Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 May 2021 *

(Reference for a preliminary ruling – Area of freedom, security and justice – Border controls, asylum and immigration – Asylum policy – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Application for international protection – Grounds of inadmissibility– Article 2(q) – Concept of 'subsequent application' – Article 33(2)(d) – Rejection by a Member State of an application for international protection as inadmissible due to the rejection of a previous application made by the person concerned in a third State with which the European Union has concluded an agreement on the criteria and mechanisms for establishing the State responsible for examining an application for asylum lodged in one of the States parties to that agreement – Final decision taken by the Kingdom of Norway)

In Case C-8/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany), made by decision of 30 December 2019, received at the Court on 9 January 2020, in the proceedings

L.R.

v

Bundesrepublik Deutschland,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 3 December 2020,

after considering the observations submitted on behalf of:

– the Bundesrepublik Deutschland, by A. Schumacher, acting as Agent,

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

* Language of the case: German.

– the European Commission, initially by G. Wils, A. Azéma and M. Condou-Durande, and subsequently by G. Wils, A. Azéma and L. Grønfeldt, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 March 2021,

gives the following

Judgment

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

2 The request has been made in proceedings between 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 asylum application of the person concerned.

Legal context

European Union law

Directive 2011/95/EU

3 Under Article 1 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), the purpose of that directive is to lay down 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.

4 Article 2 of that directive, entitled 'Definitions', provides:

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

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

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

(c) "Geneva Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 [*United Nations Treaty Series*, Volume 189, p. 150, No 2545 (1954)], as amended by the … Protocol [relating to the Status of Refugees, done at New York on] 31 January 1967;

(d) "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

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

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

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

(h) "application for international protection" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;'

Directive 2013/32

5 Article 2(b), (e) and (q) of Directive 2013/32 is worded as follows:

'For the purposes of this Directive:

…

(b) "application for international protection" or "application" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of [Directive 2011/95], that can be applied for separately;

…

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

…

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

6 Under Article 33(2) of that directive:

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

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(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; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

The Dublin III Regulation

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

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

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

9 In Chapter V of that regulation, entitled 'Criteria for determining the Member State responsible', Article 18 of that regulation, entitled 'Obligations of the Member State responsible', states, in paragraph 1:

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

…

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

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

10 Article 19(3) of the Dublin III Regulation, entitled 'Cessation of responsibilities', 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.'

The Agreement between the European Union, Iceland and Norway

11 The Agreement between the European Community 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 – Declarations (OJ 2001 L 93, p. 40; 'the Agreement between the European Union, Iceland and Norway') was approved on behalf of the Community by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

12 Under 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 [the Republic of] Iceland and [the Kingdom of] 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 [the Republic of] Iceland and [the Kingdom of] 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 [the Republic of] Iceland and [the Kingdom of] Norway.

…'

German law

The AsylG

13 Paragraph 26a of the Asylgesetz (Law on asylum), in the version applicable to the dispute in the main proceedings ('the AsylG'), entitled 'Safe third countries', provides:

'(1) A foreign national who has entered the federal territory from a third country within the meaning of the first sentence of Article 16a(2) of the [Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany)] (safe third country), cannot rely on Article 16a(1) of the Basic Law for the Federal Republic of Germany. …

(2) In addition to the Member States of the European Union, safe third countries shall be those listed in Annex I. …'

14 Paragraph 29 of 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. …'

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

16 Annex I to Paragraph 26a of the AsylG refers to the following:

'Norway

Switzerland'

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

17 On 22 December 2014, L.R., an Iranian national, lodged an application for asylum with the Office.

18 The examination of that application revealed that L.R. had already lodged an application for asylum in Norway.

19 Having received a request to take charge of L.R., the Kingdom of Norway, by letter of 26 February 2015, informed the Office that, on 1 October 2008, the person concerned had submitted an application for asylum to the Norwegian authorities, which had been rejected on 15 June 2009, and that, on 19 June 2013, he had been surrendered to the Iranian authorities. The Kingdom of Norway refused to take charge of L.R. on the ground that its responsibilities had ceased, in accordance with Article 19(3) of the Dublin III Regulation.

