Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

8 February 2024*

(Reference for a preliminary ruling – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(d) and Article 40(2) and (3) – Subsequent application – Conditions for rejecting such an application as inadmissible – Concept of 'new elements or findings' – Judgment of the Court on a question of interpretation of EU law – Article 46 – Right to an effective remedy – Jurisdiction of the national court or tribunal to rule on such an application on the merits in the event of illegality of the decision rejecting an application as inadmissible – Procedural safeguards – Article 14(2))

In Case C-216/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen, Germany), made by decision of 22 February 2022, received at the Court on 23 March 2022, in the proceedings

A. A.

v

Federal Republic of Germany,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos, T. von Danwitz and O. Spineanu-Matei, Presidents of Chambers, M. Ilešič, J.-C. Bonichot (Rapporteur), P.G. Xuereb, L.S. Rossi, I. Jarukaitis, A. Kumin, N. Wahl and I. Ziemele, Judges,

Advocate General: N. Emiliou,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 28 February 2023,

after considering the observations submitted on behalf of:

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

– the Austrian Government, by A. Posch, J. Schmoll and V.-S. Strasser, acting as Agents,

* Language of the case: German.

– the European Commission, by A. Azéma and H. Leupold, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 33(2)(d), Article 40(2) and (3) and Article 46(1)(a)(ii) 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).

2 The request has been made in proceedings between A. A., a third-country national, and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) ('the Office'), concerning the rejection as inadmissible of his subsequent application for refugee status.

Legal context

European Union law

3 Recitals 18 and 36 of Directive 2013/32 are worded as follows:

'(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(36) 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.'

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

'For the purposes of this Directive:

…

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

…

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

5 Article 14 of the said directive, headed 'Personal interview', provides:

'1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. This subparagraph shall be without prejudice to Article 42(2)(b).

…

2. The personal interview on the substance of the application may be omitted where:

(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available …

…'

6 Article 33 of the same directive, entitled 'Inadmissible applications', provides:

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

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

…

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

…'

7 Article 40 of Directive 2013/32, entitled 'Subsequent application', provides, in paragraphs 2 to 5 thereof:

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

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

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

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).'

8 Article 46 of that directive, headed 'The right to an effective remedy', is worded as follows:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:
   (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
   (ii) considering an application to be inadmissible pursuant to Article 33(2);

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95], at least in appeals procedures before a court or tribunal of first instance.

…'

German law

9 Paragraph 71 of the Asylgesetz (Law on the right to asylum) (BGBl. 2008 I, p. 1798), in the version applicable to the dispute in the main proceedings ('the Law on the right to asylum'), entitled 'Subsequent application', provides, in subparagraph 1 thereof:

'If, after withdrawal or unchallengeable rejection of an initial asylum application, the foreign national lodges a further asylum application (subsequent application), a new asylum procedure shall be

conducted only if the conditions of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz [(Law on administrative procedure) (BGBl. 2013 I, p. 102)] are met; …'

10 Paragraph 51 of the Law on administrative procedure, in the version applicable to the dispute in the main proceedings ('the Law on administrative procedure'), provides:

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

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

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

3. reasons for reopening the procedure in accordance with Paragraph 580 of the [Zivilprozessordnung (Code of Civil Procedure)] exist.

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

(3) The request must be made within three months. The time limit shall run from the day on which the individual concerned became aware of the ground for re-examination.

…'

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

11 The applicant in the main proceedings is a Syrian national. On 26 July 2017, he submitted an application for asylum in Germany after he, according to his own statements, left Syria in 2012, stayed in Libya until 2017 and then crossed Italy and Austria to enter Germany.

12 During his interview at the Office, he explained that he had performed his military service in Syria between 2003 and 2005 and that he had left the country out of fear of being recalled to serve in the armed forces or of being arrested if he refused to fulfil his military obligations. After his departure from Syria, his father informed him that a summons had been sent to him by the military authorities.

13 By decision of 16 August 2017, the Office granted him subsidiary protection, but refused to grant him refugee status.

14 In order to justify that refusal, the Office found that the Syrian State could not be assumed to interpret the emigration of the applicant in the main proceedings as a manifestation of opposition to the regime. First, he came from a region over which the Syrian army, the Free Syrian Army and the Islamic State were fighting at the time of his departure. Second, having left Syria, according to his own statements, before being called up to join the Syrian army, there was no reason to believe that he would be regarded in his country as a deserter or an opponent of the

regime. Moreover, the applicant in the main proceedings had not established that conscription was the reason for his departure. He relied, in general terms, only on the dangerous situation due to the war in Syria.

