Case C-483/20

Request for a preliminary ruling

Date lodged:

29 September 2020

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

30 June 2020

Appellant:

XXXX

Respondent:

Commissaire général aux réfugiés et aux apatrides

CONSEIL D'ÉTAT, SECTION DU CONTENTIEUX ADMINISTRATIF

(Council of State, Administrative Litigation Section, Belgium)

[…]

JUDGMENT

[…]

In the proceedings: **XXXX**

v

Commissaire général aux réfugiés et aux apatrides

I. *Subject matter of the request*

By application lodged on 21 May 2019, XXXX requested that the judgment […] of 8 May 2019 of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) […] be quashed.

II. *Procedure before the Council of State*

[…]

[…] **[Or. 2]** [...]

[…]

III. *Facts relevant to the examination of the case*

The appellant, who claims to be a Syrian national, was granted refugee status in Austria on 1 December 2015.

He claims to have left Austria at the beginning of 2016 to join his daughters, one of whom is a child, who were granted subsidiary protection status in Belgium on 14 December 2016.

On 14 June 2018, he submitted an application for international protection in Belgium.

On 11 February 2019, the Commissaire général aux réfugiés et aux apatrides (Commissioner-General for Refugees and Stateless Persons) declared his application inadmissible on the basis of point 3 of Article 57/6(3) of the loi du 15 décembre 1980 sur l'accès au territoire, l'établissement, le séjour et l'éloignement des étrangers (Law of 15 December 1980 on entry into the territory, residence, stay and removal of foreign nationals). **[Or. 3]**

On 8 May 2019, […] the Council for asylum and immigration proceedings dismissed the action brought by the appellant against that inadmissibility decision. It is that decision which the appellant seeks to have quashed.

IV. *Applicable Belgian law*

[Article] […] 57/6(3) of the Law of 15 December 1980 on entry into the territory, residence, stay and removal of foreign nationals provide[s] […]:

> […]
>
> […] **[Or. 4]**
>
> […]

[…] **[Or. 5]**

Article 57/6 (3) The Commissioner-General for Refugees and Stateless Persons may declare an application for international protection inadmissible where:

[…]

3. the applicant is already a beneficiary of international protection in another Member State of the European Union;

[…]

V. *Single plea*

V.1. Submissions of the parties

The appellant relies on a single plea alleging infringement of Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, read in the **[Or. 6]** light of Articles 181 to 188 of the UNHCR Handbook on Procedures and Criteria, of Articles 18 and 24 of the Charter of Fundamental Rights of the European Union, of Articles 2, 20, 23 and 31 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 and recital 18 thereof, of Article 25(6) of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection and recital 33 thereof, of Article 149 of the Constitution, of Articles 39/2, 39/65, 48/3, 48/4 and 57/6(3) of the Law of 15 December 1980 on entry into the territory, residence, stay and removal of foreign nationals, of the principles of family unity and the best interests of the child, and of the principles requiring respect for the rights of the defence and the right to be heard.

He argues that Article 33(2) of Directive 2013/32 cited above and Article 57/6(3) of the Law of 15 December 1980 cited above provide for a power, rather than an obligation, and that they must be interpreted and applied in compliance with fundamental rights. He points out that the contested judgment ‘does not state that, when applying Article 57/6(3) of the Law, the principle safeguarding family unity cannot and/or must not be taken into account; however, it limits the application of that principle to a person without protection’, but that ‘there is no coherent justification for why the best interests of the child should not be’ since ‘if the principle of family unity may be taken into account when Article 57(3) of the loi sur les étrangers (Law on foreign nationals) is applied, there is nothing to preclude the same from also applying in relation to the best interests of the child, since the

rights guaranteed are of the same nature and are closely interlinked with one other'. He sees this as a contradiction in reasoning.

As regards the reasoning that 'the persons concerned are not unfamiliar with the imbalance in their circumstances', he explains, first, that 'the judgment does not explain how this precludes respect for the principle of family unity' and, second, that this issue was raised neither by the respondent nor in the order served on him and that he was therefore unable to express his views on it, which is in breach of the rights of the defence.

As regards the best interests of the child, he refers to Article 24 of the Charter of Fundamental Rights of the European Union, to Article 20(5) of Directive 2011/95, to Article 25(6) of Directive 2013/32 and to Articles 3, 9 and 10 of the **[Or. 7]** Convention on the Rights of the Child, and criticises the judgment for having ruled 'as a matter of principle that the best interests of the applicant's child do not have to be taken into account on the sole ground that they do not exempt the parent from satisfying the conditions governing the procedure for granting international protection' without 'taking into consideration the specific factors relied on in this regard by the applicant in his action'.

He further argues that the principle of family unity 'requires protection to be granted to a person who is already a beneficiary of protection in a country other than that in which that person's child has been granted such protection, precisely in order to ensure respect for family unity'. He refers to Article 18 of the Charter, to the UNHCR Handbook on Procedures and Criteria, interpreting Article 1 of the Geneva Convention on Refugees, and to Article 23 of Directive 2011/95 and submits that: 'Contrary to the ruling made in the judgment, protection must be afforded to the applicant in compliance with the best interests of the child and family unity, in order, in particular, for him or her to be able to enjoy the benefits referred to in Articles 24 to 35 of the directive'. He argues that 'the grant of protection to the applicant is not entirely unconnected to the rationale for international protection since the applicant has been recognised as a refugee in another Member State; since he does not have the right to stay in Belgium, where he lives with his daughter, a child who is recognised as a refugee and is under his supervision, the grant of protection to him in that country is not unconnected to the rationale for protection that led to his daughter's recognition'.

