is defined in Article 2(q) of Directive 2013/32. The present request for a preliminary ruling concerns the interpretation of Article 33(2)(d) of that directive, read in conjunction with Article 2(q) thereof.

3. As worded, the referring court's question seeks clarification on the Kingdom of Norway's participation in the Common European Asylum System in order to determine, in essence, whether a final negative decision by that third country on an application for international protection may be treated as if it had been taken by a 'Member State', thereby allowing the Office to find a 'subsequent application' by the same applicant to be inadmissible for the purposes of Article 33(2)(d) of Directive 2013/32.

4. Before I can answer that question, I believe it is necessary to elucidate whether, in the context of applying the Dublin III Regulation, the fact that the applicant returned to his country of origin between his first and second applications, of itself, precludes the second application from being classified as a 'subsequent application'.

5. On completion of my explanation, I will propose that the Court should find that, since L.R. was removed by the Kingdom of Norway to his country of origin when it completed its examination of his first application, the application at issue in the main proceedings should be treated as a new application. In the alternative, in case the Court does not concur with that proposal, I will set out the reasons why in my view the fact that the decision was taken by another Member State or, as in the present case, by the Kingdom of Norway, does not prevent the Member State to which an application is made from finding it to be inadmissible as a 'subsequent application'.

I. Legal context

A. The Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway

6. The Agreement between the [European Union] and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (OJ 2001 L 93, p. 40) ('the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway') was approved on behalf of the European Union by Decision 2001/258/EC. [4]

7. According to Article 1 of that agreement:

'1. The provisions of the Dublin Convention, listed in Part 1 of the Annex to this Agreement and the decisions of the Committee set up by Article 18 of the Dublin Convention listed in Part 2 of the said Annex shall be implemented by Iceland and Norway and applied in their mutual relations and in their relations with the Member States, subject to paragraph 4.

2. Member States shall apply the rules referred to in paragraph 1, subject to paragraph 4, in relation to Iceland and Norway.

…

4. For the purposes of paragraphs 1 and 2, references in the provisions covered by the Annex to "Member States" shall be understood to include Iceland and Norway.

…'

[4] Council Decision of 15 March 2001 (OJ 2001 L 93, p. 38).

8. The annex to that agreement refers neither to Directive 2011/95 [5] nor to Directive 2013/32.

B. EU law

1. The Dublin III Regulation

9. Article 18(1) of the Dublin III Regulation provides:

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

…

(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.'

10. Article 19(3) of that regulation provides:

'The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States in compliance with a return decision or removal order issued following the withdrawal or rejection of the application.

An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.'

2. Directive 2013/32

11. Recital 13 of Directive 2013/32 is worded as follows:

'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.'

12. Recital 36 of that directive provides:

'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.'

[5] 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).

13. Article 2 of that directive, entitled 'Definitions', provides:

'For the purposes of this Directive:

…

(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).'

14. Article 33 of that directive, entitled 'Inadmissible applications', provides, in paragraph 2 thereof:

'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;

…'

15. Article 40 of Directive 2013/32, 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 Member State responsible, as defined in that Regulation, in accordance with this Directive.'

C. German law

16. Paragraph 29 of the Asylgesetz (Law on asylum), in the version applicable to the facts at issue in the main proceedings ('the AsylG'), entitled 'Inadmissible applications', is worded as follows:

'(1) 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. …'

17. Paragraph 71a of the AsylG, entitled 'Second application', provides:

'(1) 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 [Verwaltungsverfahrengesetz (Law on administrative procedure)] are met; this shall be examined by the [Office]. …'

18. According to the information provided by the referring court, in the case of a second application for asylum, Paragraph 51(1) of the Law on administrative procedure requires a conclusive statement of facts that is not, on a full and reasonable consideration, incapable from the outset of establishing entitlement to the right being sought.

II. The dispute in the main proceedings, the question referred and the proceedings before the Court of Justice

19. On 22 December 2014, L.R., an Iranian national, lodged an application for international protection with the Office.

20. When it examined the application, the Office found that L.R. had previously applied for asylum in Norway. The Federal Republic of Germany therefore requested the Kingdom of Norway to take back L.R., in accordance with the obligations under the Dublin III Regulation applicable to that third State.

21. By letter of 26 February 2015, the Kingdom of Norway rejected that request on the ground that its responsibilities had ceased, in accordance with Article 19(3) of that regulation. In its reply to the Office, the Kingdom of Norway stated that L.R. had submitted an application for international protection to the competent Norwegian authority on 1 October 2008, that his request had been rejected on 15 June 2009 and that he had been surrendered to the Iranian authorities in 19 June 2013.

22. During the examination by the Office, L.R. stated that he had left Iran 18 months before lodging his application in Germany and had lived in Iraq until three months before he arrived in Germany.

23. By decision of 13 March 2017, the Office rejected L.R.'s application for international protection as inadmissible, pursuant to Paragraph 29(1)(5) of the AsylG. The Office took the view that it was a second application within the meaning of Paragraph 71a of the AsylG, and that the conditions laid down in Paragraph 51(1) of the Law on administrative procedure for the initiation of a further asylum procedure were not met since the statement of facts that L.R. presented in support of his application did not appear credible overall.

24. L.R. brought an action against that decision before the referring court. He is seeking to be granted, primarily, refugee status and, in the alternative, subsidiary protection.[6] In the further alternative, he has applied for a finding of prohibition on removal under German law.