15 The applicant in the main proceedings did not lodge an appeal against that decision, which became final.

16 On 15 January 2021, the applicant in the main proceedings lodged a further asylum application, that is to say, a 'subsequent application', within the meaning of Article 2(q) of Directive 2013/32, to the Office. He essentially based his application on the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945). He argued, in essence, that that judgment constituted a 'change in the legal position' within the meaning of the national provisions and that, consequently, the Office was obliged to examine his subsequent application on the merits. That change lies in the fact that the judgment relied on provides for an interpretation of the rules on the burden of proof that is more favourable to asylum seekers than that adopted in national case-law for such applicants who have fled their country in order to escape their military obligations. The said change follows from the wording used by the Court, according to which, in certain circumstances, there is a 'strong presumption' that refusal of military service relates to one of the reasons for persecution listed in Article 10 of Directive 2011/95.

17 By decision of 22 March 2021, the Office rejected as inadmissible the subsequent asylum application of the applicant in the main proceedings. It justified that decision by indicating, in essence, that the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945), did not mean that it had to examine that application on the merits. In so far as the applicant in the main proceedings had merely relied on that judgment in support of his subsequent application, the requirements set by both national and EU provisions for a fresh examination of his asylum application were not met.

18 The applicant in the main proceedings brought an action before the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen, Germany), which is the referring court, seeking the annulment of the decision of the Office of 22 March 2021 and the grant of refugee status.

19 That court notes that, under the combined provisions of Paragraph 71(1) of the Law on the right to asylum and Paragraph 51(1)(1) of the Law on administrative procedure, if, after unchallengeable rejection of an initial asylum application, the third-country national lodges a subsequent application, the determining authority must reopen the procedure if the factual or legal position on which the administrative act was based has subsequently changed in favour of the individual concerned. In terms of a change in the 'legal position' within the meaning of those provisions, it notes that, according to the interpretation advocated by the prevailing national case-law, only an amendment to the applicable provisions is, in principle, capable of coming within that concept, and not a judicial decision, such as a decision of the Court. A judicial decision, after all, is limited to interpreting and applying the relevant provisions in force at the time of the adoption of the decision on the previous application, without amending them. The referring court indicates, however, that the decisions of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) on the extent of the fundamental right to asylum can exceptionally constitute changes in the 'legal position', within the meaning of the said provisions.

20 The referring court is however uncertain whether that interpretation of national law is compatible with EU law, in that it refuses generally to consider a decision of the Court to be capable of changing 'the legal position' and thus to justify the reopening of the procedure where a subsequent application is lodged, whereas, in the 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), the Court held that the existence of a judgment of the Court finding that national legislation is incompatible with EU law constitutes a new element within the meaning of Article 33(2)(d) of Directive 2013/32.

21 Thus, the referring court asks inter alia whether a decision of the Court which is limited to interpreting a provision of EU law already in force at the time of the adoption of the decision on a previous application is capable of constituting a 'new element or finding' within the meaning of Article 33(2)(d) and Article 40(3) of Directive 2013/32. Specifically, it asks whether the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945), relied on by the applicant in the main proceedings, constitutes, in the case at hand, a 'new element or finding', regard being had to the fact that it includes important details on the application of Article 9(2)(b) and Article 10 of Directive 2011/95 to the situation of Syrian conscientious objectors.

22 In addition, the referring court notes that, under the applicable national procedural law, when it hears an appeal against a decision of the Office rejecting a subsequent application as inadmissible, it can rule only on the conditions of admissibility of that application as are set out in Paragraph 71(1) of the Law on the right to asylum and in Paragraph 51(1) to (3) of the Law on administrative procedure. Thus, if the referring court considers that the Office was wrong to reject the subsequent application, it can only annul the decision of inadmissibility and refer the examination of that application back to the Office for it to issue a fresh decision.

23 That court questions, however, whether those national procedural rules are compatible with the right to an effective remedy referred to in Article 46(1) of Directive 2013/32 and with the objective of that directive, set out in recital 18 thereof, that a decision should be made as soon as possible on applications for international protection. Assuming that it follows from that Article 46 that it may – or even must – rule itself on the subsequent application on the merits and, as the case may be, grant the applicant in the main proceedings refugee status, it is still uncertain whether that applicant must then benefit from the procedural safeguards provided for by the provisions of Chapter II of Directive 2013/32.