20 The Office therefore examined L.R.'s application for asylum and, by decision of 13 March 2017, rejected it 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.

21 L.R. brought an action against that decision of the Office before the referring court, seeking to be granted, primarily, refugee status, in the alternative, 'subsidiary protection' and, in the further alternative, a prohibition on removal under German law. By order of 19 June 2017, the referring court, granting the application for interim measures made by L.R., recognised the suspensory effect of that action.

22 The referring court considers that, in order to rule on the dispute pending before it, it needs clarification as to whether an application for international protection may be classified as a 'subsequent application', within the meaning of Article 2(q) of Directive 2013/32, where the first procedure, which led to the rejection of such an application, took place not in another EU Member State but in a third State, namely Norway.

23 In that regard, the referring court states that, although the answer to that question was left open in a judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) of 14 December 2016, it considers that an application may constitute a 'subsequent application', within the meaning of Article 2(q) of Directive 2013/32, where the first procedure, which led to the rejection of the first application for international protection of the person concerned, took place in another Member State.

24 The referring court acknowledges that it is apparent from both the wording of Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(b), (e) and (q) thereof, and the general scheme of that directive that an application for international protection can be classified as a 'subsequent application' only if the 'final decision' rejecting a 'previous application' by the same applicant was adopted by a Member State. In its view, it is clear from Article 2(b) and (e) of Directive 2013/32 that such a 'previous application' and the final decision adopted in relation to it must concern the protection conferred by Directive 2011/95, which is addressed only to the Member States.

25 Nevertheless, the referring 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, Iceland and Norway. In the view of that court, while it is true that the Kingdom of Norway is not bound by Directives 2013/32 and 2011/95, the Norwegian asylum system is, from both a substantive and procedural point of view, equivalent to that provided for in EU law. It would therefore be contrary to the objective and purpose of the Common European Asylum System, and the Kingdom of Norway's involvement in it, to oblige the Member States to conduct a complete first asylum procedure in a situation such as that at issue in the main proceedings.

26 In those circumstances, 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?'

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application seeking the grant of refugee status, made to a third State implementing the Dublin III Regulation in accordance with the Agreement between the European Union, Iceland and Norway, had been rejected by that third State.

28 As a preliminary point, it must be noted that, in the request for a preliminary ruling, the referring court started from the premiss that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, applies to a further application for international protection made to a Member State after the rejection, in a 'final decision', within the meaning of Article 2(e) of that directive, of a previous application made by the same applicant to another Member State. In its observations submitted to the Court, the German Government shares that view.

29 By contrast, in its observations submitted to the Court, the European Commission claims that a further application for international protection can be classified as a 'subsequent application', within the meaning of Article 2(q) and Article 33(2)(d) of Directive 2013/32, only if it is made to the Member State whose competent bodies have rejected, by a final decision, a previous application made by the same applicant.

30 However, since the question referred concerns an application for international protection made to a Member State after a previous application made by the same applicant to a third State party to the Agreement between the European Union, Iceland and Norway was rejected, it is necessary, in order to provide a useful answer to the referring court, to determine only whether such an application constitutes a 'subsequent application' within the meaning of Article 2(q) and Article 33(2)(d) of Directive 2013/32.

31 Subject to that proviso, it must be recalled that, in accordance with the Court's 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 (judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)*, C-564/18, EU:C:2020:218, paragraph 29 and the case-law cited).

32 According to the referring court, only Article 33(2)(d) of Directive 2013/32 can justify the rejection as inadmissible of an application such as that at issue in the main proceedings.

33 That provision states that Member States may reject an application for international protection as inadmissible if it constitutes 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.

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

35 That definition thus reproduces the concepts of 'application for international protection' and 'final decision', also defined in Article 2 of that directive, in points (b) and (e), respectively.