The respondent replies as follows: the UNHCR Handbook on Procedures and Criteria lays down the principle of family unity; this principle implies that, if the head of a family meets the criteria of the definition, his or her dependants are normally granted refugee status; this means that family members are granted that status not because they themselves satisfy the conditions set out in the Geneva Convention, but because the head of the family has been granted refugee status; that is why the principle of family unity includes a so-called 'derived' status; the court's reasoning that that principle 'is based on a fundamental rationale of protection and aims to extend the international protection obtained by a family member to other family members without such protection. That principle therefore

does not apply where, as in the present case, all the persons involved are each already beneficiaries of international protection, even if those protections were granted in different countries' is therefore perfectly correct and coherent; the principle of family unity is not enshrined in the Law of 15 December 1980; although Directive 2011/95 lays down the principle of family unity, it does not aim, however, to secure the grant of a **[Or. 8]** derived status but to enable family members of the beneficiary of international protection to enjoy the benefits referred to in Articles 24 to 35, in accordance with national procedures; Article 23 refers, moreover, to family members of the beneficiary of international protection who do not qualify for such protection; Article 23 therefore does not apply in the present case; that reasoning has been confirmed by the Court of Justice of the European Union, which, in its judgment of 4 October 2018[, *Ahmedbekova*, C-652/16, EU:C:2018:801, paragraph 68], stated that 'Directive 2011/95 does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status. It follows that Article 23 of that directive merely requires Member States to amend their national laws so that family members, within the meaning referred to in Article 2([j]) of the directive, of the beneficiary of such a status are, if they are not individually eligible for the same status, entitled to certain benefits, which include, inter alia, a residence permit, access to employment or to education, which are intended to maintain family unity'; since the requirements inherent in the principle of family unity are not fulfilled, the principle of the best interests of the child cannot alone justify its application; since the legislature has laid down specific provisions governing the grant of international protection, they cannot be disapplied on account solely of the principle of the best interests of the child; as regards the contradiction in the reasoning as alleged in the appeal on a point of law, it must be concluded that this is in no way apparent from the terms of the contested judgment; the court very clearly set out the reasons why the principle of family unity does not apply and why the best interests of the child do not permit the application of that principle; while it does not in fact exclude the principle as such when Article 57(3) applies, it explains very clearly why, in the present case, that principle cannot be applied, namely, because the appellant's family members already have international protection status; the court in no way concludes that the principle of family unity does not apply because 'the persons concerned are not unfamiliar with the imbalance in their circumstances'; it is in fact because the appellant's family members already have international protection status that led it to rule as it did; it is not a determining factor that should have given rise to the reopening of the oral proceedings and the appellant has failed to demonstrate how the rights of the defence have not been observed.

The appellant adds, in his reply, that the UNHCR highlights in its Guidance Note of May 2009 on refugee claims relating to female genital mutilation that 'just as a child can derive **[Or. 9]** refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his or her child's refugee status' and submits that the fact that he is recognised as a refugee in another Member State 'does not constitute an obstacle to that principle, since that recognition does not allow him to live with his child in the state where

the child was granted protection'. He points out that 'the Court of Justice has held that the automatic application of derived refugee status under national law is not contrary to the spirit of the directive or to the Geneva Convention and that, on the contrary, such a practice pursues the objective laid down in Article 23 of Directive 2011/95, namely maintaining family unity' and infers therefrom that, *a contrario*, 'the automatic exclusion from that status in this case, as a matter of principle, of the father of a child who is recognised as a refugee, on the sole ground that the said father has been granted protection in another Member State, goes against the objective pursued by Article 23 of the directive'.

Referring to a judgment of 6 December 2012, [*O and others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 81)) of the Court of Justice requiring 'the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of those of the children concerned', he submits that the 'same reasoning must prevail in the context of the examination of an application for international protection' and that, in the present case, 'such a balanced and reasonable assessment is entirely lacking'.

V.2. Assessment

The appellant was granted international protection in Austria. One of his daughters [is] a child [who] is a beneficiary of international protection in Belgium. The appellant wishes to also be granted international protection in Belgium and to live there with his child.

The appellant claims, in essence, that Article 33(2) 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 gives Member States a power but does not require them to declare an application for international protection inadmissible where, as in the present case, international protection has been granted by another Member State. According to the appellant, when implementing Directive 2013/32/EU, and in particular Article 33(2) thereof, Member States must ensure compliance with the principle of family unity and the best interests of the child, and he takes the view that compliance with those principles, in the **[Or. 10]** circumstances of the present case, precludes the Belgian State from being able to exercise its power to declare his application for international protection inadmissible.

The appellant requests that the Court of Justice of the European Union be asked to give a preliminary ruling on whether, in essence, in the circumstances of the present case, several provisions of EU law which he specifies must be interpreted as precluding the Belgian State from exercising the power to declare his application for international protection inadmissible.

Since the Council of State is a court of last instance and the question raised is relevant to the outcome of the action, it is appropriate to refer to the Court of Justice of the European Union the question raised by the appellant.

ON THOSE GROUNDS,

THE COUNCIL OF STATE HEREBY DECIDES:

[…]

Pursuant to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

> 'Does EU law, essentially Articles 18 and 24 of the Charter of Fundamental Rights of the European Union, Articles 2, 20, 23 and 31 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, and Article 25(6) 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, preclude a Member State, when applying the powers conferred by Article 33(2)(a) of Directive 2013/32/EU, from rejecting an application for international protection as inadmissible because of protection already granted by another Member State, where the applicant is the father of an unaccompanied child who has been granted protection in the first Member State, he is the sole parent of the nuclear family present by the child's side, he lives with the child and has been conferred parental responsibility for the child by that Member State? Do the principle of family unity and that requiring compliance with the best interests of the child not require, on the contrary, protection to be granted to that parent by the State where his child has been granted protection?' **[Or. 11]**

[…]

[…] [signatures]