Anonymised version

Case C-91/20

Request for a preliminary ruling

Date lodged:

24 February 2020

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

18 December 2019

Applicant and appellant on a point of law:

LW

Defendant and respondent on a point of law:

Bundesrepublik Deutschland

Copy

Bundesverwaltungsgericht (Federal Administrative Court, Germany)

ORDER

[…]

VG5K511/18.A

delivered on
18 December 2019
[…]

In the administrative-law case

LW, a minor child,

legally represented by her parents,

[…]

applicant and appellant on a point of law,

[…] **[Or. 2]**

v

Bundesrepublik Deutschland,

[…]

defendant and respondent on a point of law,

the First Chamber of the Federal Administrative Court

further to the hearing on 18 December 2019

[…]

has made the following order:

The proceedings are stayed.

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

1. Is Article 3 of Directive 2011/95/EU to be interpreted as meaning that it precludes a provision enacted by a Member State to the effect that the unmarried minor child of a person who has been granted refugee status must be granted refugee status derived from that person (that is to say, protection as a family member of a refugee) even in the case where that child — by virtue of the other parent — is, in any event, also a national of another country which is not the same as the refugee's country of origin and the protection of which that child is able to avail itself of?

2. Is Article 23(2) of Directive 2011/95/EU to be interpreted as meaning that, in the circumstances set out in question 1, the restriction whereby the entitlement of family members to claim the benefits referred to in Articles 24 to 35 of that directive is to be granted only as far as is compatible with the personal legal status of the family member

prohibits the minor child from being granted refugee status derived from the person recognised as a refugee? **[Or. 3]**

3. In providing an answer to questions 1 and 2, is it material whether or not it is possible and reasonable for the child and its parents to take up residence in the country of which the child and the mother are nationals, the protection of which they are able to avail themselves of and which is not the same as the refugee's (father's) country of origin, or is it sufficient that family unity in Germany can be maintained on the basis of the rules governing the right of residence?

G r o u n d s:

I

1 The applicant, who was born on […] 2017 in Germany, is applying for refugee status as a family member. She is, in any event, a Tunisian national. It has not been established by the court adjudicating on the substance of the case whether she also holds Syrian nationality.

2 The applicant's mother, who was born in Libya, is a Tunisian national. In her application for asylum, the applicant stated that, up until she left the country, she was habitually resident in Libya. Her application for asylum was unsuccessful. The applicant's father is, by his account, a Syrian national of Arabic ethnicity and Muslim faith. He was granted refugee status in October 2015.

3 By decision of 15 September 2017, the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) ('the Bundesamt') rejected the applicant's asylum application as manifestly unfounded.

4 By the judgment under appeal of 17 January 2019, the Verwaltungsgericht Cottbus (Administrative Court, Cottbus, Germany) annulled the decision of 15 September 2017 in so far as the applicant's application to be granted protection as a refugee was rejected as manifestly unfounded and not as merely unfounded, but dismissed the remainder of the action. The applicant does not fulfil the conditions governing the grant of refugee status since she has no reason to have a well-founded fear of being persecuted in Tunisia, 'her **[Or. 4]** State of origin — or one of them in any event'. The principle of subsidiarity in relation to international protection for refugees states that, if she has a well-founded fear of being persecuted in Syria, she must be instructed to avail herself of the protection available from Tunisia, of which she is a national. Neither is she eligible for protection as a family member of a refugee, in accordance with the first sentence of Paragraph 26(5) of the Asylgesetz (Law on Asylum; 'AsylG') in conjunction with Paragraph 26(2) thereof, on the basis of the protection which her Syrian father enjoys as a refugee in Germany. For it is contrary to higher-ranking EU law, and in particular to the principle of subsidiarity, which applies in EU law too and is a general principle of asylum law and international refugee law, to extend international protection to persons — like the applicant — who, on account not

least of their personal status as a national of another State that is able to protect them, and thus effectively by definition, do not require protection.

5 In support of her appeal on a point of law, the applicant states that she is a Tunisian national. She submits that minor children born of parents having different national origins must be granted refugee status as a family members, in accordance with Paragraph 26(2) of the AsylG in conjunction with Paragraph 26(5) thereof, even in the case where only one parent has been granted refugee status. This is not precluded by the principle of subsidiarity in relation to international protection for refugees. Article 3 of Directive 2011/95/EU allows a Member State, in cases where a family member is granted international protection, to provide for that protection to be extended to other members of that family, in so far as the latter are not caught by one of the grounds for exclusion laid down in Article 12 of Directive 2011/95/EU and in so far as their situation exhibits a connection with the rationale of international protection by virtue of the need to maintain family unity. Legislation must take particular account of the protection of minors and the best interests of the child. This also follows from Articles 3, 9, 18 and 22 of, and the preamble to, the UN Convention on the Rights of the Child and the corresponding Joint Comment of 16 November 2017.

