

Federal Administrative Court
Supreme Court<https://www.bverwg.de/en>

Judgment of 25 November 2021 - BVerwG 1 C 4.21

ECLI:DE:BVerwG:2021:251121U1C4.21.0

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When citing this ruling it is recommended to indicate the court, the date of the ruling, the case number and the paragraph: BVerwG, judgment of 25 November 2021 - 1 C 4.21 - para. 16.

Conformity of the extension of international protection by derivation with the Directive and relevant point in time for assessing the 'minor' and 'unmarried' status as well as for having the right of care and custody of the beneficiary of protection

Headnotes

1. Consistent with article 3 of Directive 2011/95/EU, section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG provides for a more favourable provision for determining who qualifies as a refugee or as a person eligible for subsidiary protection.
2. The relevant point in time for assessing the 'minor' and 'unmarried' status of the beneficiary of international protection as well as for having the right of care and custody within the meaning of section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG is the point in time when both the beneficiary of protection and the applicant parent apply for asylum.
3. An application for asylum within the meaning of section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG is deemed to have been filed when a request for protection is made informally to an authority responsible for its registration or to an authority to which such a request is likely to be made.

Sources of law

Directive 2011/95/EU

articles 2 (j) and (k), 3, 12,
23 (1) and (2), 24 (1) and (2)

Asylum Act

AsylG, *Asylgesetz*sections 13, 14, 26 (3) first
and second sentence, (4)
second sentence, (5) first
and second sentence

Residence Act

AufenthG, *Aufenthaltsgesetz*

sections 9, 26 (1) second
and third sentence, (3) and
(4)

Summary of the facts

The dispute between the parties relates to the conditions for granting (family) refugee status.

The claimants are nationals of the Syrian Arab Republic of Kurdish ethnicity and Sunni faith. The claimant no. 1, born in 1964, and the claimant no. 2, born in 1970, are the parents, and the claimants no. 3 and 4., born in 2006 and 2010 respectively, are the sisters of D... S..., born in 1998 (hereinafter principal person entitled (*Stammberechtigter*)). In September 2015, the family left their home country, entered the federal territory by land and sought asylum. In April 2016, they filed an action for failure to act (*Untätigkeitsklage*). In July 2016, the claimants filed their asylum application formally. By notice of 12 October 2016, the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, hereinafter Federal Office) granted them subsidiary protection status and, with regard to all other aspects, rejected their asylum applications. The principal person entitled was granted refugee status in January 2017.

The Administrative Court (*Verwaltungsgericht*) dismissed the claimants' action to be granted refugee status. The Higher Administrative Court (*Oberverwaltungsgericht*) dismissed the claimants' appeal on points of fact and law against this judgment. The claimants' fear of persecution relevant under refugee law was unfounded. An entitlement for recognition as refugee also did not follow from section 26 (5) first and second sentence in conjunction with (3) first and second sentence of the Asylum Act (*AsylG, Asylgesetz*) owing to the aspect of refugee protection for family members. As a matter of principle, pursuant to section 77 (1) first sentence *AsylG*, the factual and legal situation at the point in time of the last oral hearing before the court responsible for finding the facts was to be taken as a basis. Neither at the point in time of the decision by the Court of Appeal nor, with regard to all other aspects, at the point in time of the Federal Office's decision on the claimants' and the principally entitled person's application for asylum had the latter been minor. The law did not provide for an advance shift of the relevant point in time with regard to the 'minor' and the 'family' status of the beneficiary of protection from which the claimant seeking family protection intended to derive his right. This was also not required by its purpose. In particular, the aspect of maintaining family unity within the meaning of article 23 of Directive 2011/95/EU did not compel such an interpretation. Regardless of this, the claimants were not parents or siblings of a minor, unmarried beneficiary of international protection within the meaning of section 26 (5) first and second sentence in conjunction with (3) first sentence *AsylG*. If, when assessing the 'minor' status of the beneficiary of protection, one were to rely on an earlier point in time than that of the last oral hearing before or decision by the court responsible for finding the facts, the same had to apply to the element "beneficiary of international protection" in section 26 (5) first sentence in conjunction with (3) first sentence *AsylG*. Regardless of this, the conditions of article 23 (2) of Directive 2011/95/EU were not met. Under article 2 (j) third indent of Directive 2011/95/EU, family members included the father and mother responsible for the beneficiary of international protection when that beneficiary was a minor and unmarried. This had never been the case, as the minor principal person entitled had not been granted international protection and, when being granted international protection, she had no longer been a minor.

The claimants' appeal on points of law met with success.