25. The referring court considers that, in order to rule on the dispute before it, it needs to know whether an application for international protection may be classified as a 'subsequent application', within the meaning of Directive 2013/32, where the procedure which led to the rejection, by a final decision, of a previous application by the person concerned took place not in another EU Member State but in Norway.

26. In that regard, the referring court states, in the first place, that in its view the ground of inadmissibility referred to in Article 33(2)(d) of that directive is equally applicable when the procedure was conducted in the *same* Member State as when it took place in *another* Member State. In its view, the fact that, after his or her previous application was rejected by a final negative decision in a first Member State, an applicant applies again for international protection to a different Member State does not preclude the application from being found to be inadmissible as a 'subsequent application'.

27. In the second place, the referring court acknowledges that it is apparent from the wording of that article, read in conjunction with Article 2(b), (e) and (q) of Directive 2013/32, that the concept of 'subsequent application' is premissed on the 'final decision' rejecting a previous application by the same applicant having been adopted by a *Member State* rather than by a *third State*. However, that court is inclined to believe that Directive 2013/32 should be interpreted more broadly in the context of the Kingdom of Norway's involvement in the Common European Asylum System, under the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway.

28. In those circumstances, by decision of 30 December 2019, received by the Court of Justice on 9 January 2020, the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a national provision according to which an application for international protection can be rejected as an inadmissible subsequent application compatible with Article 33(2)(d) and Article 2(q) of [Directive 2013/32] if the unsuccessful initial asylum procedure was not conducted in a Member State of the EU, but in Norway?'

[6] See Article 2(f) of Directive 2011/95 for the definition of 'person eligible for subsidiary protection'.

29. The Federal Republic of Germany and the European Commission submitted written observations to the Court. A hearing was held on 3 December 2020, which was attended by the Commission and the German Government.

III. Analysis

30. As I stated by way of introduction to this Opinion, the peculiarity of the case in the main proceedings is to my mind that L.R. left, as a result of removal measures, the Norwegian territory on completion of his first asylum procedure and that he returned to his country of origin before making a second application for international protection, in Germany.

31. In contrast to what the German Government suggested in answer to a question put by the Court at the hearing, L.R.'s effective removal between his first and second applications has significant consequences for the interpretation of the concept of 'subsequent application'. I will discuss those consequences in section A of this Opinion. I will show that, when the Dublin III Regulation applies, applications made by third-country nationals such as L.R., who apply again for international protection after having been removed to their country of origin, do not, to my mind, fall within that concept. Accordingly, in a case such as that in the main proceedings, the application of the person concerned may not simply be declared inadmissible under Article 33(2)(d) of Directive 2013/32.

32. In the alternative (section B), I will examine the merits of the premiss from which the referring court starts in its request for a preliminary ruling, that is to say, that that provision does not preclude a Member State *other* than that which adopted the previous final negative decision from classifying an application for international protection as a 'subsequent application' if its national law so permits. I will set out why the ground of inadmissibility under that article may apply not only where successive applications are made to the same Member State but also in cases of secondary movements, where the Member State in which the applicant lodges the second application becomes the Member State responsible.

33. To conclude, I will make a number of comments on the particular situation of the Kingdom of Norway, as a third State that has not agreed to apply either Directive 2013/32 or Directive 2011/95 but to which the provisions of the Dublin III Regulation apply (section C).

A. Applicability of Article 33(2)(d) of Directive 2013/32 where the applicant has been removed to his or her country of origin before applying again for international protection

34. At the outset, it seems helpful to specify that, even if, formally, the referring court has limited its question to the interpretation of Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not that court has referred to them in the wording of its questions.[7]

35. In my view, in the present case, the information supplied in the order for reference does in fact show that, in view of the subject matter of the dispute in the main proceedings, it is necessary, in order to provide a useful answer to the referring court, also to interpret other provisions of EU law, namely those laid down in the Dublin III Regulation.

[7] See judgment of 9 July 2020, *Santen* (C-673/18, EU:C:2020:531, paragraph 35 and the case-law cited).

36. I note that, as emerges from the second sentence of Article 3(1) of that regulation, its underlying rationale is that there should be only a single Member State responsible for each third-country national or stateless person who makes an application for international protection. Under Article 18(1)(d) of that regulation, the Member State responsible is obliged to take back an applicant if, after his or her application has been rejected, that person makes an application in another Member State.

37. As can be seen from point 21 of this Opinion, the case in the main proceedings concerns the highly particular situation in which such taking back is not possible because the responsibilities of the Member State that analysed L.R.'s previous application (in the present case, the Kingdom of Norway) have ceased. It is common ground that the Kingdom of Norway's obligations in relation to L.R. ended pursuant to the first subparagraph of Article 19(3) of the Dublin III Regulation. That provision covers the situation in which the applicant has left the territory of the Member State responsible in compliance with a return decision or removal order issued following the withdrawal or rejection of the application.

38. Where that occurs, under the second subparagraph of Article 19(3) of the Dublin III Regulation, an application lodged by the applicant *after his or her effective removal has taken place* is to be regarded as a *new application*, giving rise to a new procedure for determining the Member State responsible.

39. Is it to be inferred from this, in contrast to what the German Government suggested in reply to a question put by the Court at the hearing, that, in the light of L.R.'s effective removal, the application at issue in the main proceedings must be regarded as a 'new application' and the Federal Republic of Germany may not classify it as a 'subsequent application' and find it to be inadmissible under Article 33(2)(d) of Directive 2013/32?