6 The defendant defends the judgment under appeal. **[Or. 5]**

II.

7 The proceedings must be stayed. In accordance with Article 267 TFEU, a reference is to be made to the Court of Justice of the European Union (‘the Court of Justice’) for a preliminary ruling on the questions set out in the operative part of this order. Those questions concern the interpretation of Articles 3 and 23(2) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9) (‘Directive 2011/95/EU’).

8 1. In German law, the legal assessment of this case is governed by the Asylgesetz (‘AsylG’), in the version published on 2 September 2008 (BGBl. I, p. 1798), as last amended by Article 48 of the Law of 20 November 2019 (BGBl. I p. 1626). The first clause of the first sentence of Paragraph 77(1) of the AsylG provides that, in disputes falling within the scope of the AsylG, the court must rely on the situation of fact and of law obtaining at the time of the last hearing.

9 The relevant legal framework for this case is thus formed by the following provisions of national law:

Paragraph 3 of the AsylG

(1) A foreign national is a refugee within the meaning of the Convention of 28 July 1951 on the legal status of refugees […] if,

1. owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group,

2. he resides outside the country (country of origin), (a) of which he is a national and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country

…

Paragraph 26 of the AsylG

…

(2) A child of a person entitled to asylum who is unmarried and a minor at the time when the asylum application is filed shall, on request, be recognised as being entitled to asylum if the recognition **[Or. 6]** of the foreign national as being entitled to asylum is incontestable and not amenable to revocation or withdrawal.

…

(5) The provisions of subparagraphs 1 to 4 shall apply *mutatis mutandis* to family members, within the meaning of subparagraphs 1 to 3, of persons entitled to international protection. Entitlement to asylum shall be replaced by refugee status or subsidiary protection. …

…

10 2. The questions referred for a preliminary ruling are material to the judgment to be given and require clarification by the Court of Justice.

11 2.1 The questions referred for a preliminary ruling are material to the decision on the applicant's application for refugee status.

12 (a) The applicant does not qualify for refugee status in her own right (Paragraph 3(4) of the AsylG).

13 Persons having two or more nationalities cannot be granted refugee status if they are able to avail themselves of the protection of one of the countries of which they are a national […]. This follows from the second subparagraph of Article 1(A)(2) of the Convention relating to the Status of Refugees of 28 July 1951 ('the Geneva Convention'), as amended by the New York Protocol of 31 January 1967 […], which sets out the principle of subsidiarity in relation to international protection for refugees. In accordance with that provision, a person must not be deemed to be lacking the protection of the country of his or her nationality if, without any valid reason based on well-founded fear, that person has not availed himself or herself of the protection of one of the countries of which he or she is a national. Even persons having only one nationality who have a well-founded fear of persecution

in relation to another State (for example, the State of former habitual residence) must generally be instructed to avail themselves of the existing protection available from the State of which they are nationals (first subparagraph of Article 1(A)(2) of the Geneva Convention). Article 2(d) and (n) of Directive 2011/95/EU and Paragraph 3(1) of the AsylG must also be interpreted to that effect. Accordingly, only persons who are unprotected because they benefit from no effective protection by a country of origin **[Or. 7]** within the meaning of Article 2(n) of Directive 2011/95/EU are refugees within the meaning of Article 2(d) of Directive 2011/95/EU […]. In accordance with those principles, the applicant does not qualify for refugee status owing to a well-founded fear of being persecuted. This is because the applicant is able to obtain effective protection from the Republic of Tunisia, a country of which she is a national. There is no evidence that the Republic of Tunisia would not be willing and able to grant the applicant the necessary protection against persecution and removal to Syria, the country of origin of her father, who has been recognised as a refugee, or to a third State (chain removal).

14 (b) However, the minor applicant fulfils the conditions laid down in the first and second sentences of Paragraph 26(5) of the AsylG in conjunction with Paragraph 26(2) thereof for the grant of refugee status to the unmarried minor children of a parent recognised as a refugee. Her father, who, by his account, is Syrian, was granted refugee status. Paragraph 26(2) of the AsylG in conjunction with the first and second sentences of Paragraph 26(5) thereof covers children of a recognised refugee even if they were born in Germany. The parent-child relationship does not need to have pre-existed in the State in which the refugee is persecuted. Subject to EU law, the national law must be interpreted as meaning that protection as a family member of a refugee must be granted even in the case where the family member is (also) a national of a State where they do not face persecution.