Reasons (abridged)

- 7 (...) The assumption of the Higher Administrative Court that claimants no. 1 and no. 2 as well as claimants no. 3 and no. 4 were not entitled to be granted refugee status as parents (1.) and as unmarried minor siblings respectively (2.) of an unmarried minor refugee, violates federal law (section 137 (1) no. 1 of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)) to the extent that the Court of Appeal erred in law in basing its assessment of the 'minor' and 'unmarried' status of the beneficiary of international protection and of having the right of care and custody of the beneficiary within the meaning of section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG on the point in time of the last decision by the court responsible for finding the facts.
- 8 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), last amended by article 9 of the Act for the Further Development of the Central Register of Foreign Nationals (*Gesetz zur Fortentwicklung des Ausländerzentralregisters*) of 9 July 2021 (BGBl. I p. 2467 < 2504>). (...).
- 9 1. According to the assessment of the Higher Administrative Court, which is not contested in the appeal proceedings on points of law, claimants no. 1 and no. 2 were not already entitled to be granted refugee status for individual reasons inherent in their persons (by "their own right"), but in their capacity as parents of an unmarried minor refugee under section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first sentence AsylG in view of the refugee's status as beneficiary of protection (by "derived right"). Section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first sentence AsylG is compatible with EU law (1.1). The conditions laid down thereunder are fulfilled by claimants no. 1 and no. 2 (1.2).
- 10 1.1. Pursuant to section 26 (5) first sentence AsylG, section 26 (1) to (4) of the Residence Act (*AufenthG, Aufenthaltsgesetz*) shall apply *mutatis mutandis* to family members within the meaning of section 26 (1) to (3) AsylG of beneficiaries of international protection. Pursuant to section 26 (5) second sentence first alternative AsylG, refugee status shall replace the entitlement to asylum. Accordingly, pursuant to section 26 (3) first sentence AsylG, the parents of an unmarried minor refugee shall be granted refugee status upon application under the conditions specified in detail in said provision.
- 11 Section 26 AsylG serves to fulfil the obligation of the Member States arising from 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 L 337 of 20 December 2011, p. 9 et seq.) and in particular from article 23 (1) thereof, to ensure that family unity of the beneficiary of international protection can be maintained (see Bundestag printed paper (BT-Drs, *Bundestagsdrucksache*) 17/13063 p. 21 and Court of Justice of the European Union (CJEU, hereinafter Court of Justice), judgment of 9 November 2021 - C-91/20 [ECLI:EU:C:2021:898], LW - para. 43). Though Directive 2011/95/EU does not require the extension of international protection to family members as stipulated in section 26 AsylG (a). As follows from article 3 of Directive 2011/95/EU, it does not however preclude a more favourable national standard, compatible with said Directive, for determining who qualifies as a refugee or as a person eligible for subsidiary protection (b).
- 12 a) Directive 2011/95/EU does not provide for the extension of international protection by derivation to family members of a person who has been granted refugee or subsidiary protection status.
- 13 Pursuant to article 23 (2) of Directive 2011/95/EU, Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in articles 24 to 35 of Directive 2011/95/EU, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.
- 14 Accordingly, the Directive merely requires the Member States to amend their national law in such a way that the family members, within the meaning referred to in article 2 (j) of Directive 2011/95/EU, of the beneficiary of protection - but not other family members not covered by article 2 (j) of Directive 2011/95/EU - enjoy certain advantages which serve to maintain family unity as provided for in article 23 (1) of Directive 2011/95/EU (CJEU, judgments of 4 October 2018 - C-652/16 [ECLI:EU:C:2018:801], Ahmedbekova and Ahmedbekov - para. 67 et seq. and of 9 November 2021 - C-91/20 - para. 36).

