Case C-8/20

Request for a preliminary ruling

Date lodged:

9 January 2020

Referring court:

Schleswig-Holsteinisches Verwaltungsgericht (Germany)

Date of the decision to refer:

30 December 2019

Applicant:

L.R.

Defendant:

Federal Republic of Germany

SCHLESWIG-HOLSTEINISCHES VERWALTUNGSGERICHT

(ADMINISTRATIVE COURT OF SCHLESWIG-HOLSTEIN)

[…]

ORDER

In the administrative matter

of Mr L.R.,

– Applicant –

[…]

v

the Federal Republic of Germany, represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) — Boostedt branch office — […]

– Defendant –

Subject matter of the dispute: Right of asylum — Secondary application (Paragraph 71a of the Asylgesetz (Asylum Law; AsylG))

the 13th Chamber of the Administrative Court of Schleswig-Holstein ordered as follows on 30 December 2019:

The proceedings are stayed.

The following question is referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

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

G r o u n d s

I.

1 The applicant, an Iranian national, is seeking international protection from the defendant[,] after having already unsuccessfully requested protection under asylum law in the Kingdom of Norway.

2 On 22 December 2014, the applicant made an asylum application in the Federal Republic of Germany. In his hearing for establishing the Member State responsible on 22 December 2014, the applicant stated the following: He had left his country of origin approximately 18 months ago and had lived in Iraq until 3 months ago. He had travelled to Germany via Turkey and Austria. Approximately 8 years ago, he had applied for asylum in Norway and had been deported to Iran.

3 A EURODAC check revealed one category 1 hit for Norway. The Kingdom of Norway, into which admission was sought, stated by letter of 26 February 2015 that its responsibilities had ceased under Article 19(3) of the Dublin III Regulation. The applicant's application for international protection of 1 October 2008 had been rejected on 15 June 2009; he had been transferred to Iran on 19 June 2013.

4 The Federal Office for Migration and Refugees (Federal Office) continued the procedure as a secondary application procedure and asked the applicant to state the reasons why he cannot return to his country of origin.

5 By letter of his authorised representative, the applicant stated that he was asserting religious reasons for his asylum application[,] and also referred to the statement

made by his son, in the asylum procedure thereof, who had been subject to political persecution in Iran and had joined the Peschmerga in Iraq.

6 The applicant stated the following, amongst other things, in […] his hearing on 12 December 2016: His application in Norway had in particular been based on the fact that he had been of no religious belief / an atheist. His current causes of flight were connected with his son, who had joined the Democratic Party of Kurdistan. The applicant had on several occasions been pressured by the secret service to divulge the whereabouts of his son. The pressure had recently increased, causing him to flee. He was also now a Christian. **[Or. 3]**

7 By decision of 13 March 2017, the Federal Office rejected the application as inadmissible. It found that (national) deportation prohibitions under Paragraph 60(5) and the first sentence of Paragraph 60(7) of the Aufenthaltsgesetz (Residence Law; AufenthG) did not apply. It asked the applicant to leave the Federal Republic of Germany within one week of notification and threatened deportation to Iran or another country willing to receive him in case of non-compliance. The ban on entry and residence pursuant to Paragraph 11(1) AufenthG was limited to 30 months from the date of deportation.

8 The Federal Office justified the inadmissibility decision on the grounds that the asylum application was inadmissible under Paragraph 29(1) point 5 of the Asylgesetz (Asylum Law; AsylG), as it was a secondary application, for which a further procedure was not to be conducted. The new asylum application in the Federal Republic of Germany was a secondary application within the meaning of Paragraph 71a AsylG, as the applicant had already unsuccessfully pursued an asylum procedure in a safe third country — Norway — pursuant to Paragraph 26a AsylG. A further asylum procedure was not to be conducted, as the conditions of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz (Administrative Procedure Law; VwVfG) had not been met. Paragraph 51(1) VwVfG called for a conclusive statement of facts, which may not be incapable from the outset, after every reasonable consideration, of helping to establish entitlement to asylum or granting of international protection. A conclusive statement which makes a more favourable decision seem possible was therefore sufficient. The applicant's statement was not credible overall. This was explained by the Federal Office in further detail.

