Judgment of 14 December 2016 - BVerwG 1 C 4.16

Title

No restriction of examination of asylum applications if proceedings in other countries are not final

Headnotes

1. A refusal to conduct a further asylum procedure on subsequent and secondary applications, which under current law is rendered as an inadmissibility decision under section 29 (1) no. 5 of the Asylum Act (AsylG, *Asylgesetz*), is to be contested by way of an action for annulment (further evolution from Federal Administrative Court judgment of 10 February 1998 - 9 C 28.97 - Rulings of the Federal Administrative Court 106, 171).

2. Under section 71a (1) of the Asylum Act, in order for a secondary application for asylum to be denied as inadmissible without examining its substance, in the absence of new arguments, an asylum procedure in a safe third country must already have reached an unsuccessful conclusion.

3. An asylum procedure that was in progress in another EU Member State, and that was discontinued without an examination of its substance because the applicant moved away, was not concluded unsuccessfully in this sense if, according to the rules of that country's legal system, the procedure can be resumed in a way that ensures a full examination of the substance of the application.

Sources of law

Asylum Act; AsylG, *Asylgesetz*;sections 26a, 29 (1) no. 3 and 5, section 31 (3), sections 33, 37, 71, 71a
Administrative Procedure Act; VwVfG, *Verwaltungsverfahrensgesetz*; section 51
Directive 2005/85/EC;; article 2 (d), article 20 (2), article 25, 32 through 34
Directive 2013/32/EU;; article 28 (2), article 33, 40 through 42
Dublin II Regulation;; article 20 (2)
Dublin III Regulation;; article 3 (3), article 18 (2)

The Facts

1 The claimants, by their own account Afghan nationals, appeal a refusal to conduct further asylum procedures.

2 They entered the federal territory of Germany in July 2012 and applied for asylum. From Eurodac hits, the Federal Office for Migration and Refugees *(Bundesamt für Migration und Flüchtlinge*; hereinafter: the Federal Office) determined that the claimants had already applied for asylum previously in Hungary, and it directed a request to Hungary to take them back. In a reply dated 30 July 2012, the Hungarian authorities confirmed that claimant no. 1 and his family had applied for asylum there in April 2012. The asylum procedure had been discontinued because the family disappeared. The Hungarian authorities consented to take back the claimants so as to decide on their asylum applications.

3 When a transfer of the claimants to Hungary did not take place, the Federal Office determined at the end of January 2013 that a decision would have to be made in a national procedure because the transfer time limit had passed.

4 In decisions of 13 and 17 June 2014, the Federal Office declined to conduct all further asylum proceedings for all of the claimants (1.), yet found that for each of them there was a prohibition of deportation under section 60 (5) of the Residence Act (AufenthG, *Aufenthaltsgesetz*) (2.). As grounds, it stated that since an asylum procedure had been conducted unsuccessfully in Hungary, each of their asylum applications was a secondary application. No additional

asylum procedure should be conducted, because none of the reasons to resume the proceedings within the meaning of section 51 (1) through (3) of the Administrative Procedure Act (VwVfG, *Verwaltungsverfahrensgesetz*), were present. However, the humanitarian conditions in Afghanistan led to a finding that there was a prohibition of deportation under section 60 (5) AufenthG.

5 The claimants initially filed an action for the issuance an administrative act, seeking recognition of their refugee status, or alternatively, subsidiary protection. They argued that they had credibly explained that claimant no. 3 was threatened with a forced marriage in Afghanistan. The application could not be considered a secondary application, they argued. In the oral hearing before the Administrative Court, the claimants withdrew their applications for the issuance of an administrative act, and sought only that item no. 1 in the decisions of 13 and 17 June 2014 respectively be rescinded.

6 The Administrative Court upheld the action. The Higher Administrative Court denied the defendant’s appeal. As grounds, the Court held that an action for annulment was the proper form of action if - as in the instant case - there was a dispute as to whether the case was one to which section 71a of the Asylum Act (AsylG, *Asylgesetz*) applied. In contrast to a subsequent procedure under section 71 AsylG, the Court found, that in the case at hand, two Member States were involved, and therefore the procedural situation had to be examined first - i.e., there was a need to determine whether this was a “secondary application situation” at all. To that extent, it held, the claimants must be accorded the right first of all to set aside, in isolation, the burdening assessment as a secondary application, and thereby to open the way for an asylum procedure to be conducted by the Federal Office.

