

**Case C-921/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

16 December 2019

**Referring court:**

Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (Netherlands)

**Date of the decision to refer:**

16 December 2019

**Applicant:**

LH

**Defendant:**

Staatssecretaris van Justitie en Veiligheid

**Subject of the action in the main proceedings**

The action in the main proceedings concerns a ‘subsequent application’ for international protection within the meaning of Article 2(q) of Directive 2013/32 (‘the Procedures Directive’). The question is whether, in such an application, the defendant may disregard documents the authenticity of which cannot be proved.

**Subject and legal basis of the request for a preliminary ruling**

By the present request under Article 267 TFEU, the referring court seeks to ascertain whether documents which have not been shown to be authentic can, for that reason alone, be deemed not to be covered by the term ‘new elements or findings’ referred to in Article 40 of the Procedures Directive.

**Questions referred**

I Is the determination by a determining authority of a Member State that original documents can never constitute new elements or findings if the

authenticity of those documents cannot be established compatible with Article 40(2) of the Procedures Directive,<sup>1</sup> read in conjunction with Article 4(2) of the Qualification Directive<sup>2</sup> and Articles 47 and 52 of the Charter of Fundamental Rights of the European Union? If not, does it make any difference if, in a subsequent application, copies of documents or documents originating from a non-objectively verifiable source are submitted by the applicant?

II Must Article 40 of the Procedures Directive, read in conjunction with Article 4(2) of the Qualification Directive, be interpreted as allowing the determining authority of a Member State, when assessing documents and assigning probative value to documents, to distinguish between documents submitted in an initial application and those submitted in a subsequent application? Is it permissible for a Member State, when submitting documents in a subsequent application, no longer to comply with the obligation to cooperate if the authenticity of those documents cannot be established?

### **Provisions of EU law cited**

Charter of Fundamental Rights of the European Union, Articles 18, 19, 47, 52.

Directive 2011/95/EU (Qualification Directive), Article 4.

Directive 2013/32/EU (Procedures Directive), recitals 36 to 60 and Articles 33, 34, 40, 42.

### **Provisions of national law cited**

Vreemdelingenwet 2000 (Law on Foreign Nationals 2000), Article 30a.

Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000), Article 3.118b.

Vreemdelingen circulaire 2000 (Circular on Foreign Nationals 2000), paragraph C1/2.9.

### **Brief summary of the facts and the procedure in the main proceedings**

- 1 L.H. ('the applicant') is an Afghan national. On 8 December 2015, he lodged an asylum application in the Netherlands. During the asylum procedure he claimed

<sup>1</sup> 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 (the Procedures Directive).

<sup>2</sup> 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 (the Qualification Directive).

that, while working as a driver for a senior official, he was ambushed by the Taliban on a number of occasions and moreover was personally threatened. The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; ‘the defendant’) deemed his statements about the ambushes credible, but not those about the individual threats. His asylum application was therefore rejected. His appeal against that rejection was dismissed, as was the higher appeal.

- 2 On 26 September 2018, the applicant lodged a ‘subsequent application’ for international protection within the meaning of Article 2(q) of the Procedures Directive. The original asylum application, with the same factual background, was considered again in this new procedure. The applicant again tried to substantiate the individual threats by the Taliban that he had put forward in the first procedure. He claimed to have come into possession of new documents, including originals the copies of which he had submitted in the previous procedure. These were primarily documents from the Afghan fire brigade and the ministry for which the applicant had worked.
- 3 Under Article 40(2) of the Procedural Directive, a subsequent request is admissible only if there are new elements or findings to be considered. According to the defendant, that can be the case only if the newly submitted documents were demonstrated to be authentic. That is the reason why the defendant had the documents examined. The government service used for that purpose, however, did not have at its disposal reference material by which it could be determined whether the original documents had been drawn up by a competent authority. Nor was it possible to rule on their authenticity and substantive accuracy. The defendant accordingly declared the asylum application inadmissible.