9 The applicant brought an action against the decision before the referring court on 18 April 2017, by which he seeks the granting of refugee status, in the alternative subsidiary protection, and in the further alternative the finding that (national) deportation prohibitions under Paragraph 60(5) and the first sentence of Paragraph 60(7) AufenthG apply.

10 The urgent application made for an order establishing the suspensive effect of the action was granted by the referring court by order of 19 June 2017 — File reference 10 B 98/17. **[Or. 4]**

II.

11 The proceedings are to be stayed. Pursuant to Article 267 TFEU, a preliminary ruling of the Court of Justice of the European Union ('the Court of Justice') must be obtained on the question set out in the operative part of the order. The question concerns the interpretation of Article 33(2)(d) and Article 2(q) 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 L 180, p. 60).

12 1. The legal assessment under national law is governed by the Asylgesetz (Asylum Law; AsylG) in the version published on 2 September 2008 (BGBl. [Federal Law Gazette] I, p. 1798), last amended by Article 45 of the Law of 15 August 2019 (BGBl. I, p. 1307).

13 The relevant legal framework of the case is formed by the following provisions of national law:

14 Paragraph 26a AsylG — Safe third countries

(1) Any foreign national who has entered the federal territory from a third country within the meaning of the first sentence of Article 16a(2) of the Basic Constitutional Law (safe third country) cannot invoke Article 16a(1) of the Basic Constitutional Law. […]

(2) In addition to the Member States of the European Union, safe third countries are those listed in Annex I. […]

15 Paragraph 29a AsylG — Inadmissible applications

(1) An application for asylum shall be inadmissible if

1. […]

5. in the case of a subsequent application under Paragraph 71 or a secondary application under Paragraph 71a, a further asylum procedure shall not be conducted. […]

16 Paragraph 71 a AsylG — Secondary application

(1) If the foreign national files an asylum application (secondary application) in the federal territory following unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a) in which European Community law on the responsibility for conducting asylum procedures applies or which has concluded an international agreement thereon with the Federal Republic of Germany, a further asylum procedure shall only **[Or. 5]** be conducted if the Federal Republic of Germany is responsible for conducting the asylum procedure and the conditions of Paragraph 51(1) to

(3) of the Administrative Procedure Law are met; this shall be examined by the Federal Office. […]

17 Paragraph 77 AsylG — Decision by the court

(1) In disputes falling within the scope of this law, the court shall take into account the situation of fact and of law obtaining at the time of the last hearing; if the decision is made without a hearing, the relevant point in time shall be that at which the decision is taken. […]

18 Annex I to Paragraph 26a AsylG

Norway

Switzerland

19 2. The question referred is relevant to the decision and requires clarification by the Court of Justice.

20 2.1 The question referred is relevant to the decision on the applicant's request. If the asylum application were to have been wrongly rejected as inadmissible, the decision would have to be annulled […].

21 2.2. The national asylum law regulates in Paragraph 71 AsylG the subsequent application and [in] Paragraph 71a AsylG the secondary application and the associated procedural treatment in contrast to the [initial application procedure]. The subsequent application under Paragraph 71 AsylG is a further asylum application after an application in the Federal Republic of Germany has already been unsuccessful. The secondary application under Paragraph 71a AsylG is a further asylum application after an application in a safe third country within the meaning [of] Paragraph 26a AsylG, these being the Member States of the EU and Norway or Switzerland, has already been unsuccessful. The spirit and purpose of Paragraph 71a AsylG is putting the secondary application on an equal footing with the subsequent application and thereby putting the third country's decision under asylum law on an equal footing with a decision under asylum law made by the Federal Republic of Germany […].

22 2.3. The question referred seeks to ascertain whether an application can be a subsequent application within the meaning of the Asylum Procedures Directive even if the unsuccessful initial procedure was not concluded in a Member State, but in Norway — a third country[,] which **[Or. 6]** participates in part in the Common European Asylum System on the basis of international law.