7 The Court found that the action also has merit. Denying the applications to conduct further asylum proceedings is contrary to the law and violates the claimants’ rights. There had not been an "unsuccessful application" (section 71a AsylG) in the asylum procedure initiated in Hungary, because the initial procedure in Hungary had not been finally completed yet. Hungary consented to take back the claimants in order to decide on their asylum request. This, the

Court noted, was consistent with the Federal Foreign Office's information about Hungarian procedural law for asylum. According to that information, a final conclusion of proceedings, with the consequence that a new request for asylum must be considered a subsequent application, can be assumed only if a prior asylum procedure has arrived at an incontestable negative conclusion in the matter, or the asylum procedure has been incontestably suspended after an explicit written withdrawal of the asylum request. On the other hand, if asylum proceedings had been discontinued without a decision in the matter, the applicant could again adduce the reasons for flight that he or she had cited in the initial proceedings. On that basis, there was also no "secondary application situation" in Germany, and instead the asylum request had to be decided upon for the first time. This was because, the Court found, the Dublin II Regulation contains no provision by which the transfer of responsibility could also result in a formal or substantive loss of rights.

8 The defendant argues in its appeal on points of law which was admitted by the Higher Administrative Court, that the Higher Administrative Court erred and interpreted the application of section 71a AsylG too narrowly. In contrast to the provision of section 71 AsylG that applies to a subsequent application procedure, section 71a AsylG does not refer solely to the situations of a withdrawal or unappealable rejection of a previous asylum application. Rather, it argues, because of the wording of an "unsuccessful conclusion of an asylum procedure", section 71a is directed to a potentially broader group of cases. An unsuccessful conclusion of an asylum procedure, according to the defendant, also always exists if a previous official asylum procedure in the Member State reached a formal conclusion without examining the substance. Here it is immaterial, the defendant argues, whether and under what conditions the safe third country offers the possibility of a resumption of proceedings or some other continuation or examination of the reasons for protection that existed up to the time of the conclusion of proceedings. Not least of all, it argues, the current decision of the Court of Justice of the European Union (ECJ) of 17 March 2016 (C-695/15) shows that EU law specifically does not require focussing on the situation of law concerning a resumption or continuation of proceedings in the safe third country. The former version of the Asylum Procedures Directive

leaves it up to the Member States whether to permit a discontinued procedure to be reopened. This margin of discretion afforded by EU law to the national legislator, would be significantly impaired if the court of appeal's decision were to be followed. If the asylum application is to be examined in Germany, the defendant argues, the laws that are in force here must also be applied.

9 The claimants defend the challenged decision.

10 The Representative of the Interests of the Federation at the Federal Administrative Court (*Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*) did not take part in the proceedings.

Reasons (abridged)

11 The defendant's appeal is without merit. The judgment of the court of appeal does not violate federal law (section 137(1) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*). The court of appeal rightly holds that the refusal to conduct further asylum proceedings in item (1) of the decisions of the Federal Office of 13 and 17 June 2014 is unlawful and violates the claimants' rights (section 113 (1) first sentence VwGO).

12 The claimants' action for annulment is the proper form of action and is admissible (1.). It also has merit, because the requirements for refusing an asylum procedure under section 71a (1) AsylG on grounds of a prior unsuccessful asylum procedure in a safe third country are not met here (2.). The decision of the Federal Office cannot be affirmed on some other legal basis (3.) and violates the claimants' rights (4.).

13 The legal assessment of the claimants' request is governed by the Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1798), as last amended with effect as from 10

November 2016 by the Fiftieth Act Amending the Criminal Code - Improvement of Protection for Sexual Self-Determination (*Fünfzigste Gesetz zur Änderung des Strafgesetzbuches - Verbesserung des Schutzes der sexuellen Selbstbestimmung*), of 4 November 2016 (BGBl. I p. 2460). Under the established jurisprudence of the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), changes in the law that take place after an appeal decision must be taken into account if the court of appeal - were it to decide instead of this Court - would have to take them into account itself (BVerwG, judgment of 11 September 2007 - 10 C 8.07 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 129, 251 para. 19). As the instant case is a dispute in asylum law for which, according to section 77 (1) AsylG, the court of appeal would regularly have to rely on the situation of fact and law at the time of the last oral proceedings or decision, if it were to decide now it would have to base its decision on the amendment of the Asylum Act that took effect during the proceedings before the Federal Administrative Court, unless reasons of substantive law required a derogation.

