ECLI:EU:C:2023:429

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

25 May 2023 (*)

(Reference for a preliminary ruling – Asylum policy – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(d) – Procedure for examining an application for international protection – Inadmissible applications – Subsequent application – Voluntary return and removal)

In Case C-364/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Minden (Administrative Court, Minden, Germany), made by decision of 2 March 2022, received at the Court on 7 June 2022, in the proceedings

J.B.,

S.B.,

F.B., legally represented by J.B. and S.B.,

v

Bundesrepublik Deutschland,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl and J. Passer (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by J. Hottiaux and H. Leupold, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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).

2 The request has been made in proceedings between J.B., S.B. and their daughter F.B. and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the rejection of their applications for asylum as inadmissible.

Legal context

European Union law

Directive 2004/83/EC

3 In Chapter V of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum OJ 2005 L 204, p. 24), entitled ‘Qualification for subsidiary protection’, Article 15 of that directive, entitled ‘Serious harm’, stated:

‘Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

4 Article 17 of that directive, entitled ‘Exclusions’, set out the grounds on the basis of which a third-country national or a stateless person could be excluded from being eligible for subsidiary protection.

5 Article 18 of that directive, entitled ‘Granting of subsidiary protection status’, provided:

‘Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

6 Directive 2004/83 was repealed by 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).

Directive 2013/32

7 Article 2 of Directive 2013/32, entitled ‘Definitions’, provides:

‘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).’

8 Article 33 of Directive 2013/32, entitled ‘Inadmissible applications’, provides in paragraph 2(d) thereof:

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

…

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

9 Article 40 of Directive 2013/32, entitled ‘Subsequent application’, is worded as follows:

‘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].

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.

…’

The Dublin III Regulation

10 Article 19(3) 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’) 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.’

German law

The Law on asylum

11 Paragraph 29(1)(5) of the Asylgesetz (Law on asylum) (BGBl. 2008 I, p. 1798), in the version applicable to the dispute in the main proceedings, provides:

‘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. …’

12 Paragraph 71 of that law, entitled ‘Subsequent application’, states in point 1 thereof:

‘If, after the withdrawal or definitive rejection of a previous asylum application, the foreign national files a new asylum application (subsequent application), a new asylum procedure shall be conducted only if the conditions of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz [(Law on administrative procedure) (BGBl. 2013 I, p. 102)] are met; this shall be examined by the Bundesamt [für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany)]. …’

Law on administrative procedure

13 Paragraph 51 of the Law on administrative procedure, in the version applicable to the dispute in the main proceedings, entitled ‘Review of the procedure’, provides in point 1 thereof:

‘An administrative body shall consider an application from an individual concerned requesting that an administrative act which is no longer open to challenge be set aside or amended, if:

1. the factual or legal circumstances on which the administrative act was based have changed in favour of the individual concerned; or

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

…’

Law on residence of foreign nationals

14 Paragraph 60 of the Aufenthaltsgesetz (BGBl. 2008 I, p. 162), in the version applicable to the dispute in the main proceedings (‘the Law on residence of foreign nationals’), entitled ‘Prohibition of removal’, provides, in points 2, 3, 5 and 7 thereof:

‘(2) A foreign national may not be removed to a State in which that foreign national faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

(3) A foreign national may not be removed to a State if that State is seeking the foreign national on account of a criminal offence and there is a risk of the death penalty or execution. …

…

(5) A foreign national may not be removed if it follows from the application of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,] that such removal is impermissible.

…

(7) A foreign national shall not be removed to another State if that foreign national faces a significant, real threat to life and limb or his or her freedom in that State. A foreign national shall not be removed to another State if he or she is exposed, as a member of the civilian population, to a significant threat to life or limb in the context of an international or internal armed conflict. The orders referred to in the first sentence of Paragraph 60a(1) shall take into account threats, within the meaning of the first or second sentence, to which the population or part of the population to which the foreign national belongs is generally exposed.’

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

15 The applicants in that main proceedings are Lebanese nationals. J.B. entered Germany in November 2000 and made an application for asylum on 29 November 2000. On 13 December 2000, the competent office rejected that application as manifestly unfounded and found that there were no grounds prohibiting his removal. On 13 August 2001, J.B. was removed to Lebanon.