40. I think it is.

41. In that regard, I would clarify that an application lodged following the applicant's removal to his or her country of origin falls neither under Article 18(1)(d) of that regulation nor under the provisions referred to therein, which concern the 'taking back' of a person by the Member State responsible. To my mind, it is therefore necessary to clearly distinguish, in legal terms, between such an application and applications made in the context of secondary movements (that is to say, where the applicant travels from one Member State to another without leaving the territory of the European Union), which are covered by those provisions and, as I will explain below in this Opinion, may be found to be inadmissible as 'subsequent applications', subject to a number of conditions.[8]

42. The purpose of that regulation and of Directive 2013/32 does not appear to me to require that Article 33(2)(d) of that directive is interpreted otherwise than as I have proposed in the light of the second subparagraph of Article 19(3) of that regulation.

[8] As I will set out in the next section of this Opinion, the possibility for Member States to classify applications lodged in the context of secondary movements as 'subsequent applications' is to my mind intended precisely to ensure that, when they become the Member State responsible in place of another Member State, either because they decide to do so or because the applicant cannot be taken back, they can prevent the application from being examined on the basis of conditions that are more favourable for the applicant than when the same Member State examines the two applications in succession. Where an application is made following the applicant's effective removal, that matter simply does not arise because the second subparagraph of Article 19(3) of the Dublin III Regulation has the effect that such an application is regarded as a 'new application', even when it is lodged with the same Member State as examined the previous application.

43. In that regard, I would emphasise that, by adopting the Dublin III Regulation, the legislature intended inter alia to speed up the processing of applications for international protection by guaranteeing applicants that their application would be examined in substance by *a single* clearly determined Member State, thereby preventing forum shopping [9] and to avoid blockages in the system as a result of the obligation on Member States to examine multiple applications by the same applicant. [10]

44. Such objectives are also apparent, in essence, from recital 13 of Directive 2013/32.

45. A situation such as that in the main proceedings, as I stated in point 41 of this Opinion, is not a matter of a secondary movement from one Member State (or from a third State that has agreed to apply the Dublin III Regulation) to another, but of a third-country national who has, for the second time, left his country of origin.

46. Furthermore, the situation of the third-country national is in fact little different from that of a first-time applicant. [11] More specifically, when L.R. lodged his second application for international protection there was no longer a Member State responsible for him. Were the Federal Republic of Germany obliged to conduct a full examination of that second application, that fact would therefore not in any way compromise the achievement of the objective of that regulation of centralising applications in order to prevent the person concerned from lodging multiple applications in other Member States even though there is already a Member State responsible in respect of that person.

47. It follows from the foregoing that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, must, in my view, be interpreted as meaning that an application for international protection such as that lodged by L.R., in the circumstances of the case in the main proceedings, cannot be found to be inadmissible as a 'subsequent application'. That result is dictated by the second subparagraph of Article 19(3) of the Dublin III Regulation, from which it follows that applications lodged by persons who have already undergone an asylum procedure culminating in a final negative decision being adopted and who have in the meantime been removed to their country of origin cannot fall within that concept. [12]

48. In the following section, in which I will set out my arguments in the alternative, in case the Court finds, in contrast to what I am proposing, that that provision is not relevant to the resolution of the present case or that it should be interpreted as meaning that the fact that L.R. had been effectively removed before he lodged his application has no effect on whether that application can be classified as a 'subsequent application', I will examine the merits of the premiss from which the referring court starts in its request for a preliminary ruling, according to

9 The expression forum shopping refers in essence to secondary movements of applicants for international protection due to the differences between the legal frameworks in the Member States.

10 See, to that effect, judgment of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraph 53 and the case-law cited).

11 In accordance with the second subparagraph of Article 19(3) of the Dublin III Regulation, an application lodged after the applicant has effectively been removed gives rise to a new procedure for determining the Member State responsible.

12 For information, I would point out that in Article 3(5) of the Proposal for a Regulation of the European Parliament and of the Council 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 (COM(2016) 270 final), ('the proposal to amend the Dublin III Regulation'), available at the following internet address: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0270:FIN), the Commission suggests deleting Article 19 of the Dublin III Regulation in its entirety and inserting a provision providing that the Member State responsible would remain responsible for examining each application by the person concerned, including any subsequent application, *irrespective of whether or not the applicant has left the territories of the Member States and of whether or not that person was removed from those territories* (which to my mind means that, in a case such as that in the main proceedings, the Kingdom of Norway would be obliged to take back L.R.). However, those suggestions have not thus far been adopted by the EU legislature.

which it is possible for a Member State, provided its national law so permits, to declare inadmissible as 'subsequent applications' applications for international protection made to it both after *another* Member State has adopted a final negative decision on a previous application by the person concerned and after it itself has adopted such a decision.

B. In the alternative, the applicability of Article 33(2)(d) of Directive 2013/32 where an applicant applies for international protection to a Member State other than that which adopted the previous final negative decision

49. I would recall that, according to the Court's settled case-law, Article 33(2) of Directive 2013/32 sets out an exhaustive list of situations in which the Member States may consider an application for international protection to be inadmissible.[13] The fact that the list set out in that article is exhaustive is based on both its wording[14] and its purpose, which consists specifically, as the Court has previously found, in relaxing the obligation of the Member State responsible for examining an application for international protection by defining the cases in which such an application is considered to be inadmissible.[15]

50. In that regard, I note that that provision distinguishes between situations where a previous application for international protection has been rejected by a final decision (Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof) and those where international protection has already been granted (Article 33(2)(a) of that directive).