14 1. The previous instances rightly held that within the present procedural situation, an action for annulment, which is the only one pending since the withdrawal of the application for the issuance of an administrative act recognising a refugee status, can be considered the proper form of action.

15 Since the Integration Act (IntG, *Integrationsgesetz*) took effect, a refusal to conduct a further asylum procedure under section 71 (1) AsylG or - in this case - section 71a AsylG constitutes, in substance, a decision on the inadmissibility of an asylum application under section 29 (1) no. 5 AsylG. In the Integration Act, to simplify the application of law under section 29 (1) AsylG and make it more comprehensible, the legislator summarised the possible reasons for the inadmissibility of an asylum application in a list (Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 18/8615 p. 51). These reasons now include, according to section 29 (1) no. 5 AsylG, the case - whose regulation is unchanged in substantive law - in which a further asylum procedure is not to be

conducted for a subsequent application under section 71 AsylG or a secondary application under section 71a AsylG.

16 At any event, since this new provision took effect, a decision not to conduct a further asylum procedure can be challenged only with an action for annulment. An inadmissibility decision under section 29 (1) no. 5 AsylG, like the refusal to conduct a further asylum procedure issued here - which amounts to the same thing - constitutes a challengeable administrative act capable of final binding effect (…). It places the claimants in a worse legal position, because it determines, without examining the substance, that their arguments for asylum do not result in a grant of protection, and that furthermore their arguments are to be cut off in the case of a further application for asylum because a subsequent application, which would arise as a possibility in accordance with section 71a (5) in conjunction with section 71 AsylG, can lead to a further asylum procedure only if the requirements of section 51 (1) to (3) VwVfG are met. Furthermore, the immediately enforceable deportation warning that is regularly to be issued under section 71a (4) in conjunction with sections 34, 36 (1) and (3) AsylG also results in the expiry of permission to remain (section 67 (1) first sentence no. 4 AsylG). The asylum seeker must obtain a revocation of the decision refusing a further asylum procedure if he or she wishes to obtain a decision on the asylum application (see also BVerwG, judgment of 7 March 1995 - 9 C 264.94 - (…) juris para. 12).

17 An action for annulment is not inadmissible on grounds of precedence of an action for the issuance of a requested administrative act, even though the latter is the correct form of action for achieving the goal ultimately pursued by the claimants: namely, obtaining recognition of their refugee status. While according to previous jurisprudence on subsequent applications the courts were obliged to exercise “reach-down jurisdiction”, and accordingly had considered an action for the issuance of a requested administrative act as the only permissible form of action (cf. BVerwG, judgment of 10 February 1998 - 9 C 28.97 - BVerwGE 106, 171 <172 et seq.>), this Senate no longer adheres to that position, with a view to the further evolution of the law on asylum procedure.

18 Following along the lines of the stronger emphasis on asylum procedures conducted by the authorities, together with the special procedural guarantees for this purpose in the Asylum Procedures Directive that is binding on EU Member States, as well as the special category of inadmissible asylum applications provided in that Directive (cf. article 25 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status <OJ L 326 p. 13> - the Asylum Procedures Directive (former version) - and article 33 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> - the Asylum Procedures Directive (current version) -), the legislator not only structured the procedure with a summarised provision on various situations for inadmissibility in section 29 (1) AsylG and opened up a form of decision for the Federal Office, but also prescribed a multi-stage examination. If an asylum application does prove to be inadmissible, an independently governed inadmissibility decision must be made. At the same time, the Federal Office must decide whether there are national prohibitions of deportation under section 60 (5) or (7) AufenthG (section 31(3) first sentence AsylG). For applications that the Federal Office categorises as a secondary application, this review aspect is limited to the questions of whether this is indeed such an application, and whether a further asylum procedure is to be carried out - i.e., whether the requirements of section 51 (1) to (3) AsylG have been met (section 29 (1) no. 5, section 71a (1) AsylG). The other requirement stated in section 71a (1) AsylG, that the Federal Republic of Germany is responsible for conducting the asylum procedure, must already be established at this point. Otherwise, an inadmissibility decision under section 29 (1) no. 1 AsylG - which takes precedence - would have to be made. After all, the Dublin Regulations conclusively govern the responsibility for examining an asylum application lodged in a Member State. Only if a Member State is responsible on those terms can it refuse an asylum application as inadmissible - as was done here - on the grounds of section 29 (1) no. 5 AsylG (cf. BVerwG, judgment of 16 November 2015 - 1 C 4.15 - BVerwGE 153, 234 para. 20).

