Case C-18/20

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 January 2020

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

18 December 2019

Appellant on a point of law:

XY

Respondent authority:

Bundesamt für Fremdenwesen und Asyl

Subject matter of the main proceedings

Asylum law — New elements or findings — Scope — Re-opening of the procedure — Incorrect transposition of the directive

Subject matter and legal basis of the request

Interpretation 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 (hereinafter also 'the Procedures Directive'), Article 267 TFEU

Questions referred

1. Do the phrases 'new elements or findings' that 'have arisen or have been presented by the applicant' in Article 40(2) and 40(3) 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 (recast) ('the

Procedures Directive') also cover circumstances that already existed before the previous asylum procedure was definitively concluded?

If the answer to Question 1 is in the affirmative:

2. In a case in which new facts or evidence come to light which could not have been relied on in the earlier procedure through no fault of the foreign national, is it sufficient that an asylum applicant is able to request the re-opening of a previous procedure which has been definitively concluded?

3. If the applicant is at fault for not having relied in the previous asylum procedure upon the newly invoked grounds, is the authority allowed to deny substantive examination of a subsequent application on the basis of a national standard laying down a principle which is generally applicable in the administrative procedure, even though, in the absence of the adoption of special standards, the Member State has not correctly transposed Article 40(2) and 40(3) of the Procedures Directive and, as a consequence, has also not made express use of the possibility granted by Article 40(4) of the Procedures Directive to provide for an exception from substantive examination of the subsequent application?

Provisions of EU law cited

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 (also 'the Procedures Directive'): recital 36, Articles 1, 2, 33 and 40.

Provisions of national law cited

Allgemeines Verwaltungsverfahrensgesetz (Law on General Administrative Procedure; 'the AVG'): Paragraphs 68 and 69;

Verwaltungsgerichtsverfahrensgesetz (Law on the Proceedings of Administrative Courts; 'the VwGVG'): Paragraph 32;

Asylgesetz 2005 (2005 Asylum Law; 'the AsylG 2005'): Paragraphs 2, 3, 8, 10, 57 and 75.

Fremdenpolizeigesetz 2005 (2005 Law on the Policing of Foreign Nationals; 'the FPG'): Paragraphs 52 and 55;

Gesetz über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl (Law on Procedures before the Federal Office for Immigration and Asylum; 'the BFA-VG'): Paragraph 9.

Brief summary of the facts and procedure

1 The appellant on a point of law (XY), who was born in 1990, hails from Iraq. On 18 July 2015, having entered Austria unlawfully, he lodged an application for international protection under the AsylG 2005. During initial questioning by a public security officer, he stated that he is a Shia Muslim, that Shia militia had demanded that he fight for them, that he did not want to fight and kill other people or be killed, that, moreover, the situation in Iraq is very bad and that the country is a war zone. XY also emphasised that this was his 'only reason for fleeing'.

2 By letter dated 23 March 2016, XY asked to be interviewed as part of the asylum procedure and, referring to documents submitted at the same time, stated that he had been held in detention in his home country for five months on charges of involvement in criminal offences. He also mentioned that he had suffered a gunshot wound in 2008.

3 On 30 May 2017, XY was interviewed by the Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum). He stated that he is single and has no children, that he was born and had always lived in Baghdad, that his father and siblings had also lived in Baghdad, that his mother was already deceased and that he had lived with his father and siblings.

4 XY gave as his reason for leaving his home country that he and his father are Shia Muslims, whereas his mother's family are Sunni Muslims, that his mother's relatives include 'some people' who belong to radical groups, and that those people had threatened to wipe out the entire family if XY 'said anything about them'.

5 XY was asked several times by the Bundesamt für Fremdenwesen und Asyl whether he had given all his reasons for fleeing and he always responded in the affirmative.

6 Following further enquiries, the Bundesamt für Fremdenwesen und Asyl adopted a decision on 29 January 2018 rejecting both his request for asylum status under Paragraph 3(1) of the AsylG 2005 and his request for subsidiary protection status under Paragraph 8(1) of the AsylG 2005. Furthermore, XY was not granted a residence permit under Paragraph 57 of the AsylG 2005, a return decision was adopted against him (based on Paragraph 52(2) No 2 of the FPG, Paragraph 10(1) No 3 of the AsylG 2005 and Paragraph 9 of the BFA-VG) and it was determined in accordance with Paragraph 52(9) of the FPG that he could be lawfully deported to Iraq. The authority granted a period for voluntary departure under Paragraph 55(1) to (3) of the FPG of 14 days from the date of the final return decision.

7 As grounds for its decision, the Bundesamt für Fremdenwesen und Asyl stated that XY's submissions were not credible, as they were contradictory, illogical and contained a number of inconsistencies.