15 2.2 The questions referred for a preliminary ruling require clarification by the Court of Justice.

16 (a) By the first question referred for a preliminary ruling, the national court wishes to ascertain whether, in a situation such as that at issue in the main proceedings, Article 3 of Directive 2011/95/EU must be interpreted as meaning that it precludes the rules laid down in Paragraph 26(2) in conjunction with the first and second sentences of Paragraph 26(5) AsylG, in accordance with which the national authorities are required to grant to the unmarried minor child of a recognised refugee the refugee status derived from that recognised refugee, even in the case where the child and his other parent are nationals of another **[Or. 8]** country which is not the same as the recognised refugee's country of origin and of whose protection they are able to avail themselves.

17 Article 3 of Directive 2011/95/EU allows the Member States to introduce more favourable standards for determining who qualifies as a refugee, in so far as those standards are compatible with that directive.

18 (aa) It is clear from the case-law of the Court of Justice that a more favourable standard is compatible with Directive 2011/95/EU if it does not jeopardise the general scheme or the objectives of the directive. National standards which provide for the grant of refugee status to third country nationals or stateless persons in situations which have no connection with the rationale of international protection are not compatible (judgment of the Court of Justice of 18 December 2014, *M'Bodj*, C-542/13, EU:C:2014:2452, paragraph 44). Circumstances in which such a connection with the rationale of international protection is lacking are set out in the grounds for exclusion laid down in Article 12 of Directive 2011/95/EU. Thus, for example, the reservation in Article 3 of Directive 2011/95/EU precludes national provisions on the basis of which refugee status is granted to persons who are excluded from that status pursuant to Article 12(2) of Directive 2011/95/EU (judgment of the Court of Justice of 9 November 2010, *B and D*, C-57/09 and C-101/09, EU:C:2010:611, paragraph 115). Where family members of a recognised refugee are not caught by any of the grounds for exclusion laid down in Article 12 of Directive 2011/95/EU and their situation is, due to the need to maintain family unity, consistent with the rationale of international protection, Article 3 of Directive 2011/95/EU allows a Member State to extend that protection to other family members (judgment of the Court of Justice of 4 October 2018, *Ahmedbekova and Ahmedbekov*, C-652/16, EU:C:2018:801, paragraph 74).

19 The extension of international protection to close family members of a beneficiary of international protection, which is provided for by Paragraph 26 of the AsylG irrespective of whether the person concerned has grounds for requiring protection in his or her own right too, has a dual function under national law. First, it flows from the experience that, when combating opposition forces, intolerant States, rather than **[Or. 9]** targeting a political opponent they cannot apprehend, tend to focus on persons who are particularly close to that persecuted individual, in order to achieve their goal of suppressing dissenting opinions in one way or another […]. That correlation is highlighted in recital 36 of Directive 2011/95/EU. For the State of origin of the family member already recognised as the principal beneficiary of protection, it generally makes no difference in that regard whether the additional family member is a national of another State in which he or she is safe from persecution. Secondly, Paragraph 26 of the AsylG 'overtransposes' in a manner not required by EU law the protection which Article 23(2) of Directive 2011/95/EU requires to be afforded to family members who do not themselves qualify for such protection. The national legislature does not ensure that such persons receive the benefits referred to in Articles 24 to 35 of Directive 2011/95/EU by means of individual provisions. In order to preserve family unity, it does so by extending the status enjoyed by the beneficiary of international protection to the other members of that person's family too, and — with the exception of persons who satisfy the personal grounds for exclusion under Article 12(2) of Directive 2011/95/EU (Paragraph 26(4) of the AsylG) — irrespective of whether the family members have any grounds for requiring protection in their own right. In the light of that dual function, the automatic granting of refugee status, under national law, to the family members of a person

to whom that status was granted under Directive 2011/95/EU, in any event generally exhibits a connection with the rationale of international protection (judgment of the Court of Justice of 4 October 2018, C-652/16, paragraph 72).