19 This clear structuring of the assessment of applications for which the Federal Republic of Germany is responsible, into deciding whether the application is a secondary application under section 71a AsylG and a further asylum procedure is to be conducted (examination of admissibility) and furthermore deciding whether the requirements in substantive law for granting asylum have been met (substantive examination), has also found expression in independent procedural requirements for the first step of the examination. Section 71a (2) AsylG particularly governs the “procedure for determining whether the new asylum application is to be processed” (on the procedure for examining admissibility in general, see also section 29 (2) to (4) AsylG). It is an obvious step to associate this with procedural consequences in special law as well, and to limit the subject-matter of the action after such an inadmissibility decision to the admissibility of the asylum application, which is all the Federal Office has examined to that point (see also Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), chamber decision of 13 March 1993 - 2 BvR 1988/92 - (…) juris para. 23; BVerwG, judgment of 23 June 1987 - 9 C 251.86 - BVerwGE 77, 323 et seq., each on the partially comparable legal situation under the Asylum Procedure Act of 1982). Finally, this is also endorsed by section 37 (1) second sentence AsylG, according to which the Federal Office must continue an asylum procedure after an appeal is granted by a court. This provision applies directly only to the case of successful petitions to the court under section 80 (5) VwGO against inadmissibility decisions under section 29 (1) no. 2 and 4 AsylG, and its special legal consequences governed by section 37(1) first sentence AsylG are not capable of generalisation. However, no such conclusion applies to the legal concept expressed in section 37 (1) second sentence AsylG. That concept is indeed transferable to the case of the revocation of an inadmissibility decision under section 29 (1) no. 5 AsylG and leads to the conclusion that in the case of a denied examination of the substance of the case the specialised authority that has particular expertise in the matter is the one who should have priority to examine the substance of the case (similarly, previously, BVerwG, judgment of 7 March 1995 - 9 C 64.94 - (…) juris para. 13 and 17). On that basis, even a limited action for the issuance of a requested administrative act, directed to the performance of an asylum procedure (if applicable, an additional procedure), does not come into

consideration, because the Federal Office is automatically obliged to perform such a procedure once the decision on inadmissibility has been set aside.

20 The objectives of acceleration pursued by the most recent legislation on asylum, and pointed out by the defendant's representative at the oral hearing, do not lead to any different assessment. Contrary to the Federal Office's estimation, subsequent and (presumed) secondary applications lead to a (further) asylum procedure. Given the current structure of national legal procedure for asylum and the requirements of Union law, the acceleration objectives do not justify expanding the subject matter of the dispute, which is according to the Asylum Act limited to the inadmissibility decision, to include the objective obligation to grant protection, and then relegating the initial decision on the merits to a proceeding in the administrative courts by taking recourse to general administrative procedure (section 113(5) first sentence VwGO). For certain constellations, moreover, the Federal Office itself has options for acceleration that may at least mitigate a possible prolongation of the entire proceedings until a final decision is reached on the entitlement to international protection. These include the option to deny plainly unfounded applications under section 30 AsylG and to issue a deportation warning with a shortened deadline to leave the country, and now, in the case of subsequent applications, also the option to conduct an asylum procedure on an accelerated basis (section 30a (1) no. 4 AsylG). There is no need to decide whether and under what conditions the Federal Office, as a precaution and with the appropriate procedure, may also expressly (as an alternative) accelerate the matter by making a decision on the merits in cases under section 29 (1) AsylG, in addition to an inadmissibility decision. It is true that under section 31 (3) AsylG, in decisions on inadmissible asylum applications, it must be determined "whether the conditions of section 60 (5) or (7) AufenthG are met", and that the Federal Office must deal at least to that extent with the merits of an application for protection. But this second determination does not replace the other form of examination, because this determination does not relate to the question of recognising the entitlement to asylum or granting international protection (section 1 (1) AsylG) - which takes precedence over the question of national protection against deportation - but rather concerns another subject-matter

instead. In cases in which the Federal Office has accompanied the inadmissibility decision with a finding that the requirements of section 60 (5) or (7) AufenthG are not met, the asylum-seeker may raise this different matter as an alternative for examination in the administrative courts, through an action for the issuance of a requested administrative act, in addition to the action for an annulment of the inadmissibility decision.