8 XY lodged an appeal against the decision of the Bundesamt für Fremdenwesen und Asyl with the Bundesverwaltungsgericht (Federal Administrative Court, Austria), contesting the appraisal of the evidence by the Bundesamt für Fremdenwesen und Asyl. The Bundesverwaltungsgericht held a hearing on 23 July 2018.

9 XY did not adduce new grounds for fleeing either in his notice of appeal or in the hearing before the Bundesverwaltungsgericht.

10 By order of 27 July 2018, the Bundesverwaltungsgericht rejected the appellant's appeal as unfounded.

11 On 4 December 2018, XY filed a new application for international protection (hereinafter also 'the subsequent application'), in which he now stated that he had been homosexual for his entire life and therefore had to fear for his life in Iraq, that he had concealed this reason for fleeing when he first applied for asylum because he did not know that he would be allowed to live out his homosexuality in Austria, and that he had found out about this only in June 2018.

12 The Bundesamt für Fremdenwesen und Asyl dismissed the subsequent application in respect of both his request for asylum status and his request for subsidiary protection status by a decision adopted on 28 January 2019 in accordance with Paragraph 68(1) of the AVG on the ground of *res judicata*. Furthermore, XY was not granted a residence permit under Paragraph 57 of the AsylG 2005, a return decision was adopted against him (based on Paragraph 52(2) No 2 of the FPG, Paragraph 10(1) No 3 of the AsylG 2005 and Paragraph 9 of the BFA-VG), an entry ban limited to a period of two years was issued in accordance with Paragraph 53(1) and (2) of the FPG and it was determined in accordance with Paragraph 52(9) of the FPG that he could lawfully be deported to Iraq. No period for voluntary departure was granted under Paragraph 55(1a) of the FPG.

13 XY lodged an appeal against the decision of the Bundesamt für Fremdenwesen und Asyl with the Bundesverwaltungsgericht.

14 By order of 18 March 2019, the Bundesverwaltungsgericht allowed the appeal inasmuch as it was directed against the entry ban. However, it declared the appeal unfounded as to the remainder.

15 XY lodged an appeal on a point of law against that order before the Verwaltungsgerichtshof (Administrative Court). The present request for a preliminary ruling has been made in connection with the appeal on a point of law.

Principal arguments of the parties in the main proceedings

16 The Bundesamt für Fremdenwesen und Asyl gave as the ground for its rejection decision that the new reason given for fleeing was not credible, that, as the relevant facts of the case had not changed, the final decision adopted in the first

asylum procedure precluded a new substantive decision on the subsequent application, and that the subsequent application should therefore be dismissed on the ground of *res judicata*.

17 The Bundesverwaltungsgericht essentially upheld that view.

18 XY is arguing that it is not his homosexuality that is a new fact; it is that he is now able to express it, that his argument that he was only able to do so as a result of 'his coming out' is credible 'in any event', because it is in line with general life experience, that, even if his plea of homosexuality were no longer admissible under Austrian law, it is in any event admissible under Directive 2013/32, and that, furthermore, the Bundesverwaltungsgericht should have taken account of his homosexuality in deciding whether there is cause to prohibit refoulement.

Brief summary of the basis for the request

19 The crucial aspect of the matter in this case, within the context of the **first question**, is how the phrases 'new elements or findings' that 'have arisen or have been presented by the applicant' contained in Article 40(2) and 40(3) of Directive 2013/32 are to be interpreted. The question is whether these should be understood to include circumstances that existed before the decision on the first application for international protection became final.

20 The open wording and scheme of the directive suggest that they should. However, this departs from the *res judicata* principle mentioned in recital 36 of Directive 2013/32, at least on the basis of the Austrian understanding of that principle. Therefore, it is possible that that principle is to be understood differently in the context of Directive 2013/32.

21 If the answer to the first question is in the affirmative, the referring court wishes, by its **second question**, to ascertain whether it suffices for the purposes of Directive 2013/32 that the asylum applicant is allowed to ask for the previous procedure to be re-opened or whether a new procedure is required for the subsequent application.

22 Either is conceivable. The first variant is supported by the importance of the legal concept of *res judicata* that follows from recital 36 of Directive 2013/32. The second variant is supported by the wording of Article 40(3), which states that, if new elements or findings have arisen, 'the application shall be further examined in conformity with Chapter II'.

23 Likewise, if the answer to the first question is in the affirmative, the referring court wishes, by its **third question**, to ascertain whether an asylum applicant at fault for the fact that the new grounds were not relied upon in the first procedure may be denied substantive examination of the subsequent application, even though Article 40 of Directive 2013/32 was not transposed correctly.

24 It is necessary to clarify in this context whether the Member States have to provide for an *express* exemption from substantive examination of subsequent applications in order to transpose Article 40(4) of Directive 2013/32 or whether national law can be interpreted in a manner consonant with EU law.