51. Article 33(2)(a) refers explicitly to the situation where '*another* Member State'[16] responds *favourably* to a first application by the person concerned.[17] By contrast, neither Article 33(2)(d) of Directive 2013/32 nor Article 2(q) thereof, which defines 'subsequent application', specifies whether, where the final decision on a previous application by the person concerned is *negative*, that decision must systematically have been taken by the *same* Member State as that to which the subsequent application has been made or whether, on the contrary, it may have been taken by *another* Member State.[18]

52. As I noted in point 48 of this Opinion, the referring court starts from the premiss that the concept of 'subsequent application' may equally well be applied to an application for international protection made to a Member State *other* than that which adopted the previous final negative decision as to an application made to the *same* Member State.

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

[14] See, in particular, the word 'only' preceding the list of grounds of inadmissibility laid down in that article.

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

[16] Emphasis added.

[17] On the interpretation of Article 33(2)(a) of Directive 2013/32, see, for example, judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219). That judgment concerns the situation where the persons concerned left their country of origin and were granted subsidiary protection (in Bulgaria and Poland, respectively) before making applications for international protection in Germany.

[18] Article 40(1) of Directive 2013/32, which the parties in this case also mention, is admittedly more explicit than Article 2(q) and Article 33(2)(d) of that directive (since it concerns situations where a subsequent application is lodged or further representations are made in *the same Member State* as that in which the person concerned had previously applied for international protection). Nevertheless, that article does not in my view preclude a Member State other than that which adopted the previous final negative decision from, for its part, finding an application by the same person to be inadmissible as a 'subsequent application'. In that regard, I note that Article 40(1), moreover, contains no reference to Article 33(2)(d) of that directive whereas Article 40(2) to (5) of that directive refers to it explicitly.

53. The Federal Republic of Germany and the German Government share that view. The Commission considers, in contrast, that the ground of inadmissibility under Article 33(2)(d) of Directive 2013/32 may be applied only in the latter situation.

54. I will set out below the reasons why I believe that, once a final negative decision has been taken on a previous application, any application made by the same applicant in *any Member State whatsoever* may be considered to be a 'subsequent application'.[19] I believe it is helpful to recall as a preliminary point a number of aspects of the 'taking back' mechanism laid down by the Dublin III Regulation, in order to clarify the context in which a Member State which is not the Member State that adopted the previous final negative decision may, as the case may be, have cause to rule on the admissibility of such an application.

1. Brief overview of the 'taking back' mechanism under the Dublin III Regulation

55. As I have already stated in point 36 of this Opinion, in the context of Article 18(1)(d) of the Dublin III Regulation, the 'taking back' mechanism is intended, inter alia, to prevent an application for international protection from being examined by a Member State other than that which took the final negative decision on a previous application by the person concerned.[20]

56. More specifically, where a person falls within the scope of that article, the Member State to which the application is made (which in the interests of clarity I will refer to as 'Member State B') may require the Member State that adopted the final negative decision ('the Member State responsible' or 'Member State A') to take back the person concerned.[21]

57. Once Member State A has accepted the request, Member State B is to notify the person concerned of the decision to transfer him or her and, where applicable, not to examine his or her application for international protection.[22] In other words, it takes a decision to transfer the person concerned and not to examine the application.

58. It should be recalled that in its case-law the Court has clearly distinguished decisions to transfer and not to examine an application from inadmissibility decisions taken under Directive 2013/32. Specifically, it has found that it is apparent from the wording of Article 33(1) of that directive, particularly from the use of the phrase 'in addition to cases in which an application is not examined in accordance with [the Dublin III Regulation]', and from the objective of procedural economy pursued by that provision, that, in the situations listed in Article 33(2) of that

[19] I would add, for information, that the interpretation I am proposing is in line with the clarification suggested by the Commission as part of its proposals to reform the Common European Asylum System (in that respect, see Article 42(1) of the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 467 final) (available at the following internet address: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0467).

[20] In contrast, in respect of applications lodged after another Member State has granted or partially granted a previous application by the person concerned (that is to say, those falling within the scope of Article 33(2)(a) of Directive 2013/32), the EU legislature has taken the view that the application must be rejected by an inadmissibility decision instead of by means of applying the reason for not examining the application laid down in Article 18(1)(d) of the Dublin III Regulation (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 44 and the case-law cited).

[21] In accordance with Article 23 of the Dublin III Regulation.

[22] Article 26 of the Dublin III Regulation.

directive, that provision permits the Member States to reject an application for international protection as being inadmissible *without those States being obliged or able to have recourse, as the first resort, to the take charge or take back procedures* provided for by that regulation. [23]

59. It follows that an application for international protection cannot *both* result in a decision to transfer and not to examine the application *and* be declared inadmissible.

60. That view is corroborated by Article 40(7) of Directive 2013/32, according to which subsequent applications by a person with regard to whom a transfer decision has to be enforced are to be examined by the responsible Member State (that is to say, Member State A), and there is therefore no question of another Member State (that is to say, Member State B) ruling on whether those applications may be inadmissible. [24]

61. In that regard, the Commission submits that any application made to a Member State *other* than that which adopted a final negative decision on a previous application by the applicant must, in accordance with Article 18(1)(d) of the Dublin III Regulation, as the first resort, be subject to the 'taking back' mechanism. In the Commission's view, it is only in situations in which the responsibilities of Member State A have ceased, where the taking back is not possible under Article 19(3) of the Dublin III Regulation, that the matter of whether Article 33(2)(d) of Directive 2013/32 applies to such an application could arise in a context involving several Member States.