20 (bb) It is necessary, however, to ascertain from the Court of Justice whether, under EU law, it is consistent with the general scheme and objectives of Directive 2011/95/EU to grant protection as a family member of a refugee even to third-country family members of a recognised refugee who are nationals of another country which is not the same as the refugee's country of origin and the protection of which they are able to avail themselves of, or whether this is incompatible with their personal legal status. **[Or. 10]**

21 (1) Various provisions of Directive 2011/95/EU and of the Geneva Convention, each of which reflects the principle of subsidiarity in relation to international protection for refugees, might indicate that the foregoing is incompatible. According to recital 4 of Directive 2011/95/EU, the Geneva Convention, as amended by the New York Protocol of 31 January 1967, provides the cornerstone of the international legal regime for the protection of refugees. The first subparagraph of Article 1(A)(2) of the Geneva Convention states that, for the purposes of that convention, the term 'refugee' is to apply to any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. The first clause of the second subparagraph of Article 1(A)(2) of the Geneva Convention provides that, in the case of a person who has more than one nationality, the term 'the country of his [or her] nationality' is to mean each of the countries of which that person is a national. In accordance with the second clause of the second subparagraph of Article 1(A)(2) of the Geneva Convention, a person must not be deemed to be lacking the protection of the country of his or her nationality if, without any valid reason based on well-founded fear, that person has not availed himself or herself of the protection of one of the countries of which that person is a national. Article 1(A)(2) of the Geneva Convention is an expression of the principle of subsidiarity in relation to international protection for refugees.

22 That principle is reflected in the recitals of Directive 2011/95/EU. According to recital 12 of Directive 2011/95/EU, the main objective of that directive is, inter alia, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection. In accordance with recital 15 of Directive 2011/95/EU, those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of that directive (see also, in that regard, judgment of the Court of Justice of 18 December 2014, C-542/13, paragraph 46).

23 From the point of view of substantive law, the principle of international subsidiarity is also expressed in Article 2(d) of Directive 2011/95/EU. The same **[Or. 11]** is true of Article [11](1)(c) of Directive 2011/95/EU. The cessation clause clearly indicates that a person who enjoys the protection of his or her own country is not in need of international protection (UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011 version (German version, 2013), paragraph 129). The final clause of Article 23(2) of Directive 2011/95/EU is also regarded by some as a substantive-law expression of the principle of subsidiarity in relation to international protection for refugees. In this respect, personal legal status ('persönliche Rechtsstellung'/'statut juridique personnel') includes possession of a different or an additional nationality ([…] see to that effect, inter alia, the Conseil du Contentieux des Etrangers (Council for asylum and immigration proceedings, Belgium), according to which Article 23 of Directive 2011/95/EU reminds the Member States of the need to take into account the personal legal status of the family member '(e.g. a different nationality)'. See European Asylum Support Office, *Qualification for International Protection (Directive 2011/95/EU) A Judicial Analysis*, 2018, p. 97, footnote 640). Compatibility with the personal legal status of the family member is addressed by the UN High Commissioner for Refugees in paragraph 184 of the '*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*', which is not legally binding but, in accordance with recital 22 of Directive 2011/95/EU, is nevertheless to be taken into account as an aid to interpretation for the purposes of achieving uniformity in the application of the law. That paragraph states, in relation to the second clause of the second subparagraph of Article 1(A)(2) of the Geneva Convention:

> 'If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant **[Or. 12]** him refugee status in such circumstances would not be called for.'

(see also, to that effect, UNHCR Standing Committee, *Family Protection Issues*, document EC/49/SC/CRP.14 of 4 June 1999, point 9, https://www.unhcr.org/fr/excom/standcom/4b30a6i8e/questions-relatives-protection-famille.html).

24 Under Article 4(3)(e) of Directive 2011/95/EU, the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account whether the applicant could reasonably be expected to avail

himself or herself of the protection of another country where he or she could assert citizenship. That standard transposes substantive conditions laid down elsewhere to an assessment by the authorities which, in the light of Article 1(A)(2) of the Geneva Convention, is concerned in particular with the requirement to investigate whether the applicant has more than one nationality […].

25 From a procedural point of view, the principle of subsidiarity in relation to international protection for refugees is expressed, inter alia, in Article 33(2)(b) of Directive 2013/32/EU and subparagraph (b) of the first sentence of Article 35 thereof.