### **Main submissions of the parties to the main proceedings**

- 4 The parties are divided as to whether original documents the authenticity of which has not been established may be automatically disregarded or whether there should be an assessment of any probative value that may nevertheless be attached to the documents for the substantiation of an asylum claim in a subsequent procedure.
- 5 According to the applicant, it is unreasonable to place the burden of proof regarding the authenticity of the original documents solely on him and to disregard those documents automatically if he does not succeed in doing so. The documents relate to the core of the reasons for making the asylum claim (*‘asielrelaas’*) and, in the initial procedure, crucial parts of it were deemed credible. Moreover, he has stated in writing how he obtained those documents and why he had initially been unable to access them. According to the applicant, it is contrary to European law, in particular, to the principle of effectiveness, to exclude certain categories of evidence in subsequent applications.
- 6 In adopting the decision and in its statement of defence, the defendant relied exclusively on the position that there were no new elements or findings. In

accordance with national regulations and with its own policy, in force since 1 July 2019, the applicant was not afforded the opportunity to present his views again in person. The defendant did not comment on the content and probative value of the documents, or on the fact that the applicant's reasons for making the asylum claim were considered to be largely credible. Only at the hearing did the defendant, in response to the discussion on its position, take a substantive position in the alternative on the content and probative value of the documents. The question referred for a preliminary ruling concerns the primary position that there are new elements only if the documents are demonstrably authentic.

### **Brief summary of the reasons for the referral**

- 7 The referring court states that, according to the settled case-law of inter alia 2015 of the Afdeling bestuursrechtspraak (Chamber for Contentious Administrative Proceedings; 'the Afdeling') of the Raad van State (Council of State), the highest administrative court in immigration cases in the Netherlands, there are no new elements or findings if the documents submitted by a foreign national are not demonstrably authentic. The burden of proof rests on the foreign national. The defendant can be facilitate a foreign national by having the authenticity of the documents assessed, but that in no way affects the latter's own responsibility. In 2018, the Afdeling also ruled that the judgment of the European Court of Human Rights ('the ECtHR') of 19 January 2016, *M.D. and M.A. v Belgium* (CE:ECHR:2016:0119JUD005868912), does not alter that ruling.
- 8 The referring court, on the contrary, is of the view that it follows from the judgment in *M.D. and M.A. v Belgium* that the defendant must carefully and thoroughly investigate a possible breach of Article 3 ECHR and that rejecting documents without assessing their authenticity, relevance and probative value is too formalistic an approach. Referring to the aforementioned case-law of the Afdeling, the defendant states that he did not in fact act contrary to Article 3 ECHR since he had the authenticity of the documents investigated but, according to the referring court, that is not sufficient. In its opinion, it is also a formalistic approach not to take into account the content of documents merely because, following an investigation, it is not possible to rule on their authenticity.
- 9 Even if the authenticity of the documents in question cannot be established, the defendant will have to take into account, on the basis of the *M.D. and M.A. v Belgium* judgment, the nature of those documents, the manner in which the applicant obtained them and their relevance to the asylum claim. By considering all those factors in combination with the uncertainty about their authenticity, it is possible to give a careful judgment about the probative value of the documents and thus to answer the question whether there are new facts and circumstances.
- 10 According to the referring court, it is also apparent from other judgments of the ECtHR that, if a foreign national claims to fear a breach of Article 3 of the ECHR,

available documents must be used and their content taken into account.<sup>3</sup> Those judgments stemmed from cases involving initial applications. It is not apparent from the wording of those judgments, however, that the grounds considered relate solely to the obligations of Member States during initial applications. On the contrary, the ECtHR appears to have formulated general principles for the assessment of documents submitted by applicants for international protection to substantiate their asylum claim. It can also be inferred from this that Member States must ensure that foreign nationals who must substantiate their fear of human rights violations do not have to satisfy excessively high requirements. Member States will have to take into account the position in which those foreign nationals find themselves.

- 11 In those circumstances, the question arises as to how the term ‘new elements or findings’ in Article 40 of the Procedures Directive is to be interpreted. Several provisions of the Procedures Directive contain the term ‘element’ without defining it. Some provisions refer to the definition of the term ‘elements’ in Article 4 of the Qualification Directive, which states that this covers ‘all the documentation at the applicant’s disposal’. The referring court assumes that that definition is also relevant for the interpretation of the term ‘element’ in Article 40 of the Procedures Directive. Article 4 of the Qualification Directive makes no distinction between elements in initial and subsequent procedures. Nor is it stipulated that only demonstrably authentic documents can constitute an element.
- 12 The referring court considers it relevant for this reference for a preliminary ruling that the Procedures Directive and the Qualification Directive must be interpreted in accordance with the Charter of Fundamental Rights of the European Union. If original documents cannot be substantively assessed solely because their authenticity cannot be established, that may be contrary to the right to asylum, the prohibition of refoulement and the right to an effective remedy as laid down in Articles 18, 19 and 47 of the Charter. When interpreting those provisions, Articles 3 and 13 ECHR must be taken into account, as is apparent from Article 52(3) of the Charter.
- 13 If it is correct that, in the same manner as in that ECtHR case-law, it must be assessed whether there are new elements or findings within the meaning of Article 40(2) of the Procedures Directive, the referring court is of the view that it is contrary to EU law if original documents are set aside without regard to their nature, to the manner of their acquisition and to their relevance to the asylum claim.