62. In the first place, as I explained in the preceding section of this Opinion, where the taking back is not possible under Article 19(3) of that regulation, any application that person makes after being removed to his or her country of origin must, in my view, be considered to be a 'new application'.

63. In the second place, it seems plain to me that the question of whether Article 33(2)(d) of Directive 2013/32 applies should in reality be considered in a broader context than that envisaged by the Commission, since the EU legislature has clearly delimited the manner in which the 'taking back' mechanism may be used.

64. In that regard, first, it is apparent from the expression 'may request' that the legislature employs in Article 23(1) of the Dublin III Regulation that the 'taking back' procedure commenced under that provision is implemented at the discretion of the Member States. [25] Accordingly, instead of adopting a decision to transfer and not to examine an application, Member State B is quite free to take the view that it is the Member State responsible for examining an application by a third-country national in respect of whom Member State A has already adopted a final negative decision. [26]

[23] See judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraphs 77 and 80).

[24] I would add that to my mind the wording of Article 40(7) corroborates the view that the concept of 'subsequent application' should be interpreted in accordance with the referring court's premiss. That article uses the expression 'subsequent application' to refer to applications lodged in a Member State *other* than the responsible Member State.

[25] See, also, judgment of 5 July 2018, *X* (C-213/17, EU:C:2018:538, paragraph 33), in which the Court held that the authorities of the Member State in which a new application is lodged have the *power*, pursuant to Article 23(1) of that regulation, to make a take back request in respect of the person concerned.

[26] See Article 17(1) of the Dublin III Regulation, according to which 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person … 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.'

65. Second, it falls to Member State B to undertake that examination, in any event, if it does not make a take back request to Member State A within two months from receiving a hit from the Eurodac database.[27] The same applies if the transfer has not taken place within six months from Member State A accepting the take back request.[28]

66. It follows from the foregoing that when a subsequent application is made to Member State B after a final negative decision on a previous application by the applicant has been taken by Member State A, although the 'taking back' mechanism is the result favoured by the Dublin III Regulation, Member State B is not obliged, or even in all cases able, to have recourse to it.[29] Those consequences stem from the choices made by the EU legislature, in so far as it has provided that responsibility would be transferred between Member State A and Member State B in certain situations covered by Article 18(1)(d) of that regulation.

67. It is in that context, which extends beyond that envisaged by the Commission, that it is appropriate to answer the question of whether, as the Federal Republic of Germany and the German Government suggest, where an applicant makes a second application for international protection, in Member State B, after a final negative decision has been adopted by Member State A, Member State B may rely on the ground of inadmissibility laid down in Article 33(2)(d) of Directive 2013/32 and provide, in its national law, that such an application is inadmissible as a 'subsequent application'.

68. For the reasons I will set out in the following subsection, I take the view that, as long as Member State B replaces Member State A as the Member State responsible, in accordance with the uniform criteria laid down by the Dublin III Regulation (that is to say, because it so decides or because the time limits for making the take back or transfer request have not been complied with[30]), that question should be answered in the affirmative.

2. Whether Member State B may declare the application inadmissible as a 'subsequent application'

69. In its case-law the Court has repeatedly held that the principle of mutual trust between the Member States, on which the Common European Asylum System is based, is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.[31] In particular, it has expressly acknowledged that Article 33(2)(a) of Directive 2013/32 constituted an expression of that principle.[32]

[27] That obligation is apparent from Article 23(2) and (3) of the Dublin III Regulation. See, also, judgment of 5 July 2018, *X* (C-213/17, EU:C:2018:538, paragraphs 34 and 35 and the case-law cited).

[28] See Article 29(2) of the Dublin III Regulation. In the event that the applicant is imprisoned or absconds, that time limit may be extended up to a maximum of one year or eighteen months, respectively.

[29] In my view, the German Government accurately summarised one of the problems inherent in the Dublin III Regulation when it stated at the hearing that in theory there is indeed an obligation to take back an applicant under Article 18(1)(d) of that regulation, but that in practice the transfer rarely takes place. For information, I would point out that, according to the German Government, in 2019 the Federal Republic of Germany made some 50 000 take back requests (of which 9 000 concerned subsequent applications). Only approximately 17% of those requests culminated in the person concerned being transferred. I would add that, in its proposal to amend the Dublin III Regulation (p. 11) the Commission stated that, in 2014, in the European Union, only about a quarter of the total number of take charge and take back requests accepted by the Member State responsible actually resulted in a transfer (see footnote 12 of this Opinion for the full reference to that document).

[30] See points 64 to 65 of this Opinion.

[31] See 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).

[32] Judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 85) (for further detail on the cases which gave rise to that judgment, see footnote 17 of this Opinion).

70. The Commission argues that, since the legislature did not expressly state its intention, it cannot be inferred from that provision alone that Article 33(2)(d) of that directive, too, applies in a cross-border context within the European Union. Article 33(2)(a) of Directive 2013/32 is in its view an exception to the fact that EU law as it currently stands does not provide for the mutual recognition of asylum decisions between the Member States.