21 Before setting aside an unlawful inadmissibility decision, the court must examine whether the decision may still stand on the basis of a different ground for inadmissibility that has equal status. If the inadmissibility decision is overturned in response to an action for annulment, any finding that there is no prohibition of deportation under section 60 (5) and (7) AufenthG that may have accompanied the inadmissibility decision must also be set aside, together with the deportation warning. After all, in that case both decisions were at all events issued prematurely (cf. accordingly, BVerwG, judgment of 7 March 1995 - 9 C 264.94 - (…) juris para. 19).

22 2. The court of appeal held, without violating federal law, that the requirements have not been met under which an asylum procedure can be refused under section 71a (1) AsylG on the grounds that an asylum application was unsuccessful in a safe third country.

23 The legal basis for the challenged decision is section 29 (1) no. 5 in conjunction with section 71a (1) AsylG. Under section 29 (1) no. 5 AsylG, an asylum application is inadmissible (among other reasons) if, in the case of a secondary application pursuant to section 71a, another asylum procedure is not to be conducted.

24 According to section 71a (1) AsylG, an application constitutes a secondary application if a foreigner files an application in the federal territory after having unsuccessfully applied for asylum in a safe third country (section 26a AsylG) in which European Community law on the responsibility for processing asylum applications applies or which has concluded an international agreement with the Federal Republic of Germany. As a consequence, a further

asylum procedure is to be conducted only if the Federal Republic of Germany is responsible for conducting the asylum procedure and the requirements of section 51 (1) to (3) VwVfG are met; the examination is the responsibility of the Federal Office.

25 By this provision, the legislator extended the special handling of subsequent (“follow-up”) applications provided under section 71 AsylG to the case in which the applicant’s asylum application was preceded by an unsuccessful asylum application in another EU Member State or a treaty state.

26 The Senate can leave aside the question of whether there are fundamental reservations under EU law against applying the concept of a subsequent application - permissible under EU law (cf. article 32 to 34 Asylum Procedures Directive (former version) and article 40 to 42 Asylum Procedures Directive (current version)) - to situations where the first asylum procedure has been conducted in a different Member state (...). There is also no need to decide whether extending the list of conditions for inadmissibility under section 29 (1) AsylG to include subsequent and secondary applications for which there are no reasons for resumption of proceedings was already compatible with the Asylum Procedures Directive (former version) - assuming that that Directive applied - and whether and in what way article 25 (2) (f) in conjunction with article 2 (d) of that Directive further limits the interpretation of the requirement "after having unsuccessfully applied for asylum”.

27 The requirements for refusing a (further) asylum procedure under section 71a (1) AsylG are not met here, if only because the claimants’ asylum applications are not secondary applications within the meaning of that provision. Their applications were not preceded by unsuccessful applications for asylum in a safe third country (section 26a AsylG).

28 Certainly Hungary, as a Member State of the European Union, is a safe third country within the meaning of section 71a (1) AsylG, to which the provisions of European Community law on responsibility for conducting asylum procedures apply: in the instant case, the assessment of international

responsibility is governed by Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 p. 1) - the Dublin II Regulation - because the asylum application and the request to take back were filed before the relevant cut-off date (1 January 2014) (cf. the transitional provision in article 49 (2) of Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person <OJ no. L 180 p. 31> - the Dublin III Regulation).

29 In any case there has been no “unsuccessful” conclusion of the asylum procedure that the claimants initiated in Hungary. An unsuccessful conclusion of the asylum procedure begun in another Member State presupposes that the asylum application has either been denied, in an incontestable form, or that the procedure has been finally discontinued after the withdrawal of the asylum application or some conduct equivalent to such a withdrawal. A discontinuation is not final in this sense if the (initial) procedure can still be resumed (a). Whether such a reopening or resumption of proceedings is possible must be assessed according to the situation of law in the country where the asylum procedure was conducted (b). According to those standards, the asylum procedure initiated by the claimants in Hungary and discontinued there has not been unsuccessfully concluded (c).