23 The referring court starts from the assumption that an application can be a subsequent application within the meaning of the Asylum Procedures Directive even if the unsuccessful initial procedure was concluded in another Member State […]. The referring court is of the opinion that this is not precluded by Article 40(1) of Directive 2013/32/EU, which requires further representations or a

subsequent application to be made ‘in the same Member State’. The concept of the subsequent application within the meaning of Article 40(1) of Directive 2013/32/EU is probably different to the concept of the subsequent application within the meaning of Article 2(q) of Directive 2013/32/EU: The concept of the subsequent application within the meaning of Article 2(q) of Directive 2013/32/EU requires a final decision within the meaning of Article 2(e) of Directive 2013/32/EU. The legal consequence of Article 40(1) of Directive 2013/32/EU is incompatible therewith. Consideration of the elements of the subsequent application in the scope of the examination of the previous application or the examination of the decision against which an appeal has been filed is not possible due to the finality of the decision.

24 2.3.1. According to the wording of the Asylum Procedures Directive, an application should not be a subsequent application within the meaning of Article 33(2)(d) and Article 2(q) of Directive 2013/32/EU if the preceding unsuccessful asylum procedure was conducted in a third country.

25 The applicability of Article 33(2)(d) of Directive 2013/32/EU firstly requires that the application is a subsequent application. Under Article 2(q) of Directive 2013/32/EU, ‘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)’.

26 It would seem from the requirement of a final decision on a previous application that the previous asylum procedure was concluded **in a Member State**. Firstly, the previous application should only be an application within the meaning of Article 2(b) of Directive 2013/32/EU and therefore require a request made by a third-country national or a stateless person for protection ‘from a Member State’. Secondly, the ‘final decision’ (Article 2(e) of Directive 2013/32/EU) is a decision on whether **[Or. 7]** a third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU. This implies a commitment to Directive 2011/95/EU, which can naturally only exist in respect of Member States. In addition, Article 2(e) of Directive 2013/32/EU contains an explicit reference to remaining in the **Member State concerned**.

27 The assumption that (unsuccessful) asylum procedures in third countries lead to a subsequent application for international protection is also undermined by the general regulatory structure of the Asylum Procedures Directive. The Asylum Procedures Directive explicitly states when a right of asylum effect can be attached to third-country-related situations (see for instance the country concepts under Articles 35, 38 and 39 of Directive 2013/32/EU).

28 Norway is not a Member State of the EU and therefore not directly bound to Directive 2013/32/EU and Directive 2011/95/EU.

29 As far as is apparent, Norway is also not put on an equal footing with a Member State by any other legal act. In particular, Article 1(4) of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway of 19 January 2001 (OJ L 93, p. 40) — Association Agreement — only leads to limited parity with the Member States with regard to the Dublin Regulation and the Eurodac Regulation.

30 2.3.2. However, the referring court is inclined to think that the Asylum Procedures Directive is to be interpreted broadly against the background of Norway's partial association.

31 On account of the aforementioned Association Agreement, Norway participates in the Dublin responsibility system, now under the Dublin III Regulation. Norway ordered that the Dublin III Regulation was to apply as Norwegian law (see section 32 paragraph 4 of the Immigration Act; English-language version available at: https://lovdata.no/dokument/NLE/lov/2008-05-15-35). Although Norway is not bound to the Reception Directive, the Asylum Procedures Directive and the Qualification Directive, the continuing involvement of Norway in the Dublin responsibility system is based on the assumption that the Norwegian asylum system is equivalent to the provisions of EU law in its substantive level of protection and in its procedural configuration and that this is sufficient. Otherwise, Norway would not be able **[Or. 8]** to fulfil its obligation under Article 3(1) in conjunction with Article 2(d) of the Dublin III Regulation. It does not appear to matter that Norway's asylum law does not contain any elements which correspond literally with Article 15(c) of Directive 2011/95/EU, as this 'loophole' may be dealt with by the elements of section 28 paragraph 1 (b) of the Immigration Act, which corresponds to Article 3 ECHR.

32 Against this background, it would be contrary to the spirit and purpose of the Common European Asylum System — and Norway's corresponding involvement therein — if applicants for asylum in the scope of the Dublin system can be transferred to Norway for examination of their application for international protection, but the Member States should nevertheless be obliged to conduct a full initial asylum procedure following unsuccessful conclusion of the asylum procedure there, and when Norway's responsibilities under the Dublin Regulation do not apply.

[…]