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

'(1) (a) Is a national provision which considers a subsequent application admissible only if the factual or legal position on which the original rejection decision was based has subsequently changed in favour of the applicant compatible with Article 33(2)(d) and Article 40(2) of Directive [2013/32]?

(b) Do Article 33(2)(d) and Article 40(2) of Directive [2013/32] preclude a national provision that does not treat a decision of the Court of Justice … (here: in preliminary ruling proceedings under Article 267 TFEU) as a "new element" or "new circumstance" or "new finding" if the decision does not establish the incompatibility of a national provision with

EU law but is limited to the interpretation of EU law? What conditions, if any, apply in order for a judgment of the Court of Justice … which merely interprets EU law to be taken into account as a "new element" or "new circumstance" or "new finding"?

(2) If Questions 1a and 1b are answered in the affirmative: must Article 33(2)(d) and Article 40(2) of Directive [2013/32] be interpreted as meaning that a judgment of the Court of Justice … which has ruled that there is a strong presumption that a refusal to do military service under the conditions set out in Article 9(2)(e) of Directive [2011/95] is linked to one of the five grounds listed in Article 10 of that directive must be taken into account as a "new element" or "new circumstance" or "new finding"?

(3) (a) Must Article 46(1)(a)(ii) of Directive [2013/32] be interpreted as meaning that the judicial remedy against an inadmissibility decision taken by the determining authority within the meaning of Article 33(2)(d) and Article 40(5) of Directive [2013/32] is limited to examining whether the determining authority has correctly concluded that the conditions for the subsequent application for asylum to be considered inadmissible under Article 33(2)(d) and Article 40(2) and (5) of Directive [2013/32] have been met?

(b) If Question 3a is answered in the negative: must Article 46(1)(a)(ii) of Directive [2013/32] be interpreted as meaning that the judicial remedy against an inadmissibility decision also covers the examination of whether the conditions for the grant of international protection within the meaning of Article 2(b) of Directive [2011/95] have been met if the court [or tribunal] finds, after conducting its own examination, that the conditions for the rejection of the subsequent application for asylum as inadmissible are not met?

(c) If Question 3b is answered in the affirmative: does such a decision by the court [or tribunal] require that the applicant has first been granted the special procedural guarantees under the third sentence of Article 40(3)[, read] in conjunction with the rules in Chapter II of Directive [2013/32]? May the court [or tribunal] conduct that procedure itself or must it delegate it to the determining authority, where necessary after suspending the [judicial] proceedings? Can the applicant waive compliance with those procedural guarantees?'

Consideration of the questions referred

Questions 1 and 2

25 By its first two questions, which it is appropriate to examine together, the referring court asks, in essence, under what conditions can a judgment of the Court constitute a 'new element or finding', within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32.

26 As a preliminary point, it should be recalled that 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 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-439/17, EU:C:2019:219, paragraph 76).

27 Article 33(2)(d) of Directive 2013/32 provides, in particular, that Member States may consider an application for international protection as inadmissible if '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'.

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

29 The procedure for examining subsequent applications is set out in Article 40 of Directive 2013/32, which provides, as regards the admissibility of such applications, for a two-step examination (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraphs 34 and 35).

30 Thus, first, paragraph 2 of that article provides that, for the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d) of that directive, a subsequent application will 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.

31 It is only if such new elements or findings exist as compared to the first application for international protection that, in the second place, the examination of the admissibility of the subsequent application continues, pursuant to Article 40(3) of Directive 2013/32, in order to ascertain whether those new elements and findings add significantly to the likelihood of the applicant qualifying for that status (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 37).

32 Moreover, in accordance with Article 40(4) of Directive 2013/32, Member States may provide that the subsequent application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting such new elements or findings in the previous procedure.

33 Where the conditions of admissibility of a subsequent application are satisfied, that application must be examined on the merits, and this, as Article 40(3) of Directive 2013/32 states, is to be done in conformity with Chapter II of that directive, which contains the basic principles and safeguards applicable to applications for international protection (see, to that effect, judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 38).

34 In order to assess the scope of the concept of 'new element or findings' within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32, it should be noted that it is apparent from the wording of Article 33(2) – in particular, from the word 'only' preceding the list of grounds of inadmissibility – and the purpose of that latter provision as well as from the scheme of that directive that the possibility of rejecting an application for international protection as inadmissible as referred to in the said provision derogates from the obligation to examine the substance of such an application (see, to that effect, judgment of 1 August 2022, *Bundesrepublik Deutschland (Child of refugees, born outside the host State)*, C-720/20, EU:C:2022:603, paragraph 49).