30 a) According to the wording, the constituting requirement “after the unsuccessful conclusion of an asylum procedure” covers any form of formal conclusion of an asylum procedure without granting a protected status. To further concretise the possible variants and the requirements for the conclusion of a procedure, one can refer to the parallel provision for a subsequent application in section 71 (1) AsylG, according to which the conclusion may take the form of a withdrawal or an incontestable rejection of the application. Contrary to the defendant’s opinion, there is nothing that argues that the

legislator’s choice of different wording in section 71a (1) AsylG was intended to embrace additional circumstances. The content and rationale of section 71a AsylG is limited to establishing that a secondary application has equivalent status to a subsequent application, and thus a third country’s decision in asylum law has equivalent status to an asylum-law decision by the Federal Republic of Germany (BT-Drs. 12/4450 p. 27 (…)).

31 According to the situation of law that applied until 16 March 2016, the concept of a withdrawal in section 71 (1) AsylG unrestrictedly also included those cases under section 33 (1) AsylG in which the asylum application is deemed to have been withdrawn if the foreigner fails to pursue it. This is made clear, not least of all, by section 32 (2) AsylG. The situation has been different since the fundamental revision of section 33 AsylG, which took effect on 17 March 2016, under the Act for the Introduction of Accelerated Asylum Procedures of 11 March 2016 (*Gesetz zur Einführung beschleunigter Asylverfahren*; BGBl. I p. 390). Under section 33 (5) second through sixth sentence AsylG, a foreigner whose asylum procedure has been discontinued for failure to pursue may now apply once for its resumption. A new asylum application is to be deemed such an application for resumption, and must be treated as the first application, unless a full nine months have elapsed since the asylum proceedings were discontinued, and so long as the asylum proceedings have not been resumed already pursuant to said provision. As a consequence of this special provision - which recognisably takes precedence - the concept of resumption in section 71 (1) first sentence AsylG is now to be interpreted narrowly even under national law, such that it includes the cases of fictive withdrawal under section 33 (1) and (3) AsylG only under the conditions of section 33 (5) sixth sentence AsylG - in other words, if the discontinuation of the asylum procedure took place at least nine months before the date of the new application or the asylum procedure has already been resumed once before.

32 If, therefore, according to unequivocal statutory requirements (argumentum a contrario from section 33 (5) sixth sentence AsylG), the existing option of resumption does oppose treatment as a subsequent application, the same - because of the intended establishment of equal status - must also apply for a

secondary application. To this position is added a systematic argument within section 71a AsylG: if, in the case of a refusal of an application, an unsuccessful asylum application within the meaning of section 71a AsylG does not exist until the refusal is unchallengeable (cf. on this point Higher Regional Court Cologne (*Oberlandesgericht K"ln*), decision of 20 July 2007 - 16 Wx 150/07 - juris para. 7 (…)), then an unsuccessful conclusion in the case of a discontinuation of proceedings after (an express or tacit/fictive) withdrawal can also be assumed only if the specific (first) asylum procedure has come to a final conclusion - i.e., with no possibility of a resumption at the applicant's request (on the concept of a "final" (i.e. legally binding) decision under EU law, see article 2(d) Asylum Procedures Directive (former version) and article 2(e) Asylum Procedures Directive (current version), respectively). After all, there is no evident reason why the two variants of an unsuccessful conclusion of an asylum procedure that each causes the same legal consequences should be subject to different requirements in this regard.

33 b) The Higher Administrative Court correctly held that the question of whether an asylum procedure conducted previously in another Member State has been concluded there with a legally binding refusal or a final discontinuation is guided overall by the applicable foreign law on asylum procedure. Section 71a (1) AsylG depends on a completed process that is conducted in a foreign country, and wholly governed by foreign law. The close connection between an administrative act and its character as legally binding means that the question of whether a foreign administrative decision is still open to challenge or review in court must be answered according to foreign law, not German law. The Member States' procedural autonomy does indeed allow room to require that a decision handed down in another Member State must be legally binding and must have legal force, as a defining circumstance for the application of national law; but it does not permit national procedural law to be extended to the assessment of this preliminary question.