26 The foregoing considerations might indicate that it is contrary to the directive for national law to provide for refugee status to be automatically extended to a family member who is a national of another country which is not the same as the refugee's country of origin and the protection of which that person is able to avail himself or herself of. This would mean that the safeguarding of family unity in such a way as to preserve the rights arising from Article 23(2) of Directive 2011/95/EU cannot be ensured — as it is under national law — by granting refugee status on the basis of Directive 2011/95/EU, but must be achieved by issuing a residence permit in accordance with the conditions laid down in the provisions on family reunification contained in the Aufenthaltsgesetz (Law on Residence). **[Or. 13]**

27 (2) Militating in favour of the compatibility of extending refugee protection to the applicant notwithstanding her Tunisian nationality, by contrast, is the fact that hers is a derived refugee status, which, conversely, does not require family members to satisfy the criteria governing refugee status (Article 2(d) of Directive 2011/95/EU) in their own right. If it is compatible with the directive to grant derived refugee status to family members even in the case where it is established that those family members have no reason to have a well-founded fear of being persecuted, it is difficult to explain why the existence of a country of origin affording protection which is not the same as the refugee's country of origin should preclude entitlement to the grant of (derived) refugee status. After all, the ability [of family members] to avail themselves of the protection of the country of origin does not — contrary to the definition of 'refugee' — constitute a ground for exclusion. Even in this scenario, therefore, extending protection to the family member may, not least on account of the need to maintain family unity, exhibit a sufficient connection with the rationale of the international protection granted to the refugee. The question of whether family unity in the refugee's country of refuge could also be ensured by the issue of a residence permit to the family member was not considered by the Court of Justice in *Ahmedbekova* (see judgment of the Court of Justice of 4 October 2018, C-652/16, paragraph 73).

28 (b) It also falls to be ascertained what significance is to be attached to the reservation contained in Article 23(2) of Directive 2011/95/EU with respect to compatibility with the personal legal status of the family member. The reservation as regards compatibility with the personal legal status originates from an

amendment proposed by the European Parliament to the European Commission's proposal for what became Directive 2004/83/EC. The wording 'unless that status is incompatible with their existing status' was explained as meaning that some family members may have a separate and different legal status that may not be compatible with international protection status (Report by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, 8 October 2002 (COM(2001)510 — C5-0573/2001 — 2001/0207(CNS), p. 18, Amendment 22). **[Or. 14]**

29 The UNHCR interprets that reservation as meaning that there are situations where the principle of derived status should not be observed, that is to say where family members wish to apply for asylum in their own right, or where the grant of derived status would be incompatible with their personal status, for example if they are nationals of the host country, or because their nationality entitles them to a better standard (*UNHCR Annotated Comments on the EC 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 L 304/12 of 30.9.2004)*, p. 38, with regard to Article 23(1) to (2)).

30 Legal commentators argue that that reservation is directed only at nationals of the host Member State or of another Member State of the European Union or at third-country nationals with a long-term right of residence […]. However, this cannot be inferred with the requisite clarity from Article 23(2) of Directive 2011/95/EU. The question therefore arises as to whether the reservation in Article 23(2) of Directive 2011/95/EU excludes family members, who are nationals of a third country which is not the same as the refugee's country of origin and the protection of which they are able to avail themselves of, from entitlement to the benefits referred to in Articles 24 to 35 of Directive 2011/95/EU and whether it thereby refers in essence to the preservation of family unity in accordance with the law governing foreign nationals.

31 (c) In the referring court's view, it falls finally to be ascertained to what extent, in providing answers to questions 1 and 2, it is material whether, in the light of the refugee status enjoyed by one parent and in the factual circumstances of the individual case, it is possible and reasonable for the unmarried minor child and its parents to take up residence in the country **[Or. 15]** of which the child and one parent are nationals, the protection of which they are able to avail themselves of and which is not the same as the country of origin of the other parent, who is recognised as a refugee. It must be borne in mind in this regard that, under German law, family unity in the host Member State can, in principle, also be maintained on the basis of the provisions on family reunification contained in the Law on Residence, although this does not provide for an unconditional right covering all conceivable cases.

32 It would be impossible for the refugee to take up residence in the country of which his or her family members are nationals if, for example, he or she had already

been refused entry to that country. It would any event be unreasonable for that person to do so if he or she had reason to fear of being removed to the State of persecution or exposed to the risk of removal to a third State (chain removal) (principle of *non-refoulement*). In the situation in the present case, however, such a course of action may be unreasonable not least because a refugee recognised in a Member State is supposed to be able to exercise with immediate effect — not only a mere right of residence but also — all the rights associated with the status of refugee; that person can do this automatically only in the State which has granted him or her refugee status (see also order of the Court of Justice of 13 November 2019, *Hamed and Omar*, C-540/17 and C-541/17, EU:C:2019:964, paragraph 40). Neither is it clear whether account is also to be taken in this regard of other individual circumstances which, in the context of the facts of the case, make it seem impossible or unreasonable for the refugee, the unmarried minor child or the other parent to take up residence. The principle of proportionality might militate in favour of doing so.

[…]