35 The Court has thus already had occasion to find that it follows both from the exhaustiveness of the list in that Article 33(2) and from the fact that the grounds of inadmissibility set out in that list are exemptions that those grounds must be interpreted strictly (see, to that effect, judgment of 1 August 2022, *Bundesrepublik Deutschland (Child of refugees, born outside the host State)*, C-720/20, EU:C:2022:603, paragraph 51).

36 Accordingly, the situations in which Directive 2013/32 requires a subsequent application to be considered admissible must, conversely, be interpreted broadly.

37 Furthermore, it is apparent from the very wording of Article 33(2)(d) of Directive 2013/32 and, in particular, from the use of the expression 'new elements or findings' that that provision refers not only to a factual change in the personal circumstances of an applicant or that of his or her country of origin, but also to new legal elements.

38 It follows, in particular, from the case-law of the Court that a subsequent application cannot be declared inadmissible, pursuant to Article 33(2)(d) of Directive 2013/32, where the determining authority, within the meaning of Article 2(f) of that directive, finds that the definitive rejection of the earlier application is contrary to EU law. Such a finding must necessarily be made by that determining authority when that incompatibility arises from a judgment of the Court or was established by a national court or tribunal (see, to that effect, 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, paragraphs 198 and 203).

39 That conclusion is explained by the fact that the practical effect of the right recognised to an applicant for international protection, such as is enshrined in Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter') and given specific expression by Directives 2011/95 and 2013/32, to obtain the status of beneficiary of international protection, provided that the conditions required by EU law are met, would be seriously compromised if a subsequent application could be declared inadmissible on the ground referred to in Article 33(2)(d) of Directive 2013/32, when the rejection of the first application constituted an infringement of EU law. In fact, such an interpretation of that provision would have the consequence that the incorrect application of EU law might be repeated in each further application for international protection without any possibility of providing the applicant with an examination of his or her application that was not vitiated by the infringement of EU law. Such an obstacle to the effective application of the rules of EU law in relation to the procedure for the grant of international protection cannot reasonably be justified by the principle of legal certainty (see, to that effect, 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, paragraphs 192, 196 and 197).

40 In the specific context of Directive 2013/32, a judgment of the Court is liable to come within the concept of new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of that directive, irrespective of whether that judgment was delivered before or after the adoption of the decision on the previous application or whether it finds that a national provision on which that decision was based is incompatible with EU law or is limited to the interpretation of EU law, including that already in force at the time when the said decision was adopted.

41 The circumstance, relied on by the German and Austrian Governments, that the effects of a judgment by which the Court, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, interprets a rule of EU law take effect, in principle, from the date of entry into force of the rule interpreted, is thus, inter alia, irrelevant (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 63 and the case-law cited).

42 Moreover, while it is true that the Court held, in essence, in paragraphs 194 and 203 of the 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), that the existence of a judgment

finding that national legislation on the basis of which a previous application for international protection was rejected is incompatible with EU law constitutes a new element relating to the examination of a subsequent application, within the meaning of Article 33(2)(d) of Directive 2013/32, it should be noted that, in so doing, the Court in no way considered that only judgments containing such a finding could constitute such a new element.

43 After all, an interpretation according to which a judgment of the Court can constitute a new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32, only on condition that it finds that a provision of national law on the basis of which the decision on the previous application was adopted is incompatible with EU law, would not only compromise the practical effect of the right recognised to an applicant for international protection, enshrined in Article 18 of the Charter and recalled in paragraph 39 of the present judgment, but would also disregard the *erga omnes* effect of preliminary rulings and the nature of the procedure laid down in Article 267 TFEU and its objective of ensuring the uniformity of interpretation of EU law.

44 It follows from the foregoing that any judgment of the Court is capable of constituting a new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32.

45 That interpretation of the concept of new element is borne out by recital 36 of Directive 2013/32, from which it is apparent that, in support of his or her subsequent application, the applicant must be able to present 'new … arguments'.

46 The said interpretation allows the applicant to make, in support of his or her subsequent application, the argument that his or her previous application was rejected in disregard of a judgment of the Court, as such an argument could not, by definition, be raised during the examination of that previous application.

47 In that context, it should also be noted that the fact that, during the examination of the previous application, the applicant did not rely on a judgment already delivered by the Court cannot amount to a fault of that applicant, within the meaning of Article 40(4) of Directive 2013/32. Other than the fact that, in accordance with what has been indicated in paragraphs 34 and 35 of the present judgment, that concept of fault must be interpreted restrictively, to use a broader conception of the said concept would lead to allowing an incorrect application of EU law to be repeated, when it is for the determining authority and for the competent courts or tribunals to take into account the factual elements at their disposal in a manner in conformity with that law by applying the relevant judgments of the Court.