34 The Dublin II Regulation, which still applies here, limits itself to governing international jurisdiction. However, it offers no basis for any form of handling by which the transfer of responsibility to another Member State would prejudice

legal interests in procedural law. In particular, it does not confer a right to link a transfer of responsibility under article 20 (2) of the Dublin II Regulation with a loss of the right to an examination of the application that is neither restricted nor conducted according to the principles for subsequent applications, if such a right was still accorded under the asylum procedure law that applied in the state that previously had responsibility (cf. also Higher Administrative Court Mannheim, judgment of 29 April 2015 - A 11 S 121/15 - (…) juris para. 36).

35 This does not conflict with the argument brought up by the defendant that if Germany is responsible for examining an asylum application, that examination must also be conducted under German law. This is true, of course, in that a transfer of responsibility does not preclude all prejudice whatsoever to a legal interest. For example, a state that has become responsible because the transfer time limit has passed may also decline an application for asylum under article 3 (3) of the Dublin III Regulation (comparably: article 3 (3) of the Dublin II Regulation) even if the country with original responsibility does not make use of the third-country concept (cf. ECJ, judgment of 17 March 2016 - C-695/15 [ECLI:EU:C:2016:188], PPU (…). However, the provision on a secondary application that is relevant here differs from that case constellation in that in this provision, the German legislator makes the scope of the examination contingent on the conclusion of an administrative procedure in another Member State. Thus the legislative provision itself ties into a set of circumstances that is to be assessed in accordance with the foreign legal system.

36 Nor does any other result proceed from the further finding of the Court of Justice of the European Union, in the aforementioned decision, that article 18 (2) of the Dublin III Regulation does not require the competent authorities of the responsible Member State, in the event of the taking back of an applicant for asylum, to resume the procedure for examining that applicant’s application at the stage at which it was discontinued. In this context, the Court of Justice also refers to the last subparagraph of article 28 (2) of the Asylum Procedures Directive (current version), according to which Member States may allow the authority to resume the examination of an application at the stage at which it was discontinued, without, however, requiring them to do so (cf. ECJ, judgment

of 17 March 2016 - C-695/15 - para. 67; likewise article 20(2) subpara. 4 Asylum Procedures Directive (former version)). It may follow from this, for example, that a hearing that has already taken place need not necessarily be repeated. Irrespective of the various procedural configurations, however, these remarks do not justify the conclusion that it would be compatible with EU law to forfeit the right to an unrestricted examination of one's application as a result of a mere transfer of responsibility. The terms "procedural stage" or "stage", as the Court of Justice understands them, undoubtedly do not refer to the question of whether the procedure is a first-time procedure or a subsequent one. The Court of Justice expressly emphasises that the examination of the application must satisfy the requirements for first-time applications.

37 In accordance with the discussion above, there can also be no success for the defendant's objection that if Hungarian law is applied, it would adversely affect the discretion that the Asylum Procedures Directive (former version) confers on the national legislators or rule-makers of the Member States in the present context. It is true that- unlike article 28 (2) of the Asylum Procedures Directive (current version) - article 20 (2) of the Asylum Procedures Directive (former version) does not yet prescribe bindingly that the Member States must provide for a reopening of asylum procedures that have been discontinued because of a tacit withdrawal of the application or failure to pursue, but instead also allows the option of treating an application filed later as a subsequent application. However, so far as it concerns applying the subsequent application concept to situations where the first asylum procedure has been conducted in a different Member State - assuming that this expansion is compatible with Union law - this option belongs to the state where the proceeding was conducted, meaning Hungary in the instant case. Nothing else can be concluded from the use of the plural in article 20 (2) of the Asylum Procedures Directive (former version) ("Member States shall ensure..."). If this provision mentions an asylum seeker "who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this article", this describes a process within a single Member State, not a situation involving several countries.