<sup>3</sup> For example, ECtHR, 18 December 2012, *F.N. v Sweden*, CE:ECHR:2012:1218JUD002877409; ECtHR 18 November 2014, *M.A. v Switzerland*, CE:ECHR:2014:1118JUD005258913, and ECtHR, 2 October 2012, *Singh v Belgium*, CE:ECHR:2012:1002JUD003321011.

- 14 The referring court also wishes to ascertain whether, when assessing documents, it is justified to make a distinction between the submission of original documents in an initial application and in subsequent applications. Current Netherlands practice takes into account only documents whose authenticity is uncertain in the case of first applications. In the case of a subsequent asylum procedure, uncertainty about authenticity in itself constitutes a reason to conclude that there are no new elements or findings, which results in the application being inadmissible. In that case, the submission of a copy or a document whose origin cannot be checked automatically results in inadmissibility.
- 15 The referring court doubts whether that practice complies with European law. Indeed, it is not ruled out that information the provenance of which cannot be checked or which is evidenced by a copy of the document can nevertheless be assessed and can be included as objective information in the assessment of the subsequent request. Moreover, the defendant's policy of not taking into account, in such an application, original documents the authenticity of which has not been established, means that a decision can be taken without the asylum applicant being heard and without the defendant having to comment on the nature, relevance and method of acquiring the documents.
- 16 The Afdeling has never given a clear ruling on whether it is contrary to European law to declare a subsequent application inadmissible simply because of the inability to establish the authenticity of original documents submitted. The issue of whether it is permitted for a foreign national not to be heard if those documents are disregarded has not been addressed, either. The Afdeling has always confined itself to the opinion that, with the earlier asylum procedure, it has already been established according to law that the asylum claim is not credible and that this is also taken into account by the defendant in the position taken on the original documents the authenticity of which has not been established. Nowhere has the Afdeling assessed whether the term 'new elements or findings' should be interpreted in such a restrictive way that such documents need never be included in that definition and may therefore be disregarded. According to the referring court, the Afdeling thus failed to provide adequate reasons for its finding that documents that are not demonstrably authentic can be excluded.
- 17 Since the highest administrative court has not yet ruled on the term 'new elements or findings', the referring court wishes to ascertain from the Court of Justice of the EU ('the Court of Justice') whether that term must be interpreted in such a restrictive way that original documents the authenticity of which has not been established need not be included under that definition. Previous case-law of the Court of Justice as well as Article 40 of the Procedures Directive and Article 4 of the Qualification Directive do not provide a definitive answer.
- 18 The referring court also notes that subsequent applications will be unlikely if the foreign national, based in the country where he is seeking protection, will still have to obtain authentic documents in order to substantiate his subsequent application. Nor is it to be expected that a foreign national will be able to

substantiate a subsequent application solely by means of his statements in such a way that he would still be eligible for protection. After all, a foreign national is deemed to make a complete statement in the initial procedure and also capable of doing so. The referring court emphasises in that regard that, in the Netherlands, a personal interview with the foreign national can now be dispensed with if a subsequent application is based only on documents the authenticity of which has not been established. The foreign national may therefore not even have the opportunity to substantiate his asylum claim by means of statements.

- 19 In the light of the foregoing, the referring court proposes that the Court of Justice answer the questions referred for a preliminary ruling as follows:
- 20 *I* ‘Member States are not permitted to provide that original documents can never constitute new elements or findings as referred to in Article 40(2) of the Procedures Directive solely because the authenticity of those documents has not been established. Member States are not permitted to provide that documents will never be assessed in terms of content solely because they are copies or because the document originates from a non-objectively verifiable source.’
- 21 *II* ‘Member States are not permitted to differentiate between the assessment and evaluation of documents submitted in an initial application and documents submitted in a subsequent application. All documents submitted must, in principle, be involved in the assessment of whether an applicant for recognition as a beneficiary of international protection is eligible under Directive 2011/95/EU, even if documents are submitted in a subsequent application. In the case of a subsequent application, the Member State cannot stipulate that it remains the sole responsibility of the applicant to demonstrate the authenticity of original documents, but shall, under certain circumstances, also have to fulfil the duty of cooperation, taking into account the nature and content of the documents and statements on the manner in which they were obtained and thus assessing whether they should be regarded as *prima facie* evidence.’