71. The Commission's analysis here is drawn in particular from the fact that recital 36 of Directive 2013/32 links Article 33(2)(d) of that directive with the *res judicata* principle.[33] The Commission contends that because, within the Member States, only national decisions can become *res judicata*, that provision can only refer to situations in which the final negative decision on a previous application by the applicant comes from the same Member State as that to which the subsequent application is made.

72. I have no difficulty in agreeing with the Commission's assessment according to which, where an applicant makes successive applications to the same Member State, Article 33(2)(d) allows, by virtue of the *res judicata* principle,[34] a subsequent application to be found to be inadmissible where no new elements or findings have arisen or have been presented relating to the examination of whether the conditions required to qualify as a beneficiary of international protection are met.

73. In contrast, I do not subscribe to its thesis that a negative decision taken on a previous application can only be recognised as final within the Member State of the administrative authority that adopted it and not also by other Member States. It is not apparent either from the case-law of the Court or from the overall scheme and purpose of the Dublin III Regulation and of Directive 2013/32 that this should be so.

74. In that regard, I observe, first of all, that in *Ibrahim*,[35] the Court held that Article 33(2)(a) of that directive sought to enable a new application to be rejected as being inadmissible also in situations where the applicant had been granted only subsidiary protection in another Member State, instead of solely where the applicant had been granted refugee status. Since subsidiary protection necessarily involves a rejection of the application to the extent that it seeks refugee status, I believe it is necessary to take the view, as the German Government does, that the Court has, in essence, previously extended the principle of mutual trust to partially negative decisions taken by the Member States.[36]

75. Next, I believe that to interpret Article 33(2)(d) of Directive 2013/32 as meaning that it does allow Member State B, by virtue of that principle and subject to its national law containing a provision to that effect, to declare an application for international protection to be inadmissible as a 'subsequent application' when it becomes the Member State responsible for examining that application is compatible with the definition of the concept of 'subsequent application' in Article 2(q) of that directive, which is sufficiently broad to accommodate that interpretation.

[33] As apparent from point 12 of this Opinion, that recital provides that 'where an applicant makes a subsequent application without presenting new evidence or arguments, … Member States should be able to dismiss an application as inadmissible *in accordance with the* res judicata *principle*' (emphasis added).

[34] I would note here that although the *res judicata* principle relates to judicial decisions, the Court has in addition clarified that, as regards asylum policy, EU law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final following the expiry of reasonable time limits for legal remedies or by exhaustion of domestic remedies (see judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 186).

[35] Judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 58).

[36] I would point out, in other respects, that in his Opinion in *X* (C-213/17, EU:C:2018:434, point 107), Advocate General Bot stated that the Member States already agree to recognise asylum decisions issued by other Member States where they are negative.

76. Lastly, that result is in line with the objectives of that directive and of the Dublin III Regulation.

77. *In the first place*, it allows Member States to meet the need for an effective manner of preventing the secondary movements between them which that regulation and that directive are precisely intended to guard against. [37]

78. I would recall here that if a subsequent application is not rejected as inadmissible under Article 33(2)(d) of Directive 2013/32, [38] the Member State responsible may decide to accelerate the procedure for examining it. [39] On completion of that procedure it may, where applicable, consider an application to be 'manifestly unfounded'. [40] It also has power, in certain circumstances, to derogate from the applicant's right to remain. [41]

79. What then would occur if, when an applicant lodges a subsequent application, only the Member State which adopted the previous final negative decision (that is to say, Member State A) could apply the provisions referred to above, whereas any Member State other than Member State A would be obliged to conduct a new full examination of the application and would not be able to treat it as a 'subsequent application'? The outcome, as the German Government has explained, would undoubtedly be that, once they had received a final negative decision in Member State A, third-country nationals would have an incentive to make multiple similar applications in other Member States in order to have their situation fully re-examined, thereby giving rise to secondary movements, contrary to the objectives of both the Dublin III Regulation and Directive 2013/32.

80. In that regard, I note that the Court recently relied on those objectives of the Dublin III Regulation in its judgment in *Minister for Justice and Equality (Application for international protection in Ireland)*, [42] when it allowed a Member State to which that regulation applies but which is not bound by Directive 2013/32 to find an application for international protection to be inadmissible where the applicant enjoys the status conferred by subsidiary protection in another Member State.

81. *In the second place*, an obligation to conduct new full examinations of subsequent applications made to Member States other than that which analysed a previous application by the applicant would have a significant impact on the length of procedures, whereas Directive 2013/32 in fact

37 See points 43 and 44 of this Opinion.

38 Because it is an 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.

39 See Article 31(8)(f) of Directive 2013/32.

40 See Article 32(2) of Directive 2013/32.

41 See Article 41(1) of Directive 2013/32. Since mutual recognition between the Member States applies to removal decisions (see Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2001 L 149, p. 34)), I believe that article may be applied not only in internal situations in each Member State but also in cross-border situations within the European Union. In my view, that provision therefore supports the thesis that the concept of 'subsequent application' should be interpreted broadly and should not be confined to applications lodged in the same Member State as that which has already adopted a final negative decision.