38 c) By these standards, the decision of the court of appeal not to view the asylum applications lodged by the claimants in Hungary as having been unsuccessful within the meaning of section 71a AsylG is unobjectionable upon review by this Court. The court of appeal found that if they return to Hungary, the claimants can continue the asylum procedure initiated there with no restriction on the content of their arguments, as though in a first-time proceeding. According to information provided by the Foreign Office, dated 12 March 2015 (to the Administrative Court Freiburg) and 19 November 2014 (to the Administrative Court Düsseldorf), concerning the structure of the Hungarian asylum procedure, in cases in which a previous asylum procedure had been stopped without a decision in the matter ("discontinuation"), a new asylum application would be treated like a first-time procedure, and in particular the applicant can again adduce the reasons for flight presented in the initial procedure. This is confirmed, the Foreign Office said, by the declaration of consent from the Hungarian authorities, who declared themselves willing to take the claimants back and decide on the asylum application. Ultimately, therefore, the procedure would be continued or resumed if the claimants were to return to Hungary.

39 According to section 137 (2) VwGO, this Court is bound by these findings of the court of appeal - which have not been challenged with effective objections in the present proceeding - concerning the content of Hungarian law, because according to section 173 VwGO in conjunction with section 293 of the Code of Civil Procedure (ZPO, *Zivilprozessordnung*), they are part of the findings of fact (cf., e.g., BVerwG, judgment of 20 April 2004 - 1 C 13.03 - BVerwGE 120, 298 <302 et seq.>).

40 There is no need to decide about what point in time should be the focus in assessing the question of whether an asylum procedure conducted in another Member State was unsuccessfully concluded within the meaning of section 71a (1) AsylG. To that extent, the date when the application was lodged in Germany, or the date of the transfer of responsibility, comes under consideration first. That question may be left aside here, because even at the date of the transfer of responsibility, which is the later date, the claimants still

had the ability to pursue the asylum procedures further in Hungary. The findings of the court of appeal concerning Hungarian asylum procedure law do not indicate that if an asylum procedure was discontinued because the person moved away, the right to resume it would survive only subject to a time limit (on the possibility of a time limit of at least nine months see, now, article 28(2) subpara. 2 of the Asylum Procedures Directive (current version)). There is also no reason to believe this is the case with reference to the period up to the end of January 2013, which is the relevant period here.

41 3. The decision cannot be upheld on any other basis in law. The circumstance for inadmissibility under section 29 (1) no. 3 AsylG, which is the only one that comes under consideration in this regard, does not apply, if only because Germany is responsible for conducting the asylum procedure concerned here owing to the expiry of the transfer time limit under article 20 (2) of the Dublin II Regulation. Under section 29 (1) no. 3 AsylG, an application for asylum is inadmissible if a country that is willing to readmit the foreigner is regarded as a safe third country for that foreigner according to section 26a AsylG. According to section 26a (1) third sentence no. 2 AsylG, however, entry from a safe third country does not exclude invoking article 16a (2) first sentence of the Basic Law (GG; *Grundgesetz*) if - as is the case here - the Federal Republic of Germany is responsible under European Community law for processing an asylum application. This applies not only where Germany has original responsibility, but also for a subsequent transfer of responsibility.

42 This provision is taken into account in section 29 (1) no. 3 AsylG: the inclusion of section 29 (1) no. 3 AsylG in the list of reasons for inadmissibility was not intended to alter the substance of the previous possibility of rejecting an application for asylum under section 26a AsylG. Section 31 (4) AsylG still mentions that a rejection “pursuant to section 26a” - now - is impermissible. In the legislative process, moreover, the Federal Government emphasised that the explicit reference to section 26a AsylG in the proposed section 29 (1) no. 3 AsylG expresses that the requirements governed there are still to be observed in the context of deciding on the admissibility of the asylum application. Just as under the law applicable at that time, the government said, the future section 29

(1) no. 3 AsylG would therefore presuppose that the third country meets the requirements of section 26a AsylG - which are still unchanged - and would be categorised as a safe third country by inclusion in appendix I to the Asylum Act (BT-Drs. 18/8883 p. 10). There is therefore no need to decide here whether section 29 (1) no. 3 AsylG is compatible with Union law.

43 4. The refusal to conduct (further) asylum proceedings also violates the claimants' rights (section 113 (1) first sentence VwGO). Their entitlement under Union law to an examination of their application for protection by a Member State of the EU is violated if the Federal Office, which by its own interpretation is the authority with international competence, unlawfully refuses - as here - to conduct an asylum procedure. (…)