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

37 It thus follows from the clear wording of that provision that an application addressed to a third State cannot be understood as an 'application for international protection' or an 'application' within the meaning of that provision.

38 As regards, in the second place, the concept of 'final decision', it is defined in Article 2(e) of Directive 2013/32 as a decision on whether the third-country national or stateless person is to be granted refugee or subsidiary protection status by virtue of Directive 2011/95 and which is no longer subject to a remedy within the framework of Chapter V of Directive 2013/32.

39 A decision taken by a third State cannot fall within that definition. Directive 2011/95, which is addressed to the Member States and does not concern third States, is not limited to providing for refugee status, as established in international law, namely in the Geneva Convention, but also enshrines subsidiary protection status, which, as is apparent from recital 6 of that directive, complements the rules relating to refugee status.

40 In the light of those factors, and without prejudice to the separate question whether the concept of 'subsequent application' applies to a further application for international protection made to a Member State after another Member State has rejected, by a final decision, a previous application, it is apparent from a combined reading of points (b), (e) and (q) of Article 2 of Directive 2013/32 that an application for international protection made to a Member State cannot be classified as a 'subsequent application' if it has been made after a third State has refused to grant the applicant refugee status.

41 Accordingly, the existence of a previous decision of a third State, rejecting an application seeking the grant of refugee status, as provided for in the Geneva Convention, does not permit the classification as a 'subsequent application', within the meaning of Article 2(q) and Article 33(2)(d) of Directive 2013/32, of an application for international protection, within the meaning of Directive 2011/95, made to a Member State by the person concerned after that previous decision has been adopted.

42 No other conclusion can be drawn from the Agreement between the European Union, Iceland and Norway.

43 It is true that, under Article 1 of that agreement, the Dublin III Regulation is to be implemented not only by the Member States but also by the Republic of Iceland and the Kingdom of Norway. Thus, in a situation such as that at issue in the main proceedings, where the person concerned made an application seeking to be granted refugee status to one of those two third States, a Member State to which that person has made a further application for international protection may, if the conditions referred to in Article 18(1)(c) or (d) of that regulation are met, request the Republic of Iceland or the Kingdom of Norway to take back that person.

44 However, it cannot be inferred from this that, where such taking back is not possible or does not take place, the Member State concerned is entitled to regard the further application for international protection which that person has made to its own bodies as a 'subsequent application' within the meaning of Article 33(2)(d) of Directive 2013/32.

45 While the Agreement between the European Union, Iceland and Norway provides, in essence, for the implementation, by the Republic of Iceland and the Kingdom of Norway, of certain provisions of the Dublin III Regulation and states, in Article 1(4), that, for that purpose, references to 'Member States' in the provisions reproduced in the annex to that agreement are to be understood to include those two third States, the fact remains that no provision of Directive 2011/95 or Directive 2013/32 is reproduced in that annex.

46 Even assuming that, as the referring court states, the Norwegian asylum system provides for a level of protection for asylum seekers equivalent to that laid down in Directive 2011/95, that fact cannot lead to a different conclusion.

47 In addition to the fact that it is clear from the unequivocal wording of the relevant provisions of Directive 2013/32 that, as EU law currently stands, a third State cannot be treated in the same way as a Member State for the purpose of applying Article 33(2)(d) of that directive, such treatment cannot depend, on the risk of affecting legal certainty, on an assessment of the specific level of protection of asylum seekers in the third State concerned.

48 In the light of all the foregoing considerations, the answer to the question referred is that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application seeking the grant of refugee status, made to a third State implementing the Dublin III Regulation in accordance with the Agreement between the European Union, Iceland and Norway, had been rejected by that third State.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 33(2)(d) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in conjunction with Article 2(q) thereof, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection, within the meaning of Article 2(b) of that directive, made to that Member State by a third-country national or a stateless person whose previous application seeking the grant of refugee status, made to a third State implementing 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, in accordance with the Agreement between the European Community 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 – Declarations, had been rejected by that third State.

[Signatures]