16 In March 2010, the applicants in the main proceedings entered Germany and made applications for asylum on 29 March 2010. By decision of 18 May 2010, the competent office rejected the applications of S.B and F.B., finding that the conditions for granting refugee status were not met and that there were no grounds prohibiting their removal. By decision of 4 October 2010, the competent office rejected J.B.'s application for the initiation of a further asylum procedure. On 17 March 2011, the applicants in the main proceedings left Germany voluntarily and returned to Lebanon.

17 In January 2021, the applicants in the main proceedings entered Germany again. On 11 February 2021, they made applications for asylum based, in essence, on the claim that their situation in Lebanon was not safe. By decision of 11 August 2021, the competent office declared those applications inadmissible. That office also rejected the applications for amendment of the decisions referred to in the preceding paragraph, ordered the applicants in the main proceedings to leave Germany, failing which they would be removed to Lebanon, and imposed a ban on entry and residence for a period of 30 months from the date of that removal.

18 On 18 August 2021, the applicants in the main proceedings brought an action against that decision, arguing that they had spent more than 10 years in Lebanon and that the situation in Lebanon had changed after their return.

19 In that regard, the referring court notes that, to date, the applicants in the main proceedings have not submitted new facts or evidence justifying the initiation of a further asylum procedure.

20 The defendant in the main proceedings contends that the applicants' asylum applications of 11 February 2021 must be categorised as 'subsequent applications' within the meaning, inter alia, of Article 2(q) and Article 33(2)(d) of Directive 2013/32. It argues that a return to the country of origin is not sufficient to establish a new element or finding, within the meaning of the latter provision.

21 The referring court ordered that the action brought by the applicants in the main proceedings have suspensory effect in respect of the order to leave Germany set out in the decision of 11 August 2021.

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

'(1) Must Article 33(2)(d) of [Directive 2013/32] be interpreted as precluding a national rule under which a further application for international protection must be refused as inadmissible irrespective of whether the applicant concerned returned to his or her country of origin after an application for international protection was rejected and before a further application for international protection was made?

(2) In the context of the answer to Question 1, does it make any difference whether the applicant concerned was removed to his or her country of origin or returned there voluntarily?

(3) Must Article 33(2)(d) of Directive [2013/32] be interpreted as precluding a Member State from refusing a further application for international protection as inadmissible where, although a decision on the granting of subsidiary protection status was not taken by way of the decision on the earlier application, grounds preventing removal were examined, and that examination is comparable in substance to the examination as to the granting of subsidiary protection status?

(4) Are the examination of grounds preventing removal and the examination as to the granting of subsidiary protection status comparable where, in the examination of grounds preventing removal, it was necessary cumulatively to examine whether, in the country to which the applicant concerned is to be removed, he or she faces

(a) a real risk of torture or inhuman or degrading treatment or punishment;

(b) a risk of being subjected to the death penalty or execution;

(c) a risk of being the subject of an infringement of the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950]; or,

(d) a real and significant threat to his or her life and limb or freedom;

or whether he or she

(e) is exposed, as a member of the civilian population, to a significant individual threat to life or limb in the context of an international or internal armed conflict?'

Consideration of the questions referred

The first and second questions

23 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, (i) whether Article 33(2)(d) of Directive 2013/32 must be interpreted as precluding the rejection of a subsequent application for international protection as inadmissible irrespective of the fact that the applicant returned to his or her country of origin after his or her application for international protection was refused and before he or she made that subsequent application for international protection and (ii) whether the fact that the applicant was removed or returned voluntarily to that country is relevant in that regard.

24 It must be borne in mind 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).

25 Those situations include the situation, provided for in Article 33(2)(d), in which the application concerned is a subsequent application, containing 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.

26 The term '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.

27 That definition accordingly uses the terms ‘application for international protection’ and ‘final decision’ which are also defined in Article 2(b) and (e) of that directive, respectively (judgment of 22 September 2022, *Bundesrepublik Deutschland (Application for asylum rejected by Denmark)*, C-497/21, EU:C:2022:721, paragraph 41).