42 See judgment of 10 December 2020 (C-616/19, EU:C:2020:1010, paragraphs 51 and 52 and the case-law cited). I refer also to my Opinion in that case (C-616/19, EU:C:2020:648, point 62), in which I stated that, in the context of the adoption of the Dublin III Regulation, one of the fundamental and constant objectives of the legislature has been to limit the secondary movements of third-country nationals.

acknowledges the fundamental principle that it is in the interests of both Member States and applicants that decisions on applications are made *as soon as possible*, without prejudice to *an adequate and complete examination* being carried out.[43]

82. It is in connection with those objectives that, for the purpose of a decision being taken on whether they are admissible pursuant to Article 33(2)(d) of Directive 2013/32, under Article 40(2) of that directive subsequent applications are subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant.

83. In that regard, I emphasise that the fact that the preliminary examination in question is conducted by Member State B, which did not adopt the final negative decision on a previous application by the same applicant, does not, in itself, present any specific difficulty as regards applicants' effective access to an adequate examination of their situation.

84. As the German Government observed, the exchange of information established under the Dublin III Regulation and, in particular, in Article 34 of that regulation, make it perfectly feasible for any Member State to perform that exercise. Under that article a Member State can obtain all data that are appropriate, relevant and non-excessive for the purpose of examining an application for international protection (including data relating to the date of any previous application and the place where it was lodged, the stage reached in the proceedings and the decision taken, if any, and its date).[44]

85. In the light of the foregoing, my view is that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, does not preclude a national rule that allows Member State B to find an application for international protection to be inadmissible as a 'subsequent application' where another Member State has adopted a final negative decision on a previous application by the same applicant. Such a rule must however make it clearly apparent that Member State B may not find such an application to be inadmissible unless, as I indicated in point 68 of this Opinion, it has become the Member State responsible in accordance with the uniform criteria established by the Dublin III Regulation.[45]

86. The practical consequence of the approach I am advocating is simply that it allows Member State B, where it becomes the Member State responsible, to base its decision on the previous final negative decision by the other Member State and to apply the same rules that the other Member State would have been able to apply if the application had been made to it.[46]

[43] See recital 18 of that directive. I would add that it can be seen from recital 25 of that directive that every asylum applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure.

[44] For the same reasons, the fact that Member State B is then able, as Article 42(2)(b) of Directive 2013/32 provides, to conduct the preliminary examination on the sole basis of written submissions without a personal interview with the applicant (that is to say, without the applicant being granted the opportunity of a personal interview), exactly as Member State A would be able to do if that examination fell to it, does not in my view, in itself, pose a problem. I would add in that respect that, irrespective of whether it is conducted by Member State A or Member State B, the preliminary examination must in any event comply with the guarantees laid down in Article 12(1) of that directive.

[45] In the interests of absolute clarity, I would emphasise that, as can be seen from the preceding subsection of this Opinion, Article 33(2)(d) of Directive 2013/32 is predicated on a different rationale from that underlying the 'taking back' mechanism which, conversely, presupposes that Member State A remains the Member State responsible.

[46] I note, for information, that if the Member State wishes to do so it is of course free to conduct a full examination of the application provided its national law so provides. In that regard, I would recall that it is clear from Article 5 of Directive 2013/32 that the Member States have general authority to introduce or retain more favourable standards and that, in respect of subsequent applications, the Member States may, in accordance with the second sentence of Article 40(3) of that directive, provide for additional reasons for examining such an application.

3. Interim conclusion

87. It follows from all the foregoing considerations that, where the Dublin III Regulation is applied in conjunction with Directive 2013/32, a Member State may, by virtue of the principle of mutual trust, adopt a rule in its national law according to which an application for international protection may be found to be inadmissible as a 'subsequent application' within the meaning of Article 33(2)(d) of that directive, read in conjunction with Article 2(q) thereof, where it did not itself adopt the final decision rejecting a previous application by the same applicant but has become the Member State responsible for examining the application.

88. In contrast, as I stated in the preceding section of this Opinion, that Member State does not have this option where the applicant was effectively removed between the previous final negative decision being adopted and his or her new application.

C. Applicability of Article 33(2)(d) of Directive 2013/32 where the first asylum procedure took place in Norway

89. I would point out that the Kingdom of Norway is associated with the European Union's asylum and immigration policy through the Schengen Agreement in particular.[47] That country is also part of the Dublin system and Eurodac,[48] as a result of the Dublin III Regulation being incorporated into Norwegian law,[49] in accordance with the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway.

90. The Kingdom of Norway agreed that the regulation would apply fully, with no country-specific provisions or exceptions.

91. It that regard, it should be noted that regulation was conceived in a context making it possible to assume that all the participating States, *whether Member States or third States*, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol,[50] namely the principle of *non-refoulement*, and on the European Convention for the Protection of Human Rights and Fundamental Freedoms[51] and, therefore, that those Member States can have confidence in each other as regards respect for those fundamental rights, since all those States are, in addition, parties both to the Geneva Convention and the 1967 Protocol and to the ECHR.[52]

47 An agreement was concluded on 18 May 1999 by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, p. 36), under the first paragraph of Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam. See also Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway (OJ 2000 L 309, p. 24).

48 In relation to the Kingdom of Norway's participation in Eurodac, I refer to Article 1(5) of the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway, the relevant provisions of which I have quoted in section I.A. of this Opinion.

49 Lov av 17. desember 2013 nr. 132. om endringer i utlendingsloven (gjennomføring av Dublin III-forordningen) (Law amending the Law on immigration (implementation of the Dublin III Regulation) of 17 December 2013), which entered into force on 1 January 2014.