48 Moreover, it follows from the case-law that a judgment of the Court may constitute a new element, within the meaning of Article 33(2) and Article 40(2) and (3) of Directive 2013/32, even in the absence of a reference by the applicant in the context of his or her subsequent application to the existence of that judgment (see, to that effect, 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 195).

49 It should, however, be recalled that, as has been noted in paragraph 31 of the present judgment, in order for a subsequent application to be admissible, it is still necessary, in accordance with Article 40(3) of Directive 2013/32, that the new elements or findings 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive [2011/95]'.

50 As is apparent from recital 36 of Directive 2013/32, the EU legislature considered that it would be disproportionate to oblige Member States to examine the substance of any subsequent application. That would be the case if, in order to prevent the competent authority from rejecting his or her subsequent application as inadmissible on the basis of Article 33(2)(d) of Directive 2013/32, it were sufficient for the applicant to rely on any new element or finding, irrespective of its relevance to the conditions to be met in order to claim international protection.

51 Where a judgment of the Court is relied on by the applicant as a new element, within the meaning of Article 33(2) and Article 40(2) and (3) of Directive 2013/32, such a condition therefore limits the obligation to examine the substance of a subsequent application to cases where the interpretation of EU law given in that judgment appears relevant to the assessment of the merits of that application.

52 In the case at hand, it is for the referring court to assess whether the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945), which the applicant in the main proceedings relies on in support of his subsequent application, constitutes a new element of such a kind as significantly to add to the likelihood of his qualifying for refugee status.

53 In so far as that assessment depends on the interpretation of the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945), in particular in that it found, in paragraph 61 thereof, that there is a 'strong presumption' that refusal to perform military service under the conditions set out in Article 9(2)(e) of Directive 2011/95 relates to one of the reasons listed in Article 10 of that directive, it should be pointed out to the referring court that, by that finding, made also in paragraph 60 of that judgment, the Court merely stated that, in the abovementioned circumstances, it is 'highly likely' that that relationship exists and did not intend either to establish an irrebuttable presumption or to substitute its own assessment on that point for that of the competent national authorities. The Court therefore recalled, in the last sentence of paragraph 61 of the judgment in question, that it is for those authorities to ascertain, in the light of all the circumstances at issue, whether that connection is plausible.

54 In the light of the foregoing observations, the answer to the first two questions is that Articles 33(2)(d) and Article 40(2) and (3) of Directive 2013/32 must be interpreted as meaning that any judgment of the Court, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of those provisions, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection.

Question 3

55 By its third question, the referring court asks, in essence, whether Article 46(1)(a)(ii) of Directive 2013/32 must be interpreted as allowing – or even requiring – the competent national court or tribunal, when it annuls a decision rejecting a subsequent application as inadmissible, to rule itself on that application, without having to refer the examination of that application back to the determining authority. It also asks whether, in that case, the applicant must benefit from the procedural safeguards provided for by the provisions of Chapter II of Directive 2013/32.

56 It should be recalled that, under Article 46(1)(a)(ii) of Directive 2013/32, applicants for international protection must have a right to an effective remedy against decisions considering their subsequent applications inadmissible, taken pursuant to Article 33(2) of that directive.

57 By virtue of Article 46(3) of the said directive, that remedy must, in order to be effective, include a full and *ex nunc* examination by the competent national court or tribunal of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95.

58 It follows that Member States are required, pursuant to Article 46(3) of Directive 2013/32, to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand, so that the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority. That interpretation furthers the aim pursued by Directive 2013/32 of guaranteeing that such applications are processed as rapidly as possible, without prejudice to an adequate and complete examination being carried out (judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 53).

59 However, Article 46(3) of Directive 2013/32 pertains only to the examination of the appeal and does not concern the outcome of any annulment of the decision subject to that appeal (judgments of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 145, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 54).

60 It should therefore be noted that, by adopting Directive 2013/32, the EU legislature did not intend to introduce any common rule to the effect that the determining authority should be deprived of its powers following the annulment of the decision concerning an application for international protection, so that it remains open to the Member States to provide that the file must, following such an annulment, be referred back to that body for a new decision (judgments of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 146, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 54).