28 As regards, in the first place, the term ‘application for international protection’ or ‘application’, it is defined in Article 2(b) of Directive 2013/32 as 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, within the meaning of Directive 2011/95.

29 According to the information contained in the order for reference, the applicants in the main proceedings made such requests on several occasions.

30 As regards, in the second place, the term ‘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 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.

31 It is apparent from the order for reference that such a final decision was taken by the competent national authority in respect of all the applicants in the main proceedings.

32 Furthermore, it must be stated that the temporary return of an asylum seeker to his or her country of origin after the rejection of an application for international protection has no bearing on the classification of a further application for asylum as a ‘subsequent application’ within the meaning of Article 2(q) of Directive 2013/32.

33 The wording of Article 33(2)(d) and Article 2(q) of that directive does not mention such a return as a relevant criterion for the purposes of determining whether a further application for international protection constitutes a subsequent application and may, as such, be rejected as inadmissible.

34 It is true that if new elements or findings, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32, relating to the application for international protection, have arisen or have been presented by the applicant, a new examination on the merits must be carried out. In that respect, the fact that, before making that subsequent application, the applicant stayed in his or her country of origin may have an impact on the risk assessment that must be carried out and therefore on the decision to grant international protection, for example if the applicant was exposed to a risk of persecution there. However, the mere fact that the applicant returned to his or her country of origin does not necessarily imply, in itself, the existence of a ‘new element or finding’ within the meaning of those provisions.

35 That being said, in its request for a preliminary ruling, the referring court explains that the first and second questions are submitted as a result of the considerations set out in points 34 et seq. of the Opinion of Advocate General Saugmandsgaard Øe in *L.R. (Application for asylum rejected by Norway)* (C-8/20, EU:C:2021:221), according to which Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, should be interpreted as meaning that an application for international protection cannot be found to be inadmissible as a ‘subsequent application’, where the applicant was removed to his or her country of origin before lodging that application. The referring court also notes that the Court did not rule on those considerations in its judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)* (C-8/20, EU:C:2021:404).

36 In that regard, it should be noted that those considerations were based principally on the second subparagraph of Article 19(3) of the Dublin III Regulation, as is apparent in particular from points 38 and 47 of that Opinion. According to that provision, any 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.

37 However, the question whether an application for asylum must be regarded as a 'new application', within the meaning of the Dublin III Regulation, must be distinguished from the question whether that application must be regarded as a 'subsequent application', within the meaning of Article 2(q) and Article 33(2)(d) of Directive 2013/32. When an applicant re-enters the territory of the European Union, the scope of the classification of an application as a 'new application', within the meaning of the second paragraph of Article 19(3) of that regulation, is limited, in the context of that regulation, to the procedure laid down in that regulation for determining the Member State responsible for examining the application for international protection.

38 In addition, to consider that, irrespective of whether there are new elements or findings relating to the need for protection, the return of an applicant to his or her country of origin between his or her first and further application for international protection systematically entails an examination of his or her subsequent application on the merits would amount to adding a specific ground precluding a decision on inadmissibility from being adopted in such a situation, since Article 33(2)(d) of Directive 2013/32 requires an examination on the merits only where new elements or findings are present, that is to say, on a case-by-case basis.

39 Furthermore, since the temporary return of an applicant for international protection to his or her country of origin is irrelevant for the purposes of the interpretation and application of Article 33(2)(d) of Directive 2013/32, whether he or she left the territory of the Member State concerned voluntarily or was removed is necessarily also irrelevant in that regard.

40 It follows from the foregoing that the answer to the first and second questions is that Article 33(2)(d) of Directive 2013/32 must be interpreted as not precluding the rejection of a subsequent application for international protection as inadmissible irrespective of (i) the fact that the applicant returned to his or her country of origin after his or her application for international protection was refused and before he or she made that subsequent application for international protection and (ii) whether that return was voluntary or forced.