50 Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (*United Nations Treaty Collection*, vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967 ('the 1967 Protocol'), which for its part entered into force on 4 October 1967 ('the Geneva Convention').

51 Signed at Rome on 4 November 1950 ('ECHR').

52 See to that effect, judgment of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 83 and the case-law cited). See also, recitals 32 and 39 of the Dublin III Regulation.

92. It follows from this, as the German Government observed, that the Kingdom of Norway's participation in the Dublin system is based on the assumption that the treatment which that third State reserves for applicants for international protection complies with all the requirements to which the Member States are subject under the instruments referred to above.

93. It should also be noted, however, that the Kingdom of Norway has not agreed to apply either Directive 2013/32 or Directive 2011/95 which, within the framework of the concept of 'international protection', governs two separate protection regimes, that is to say, the status of refugee and the status conferred by subsidiary protection.

94. It should be noted here that, as can be seen from recitals 6 and 33 of Directive 2011/95, subsidiary protection is intended to complement the protection of refugees enshrined in the Geneva Convention [53] and that the purpose of the Common European Asylum System is to ensure full and inclusive application of that convention. [54]

95. I would add that Article 10(2) of Directive 2013/32 provides that, when examining applications for international protection, the determining authority shall *first* determine whether the applicants *qualify as refugees* and, *if not*, determine whether the applicants are eligible for *subsidiary protection*.

96. Accordingly, when a Member State rejects an application for international protection this presupposes that it has examined not only whether the applicant could qualify as a refugee, but also whether the person concerned was eligible for subsidiary protection status.

97. The competent authorities of the Kingdom of Norway are, evidently, not required to undertake that exercise under Directive 2013/32. However, under Norwegian law [55] 'refugee' status can be granted not only to the persons defined by the Geneva Convention but also to those 'in real danger of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment on their return to their country of origin', that is to say, persons eligible for subsidiary protection within the European Union.

98. Furthermore, as I understand the procedure laid down by the Kingdom of Norway, before finally rejecting an application for international protection, the competent Norwegian authority [56] is to examine not only whether the person concerned falls within the scope of the Geneva Convention but also whether that person is in one of those situations of real danger. [57]

53 See judgment of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713, paragraph 39 and the case-law cited).

54 In accordance with Article 78(1) TFEU and Article 18 of the Charter of Fundamental Rights of the European Union.

55 See, more specifically, points (a) and (b) of the first paragraph of Article 28 of the Lov av 15. Mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (Law on the entry and stay of foreign nationals in the Kingdom of Norway) of 15 May 2008.

56 The competent authority is the Utlendingsdirektoratet (Directorate of Immigration) of the Kingdom of Norway.

57 As can be seen from point 97 of this Opinion, under Norwegian law refugee status is granted both to the persons to whom the Geneva Convention refers and to those in 'real danger of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment on their return to their country of origin'. To my mind, that presupposes that for each application for international protection lodged in Norway, the competent authority examines whether the person concerned falls within either of those categories (see also in that respect, points 3.2 and 3.3 of the Directorate of Immigration guidelines, available at the following address: https://www.udiregelverk.no/en/documents/udi-guidelines/udi-2010-071/udi-2010-071v1/). I would add that, in Prop 90 L (2015-2016) 'Endringer i utlendingsloven mv. (innstramninger II)' (draft law entitled 'Amendments to the Law on foreign nationals (Increased Stringency II)' (2015-2016), Article 6.1), it was proposed, in order to bring Norwegian law into line with EU law, to include a new provision under which persons in 'real danger' would be granted subsidiary protection instead of refugee status. It is clear from that proposal, which was not adopted by the Norwegian legislature, that, at the present time, Norway affords a higher level of protection than that conferred under the dual regime established by Directive 2011/95.

99. In that context, and assuming that the examination which an application for international protection undergoes in that third State guarantees the person concerned a level of protection at least as high as that required from the Member States under the dual regime established by Directive 2011/95, which it is for the referring court to verify, I do not believe that the fact that a final negative decision on a previous application by the applicant was taken by that third State can, of itself, prevent a Member State, such as the Federal Republic of Germany, from finding a 'subsequent application' by the same applicant to be inadmissible under Article 33(2)(d) of Directive 2013/32.

100. That conclusion cannot be undermined by the Commission's line of argument according to which Article 33(2)(d) of that directive cannot be interpreted in that way because the wording of that article refers expressly to Directive 2011/95, which according to the Commission means that only final decisions taken on the basis of that directive, that is to say, those taken by the Member States, are relevant for the purpose of applying that provision.

101. The Dublin III Regulation, too, refers to Directive 2011/95, in Article 2(d) thereof, which defines 'examination of an application for international protection', without thereby in the slightest precluding the Kingdom of Norway from being treated as a Member State for the purpose of applying that regulation.

102. To conclude, I would emphasise that the referring court's question to the Court seeks only to clarify whether a Member State may, under Article 33(2)(d) of Directive 2013/32, find an application to be inadmissible in such circumstances, without addressing whether, conversely, subsequent applications made in Norway after a Member State has adopted a final negative decision may be treated in the same way.

IV. Conclusion

103. In the light of all the foregoing considerations, I propose that the Court should reply as follows to the question referred for a preliminary ruling by the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany):

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) of that directive, must be interpreted as meaning that an application for international protection cannot be found to be inadmissible as a 'subsequent application', where the applicant has been removed to his or her country of origin before lodging that application.