61 While Directive 2013/32 affords Member States some discretion inter alia in the determination of rules for thus dealing with an application for international protection where a previous decision on that application is annulled by a court or tribunal, it is important however to note that notwithstanding that discretion Member States are required, when implementing that directive, to comply with Article 47 of the Charter which enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed. The characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter. It follows that each Member State bound by that directive must order its national law in such a way that, following annulment of that previous decision and in the event of file being referred back to the determining authority, a new decision is adopted within a short period of time and that it complies with the assessment contained in the judgment annulling the previous decision (see, to that effect, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraphs 55 and 59).

62 Moreover, by providing, in Article 46(3) of Directive 2013/32, that the court or tribunal with jurisdiction to rule on an appeal against a decision rejecting an application for international protection is required to examine, where applicable, 'the international protection needs' of the applicant, the EU legislature intended to confer on that court or tribunal, where it considers that

it has available to it all the elements of fact and law necessary in that regard, the power to give a binding ruling following a full and *ex nunc* – that is to say exhaustive and up-to-date – examination of those elements, as to whether that applicant satisfies the conditions laid down in Directive 2011/95 to be granted international protection. It follows that, where, following such an examination, the said court or tribunal reaches the conclusion that the said applicant must be granted the status of refugee or person eligible for subsidiary protection status, in accordance with the criteria laid down in Directive 2011/95, for the reasons that he or she relies on in support of his or her application and that court or tribunal annuls the decision rejecting that application and refers the case file back to the authority responsible for processing, the latter is, subject to matters of fact or law arising that objectively require a new up-to-date assessment, bound by the decision of that court or tribunal and the grounds that support it and no longer has a discretionary power as to the decision to grant or refuse the protection sought in the light of the same grounds as those that were submitted to that court or tribunal (judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraphs 65 and 66).

63 It follows that, while it is for each Member State to decide whether the court or tribunal which has annulled the decision declaring a subsequent application inadmissible may grant that application or reject it on another ground or whether, on the contrary, that court or tribunal must refer that application back to the determining authority for it to examine it again, the fact remains that, in the latter case, that authority is required to comply with such a judicial decision and the grounds that support it.

64 In addition, Article 40(3) of Directive 2013/32 requires the authority examining a subsequent application which has been considered admissible further to examine that application in conformity with the provisions of Chapter II of that directive.

65 Consequently, where, after having annulled the decision which rejected the subsequent application as inadmissible, the competent court or tribunal decides, under the conditions recalled in paragraph 62 of the present judgment, to rule on the substance of that application, that court or tribunal must ensure, *mutatis mutandis*, compliance with the basic principles and safeguards laid down in Chapter II of Directive 2013/32. The same is true where, pursuant to its national law, the said court or tribunal does not have the possibility to reject that request or to grant the applicant international protection, since the determining authority to which the file is referred back in order for it to grant or reject that application is bound by the judicial decision and the grounds that support it.

66 It is worth adding, in view of the referring court's questions in that regard, that, if there is no personal interview before the determining authority, as is provided for in Article 14 of Directive 2013/32, it is only if such an interview is conducted before the court or tribunal hearing the appeal against the decision adopted by that authority declaring the application inadmissible and that interview is conducted in accordance with all of the conditions prescribed by Directive 2013/32 that it is possible to guarantee the effectiveness of the right to be heard at that stage of the procedure (judgment of 16 July 2020, *Addis*, C-517/17, EU:C:2020:579, paragraph 71). That being so, it is also apparent from Article 14(2)(a) of that directive that such an interview may be omitted where that court or tribunal is able to take a positive decision with regard to refugee status on the basis of evidence available.

67 In the light of the foregoing considerations, the answer to the third question is that Article 46(1)(a)(ii) of Directive 2013/32 must be interpreted as allowing – but not requiring – Member States to authorise their courts or tribunals, where those courts or tribunals annul a

decision rejecting a subsequent application as inadmissible, to rule themselves on that application, without having to refer the examination of that application back to the determining authority, provided that those courts comply with the safeguards provided for by the provisions of Chapter II of that directive.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

1. **Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection**

   must be interpreted as meaning that any judgment of the Court of Justice of the European Union, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of those provisions, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection.

2. **Article 46(1)(a)(ii) of Directive 2013/32**

   must be interpreted as allowing – but not requiring – Member States to authorise their courts or tribunals, where those courts or tribunals annul a decision rejecting a subsequent application as inadmissible, to rule themselves on that application, without having to refer the examination of that application back to the determining authority, provided that those courts comply with the safeguards provided for by the provisions of Chapter II of that directive.

[Signatures]