The third and fourth questions

41 By its third and fourth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 33(2)(d) of Directive 2013/32 must be interpreted as precluding a Member State from rejecting a subsequent application for international protection as inadmissible where the decision on the previous application did not concern the granting of subsidiary protection status, but was adopted following an examination of the existence of grounds prohibiting removal and that examination corresponds, in essence, to the examination carried out with a view to granting that status. If not, the referring court wishes to know whether those examinations can be regarded as comparable.

42 It is apparent from the order for reference that those questions must be analysed in the light of the fact that the German legislature did not create an autonomous subsidiary protection status until 1 December 2013. Before that date, where the conditions laid down in Article 15 of Directive 2004/83 were met, the national asylum authority found that there were grounds prohibiting removal

on the basis of Paragraph 60(2), (3) and (7), second sentence, of the Law on residence of foreign nationals. Subject to the examination of grounds for exclusion under Article 17 of Directive 2004/83, such a finding then gave rise to the grant of the rights conferred, as regards the right of residence, on beneficiaries of subsidiary protection. Since that authority applied, in that regard, the same 'evaluation framework' as that required by Articles 15 and 18 of Directive 2004/83 in order to determine whether subsidiary protection should be granted, it followed that the consequences of a decision refusing to prohibit removal and those of a decision refusing to grant subsidiary protection status were identical.

43 In that regard, it should be noted, in the first place, that the examination of the existence of grounds prohibiting removal under Paragraph 60(2), (3) and (7), second sentence, of the Law on residence of foreign nationals, as described by the referring court, appears to be comparable, in substance, to that provided for in Article 15 of Directive 2004/83 and to confer on applicants an equivalent level of protection.

44 However, it should be observed, in the second place, that the second sentence of Paragraph 60(7) of the Law on residence of foreign nationals does not expressly refer to the criterion of the existence of a threat 'by reason of indiscriminate violence' set out in Article 15(c) of Directive 2004/83. That being said, it appears from the explanations provided by the referring court that that national provision must be interpreted as being modelled on Article 15(c) of Directive 2004/83, which it expressly transposed into German law. In particular, in accordance with a judgment of 24 June 2008 of the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the second sentence of Paragraph 60(7) had to be read as including that criterion. According to German case-law and administrative practice, for the purposes of interpreting the ground prohibiting expulsion set out in the second sentence of Paragraph 60(7), all the criteria set out in Article 15(c) of Directive 2004/8 had to be taken into account.

45 As is apparent, in essence, from paragraphs 25 to 27 and 30 above, the concept of 'subsequent application', within the meaning of Article 33(2)(d) of Directive 2013/32, relates to the existence of a previous final decision establishing, inter alia, whether the applicant is entitled to subsidiary protection status.

46 Even though, in the present case, the decisions on the previous applications made by the applicants in the main proceedings did not concern the grant of subsidiary protection status, they were adopted following an examination of the existence of grounds prohibiting expulsion in accordance with Paragraph 60(2), (3) and (7), second sentence, of the Law on residence of foreign nationals, which, according to the explanations provided by the referring court, is comparable, in substance, to the examination carried out with a view to granting that status.

47 It follows from the foregoing that the answer to the third and fourth questions is that Article 33(2)(d) of Directive 2013/32 must be interpreted as not precluding a Member State from rejecting a subsequent application for international protection as inadmissible where the decision on the previous application did not concern the granting of subsidiary protection status, but was adopted following an examination of the existence of grounds prohibiting removal and that examination is comparable, in substance, to the examination carried out with a view to granting that status.

Costs

48 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 (Seventh Chamber) hereby rules:

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

must be interpreted as not precluding the rejection of a subsequent application for international protection as inadmissible irrespective of (i) the fact that the applicant returned to his or her country of origin after his or her application for international protection was refused and before he or she made that subsequent application for international protection and (ii) whether that return was voluntary or forced.

2. **Article 33(2)(d) of Directive 2013/32/EU**

must be interpreted as not precluding a Member State from rejecting a subsequent application for international protection as inadmissible where the decision on the previous application did not concern the granting of subsidiary protection status, but was adopted following an examination of the existence of grounds prohibiting removal and that examination is comparable, in substance, to the examination carried out with a view to granting that status.

[Signatures]

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* Language of the case: German.