- 15 b) However, compatible with article 3 of Directive 2011/95/EU, section 26 (3) first sentence AsylG establishes a more favourable national provision for determining who qualifies as a refugee or a person eligible for subsidiary protection.
- 16 aa) According to article 3 of Directive 2011/95/EU, Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Directive. Pursuant to recital 14 of Directive 2011/95/EU, Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of article 1 (A) of the Geneva Refugee Convention, or a person eligible for subsidiary protection. Compatibility of a more favourable standard with Directive 2011/95/EU presupposes that the norm is not contrary to the general scheme and objectives of the Directive. Especially such provisions which allow for the granting of refugee status to third country nationals or stateless persons in situations which have no connection with the purpose of international protection are prohibited (CJEU, judgment of 18 December 2014 - C-542/13 [ECLI:EU:C:2014:2452], M'Bodj - para. 42 and 44, of 4 October 2018 - C-652/16 - para. 71, and of 9 November 2021 - C-91/20 - para. 40).
- 17 A connection with the purpose of international protection exists, when the refugee status of a person is automatically extended to members of the core family with the aim of enabling the beneficiary of protection to maintain the unity of his or her core family which constitutes an indispensable right for him or her. Such an automatic extension of international protection by way of derivation takes account of the requirement to maintain family unity, regardless of whether the member of the core family himself or herself fulfils the conditions for the granting of international protection (CJEU, judgments of 4 October 2018 - C-652/16 - para. 72 et seq. and of 9 November 2021 - C-91/20 - para. 41 et seq.). Moreover, it is not limited to those family members covered by article 2 (j) of Directive 2011/95/EU, but can also cover other members of the core family, such as children born in the host Member State (CJEU, judgment of 9 November 2021 - C-91/20 - para. 44). Nothing else can then apply to siblings to the extent that their inclusion is intended to serve the protection of the unity of the core family.
- 18 A threat to the general scheme or the objectives of Directive 2011/95/EU is also not to be assumed where the granting of refugee status by derivation favours such members of the refugee's core family who have already been granted subsidiary protection status. It is true that it would be possible for the refugee to maintain family unity with these relatives by virtue of their protection status and the right of residence arising from it. However, the national legislature was not prevented from further realising the objective of Directive 2011/95/EU to consolidate the unity of the refugee's core family by bringing about the unity of the protective status. This applies all the more as the extension of refugee status helps to enforce the differentiation between refugee and subsidiary protection status expressed in articles 2 (e) and (f) as well as in articles 9 et seqq. and 15 et seqq. of Directive 2011/95/EU and, in doing so, taking into account the fact that subsidiary protection status under article 2 (f) of Directive 2011/95/EU presupposes precisely that the third-country national or stateless person does not fulfil the requirements for recognition as a refugee, thus considering the priority of the granting of refugee status and also taking into account the differences in the legal status of refugees and beneficiaries of subsidiary protection that persist in EU law (see article 24 (1) and (2) of Directive 2011/95/EU) and are reflected in German law (see section 26 (1) second and third sentence, (3) and (4) in conjunction with section 9 AufenthG).
- 19 An extension of international protection by way of derivation with the aim of maintaining family unity of the beneficiary of protection may, in certain situations, prove incompatible with the Directive, despite the presence of the necessary connection with the purpose of international protection. On the one hand, this is the case if the extension benefits a person who falls under one of the grounds for exclusion mentioned in article 12 of Directive 2011/95/EU (CJEU, judgments of 9 November 2010 - C-57/09, B and C-101/09 [ECLI:EU:C:2010:661], D - para. 115, of 4 October 2018 - C-652/16 - para. 71 and of 9 November 2021 - C-91/20 - para. 46). On the other hand, it follows from article 23 (2) of Directive 2011/95/EU that an extension of the advantages referred to therein to a member of the core family is excluded where that would be incompatible with the personal legal status of the family member concerned (CJEU, judgment of 9

November 2021 - C-91/20 - para. 48). Such incompatibility must be assumed where the family member concerned is entitled to better treatment in the host Member State than that resulting from the extension of international protection, for instance because he or she holds its nationality or the nationality of another state (CJEU, judgment of 9 November 2021 - C-91/20 - para. 50 et seq.). No clarification is needed here on the question of whether entitlement to better treatment could convey the granting of another protection status. For, in any case, derived refugee protection does not fall short of the individually granted subsidiary protection status, but conveys to the beneficiary family member - apart from the formation of chains of derivation excluded by section 26 (4) second sentence AsylG (BT-Drs. 17/13063 p. 21) - a comprehensive refugee status and therefore those rights provided for in national law which are also available to foreign nationals who have been granted refugee status directly, especially since it does not expire *ipso iure*, even in the cases where there are grounds for annulment, but is subject to an annulment decision, prior to which it must be examined, whether the beneficiary needs international protection for other reasons, taking into account all the circumstances of the individual case.

- 20 bb) By these standards, the extension of refugee status to the parents of an unmarried minor refugee, as provided for in section 26 (5) first sentence in conjunction with (3) first sentence AsylG, is, as a matter of principle, compatible with article 3 of Directive 2011/95/EU, even if the parents - as in the present case - have already been granted subsidiary protection. The exclusion of such family members falling under one of the grounds for exclusion mentioned in article 12 of Directive 2011/95/EU, as required by EU law, has been expressly provided for by the legislature in section 26 (4) AsylG. Section 26 (3) first sentence no. 2 AsylG makes the granting of international family protection subject to the family already existing in the country of origin. Section 26 (3) first sentence no. 3 AsylG places the entry or the application for asylum of the family member in a direct connection with the asylum procedure or the entry of the beneficiary of protection.
- 21 c) With regard to the legal questions dealt with in the foregoing, it is not necessary to obtain a preliminary ruling from the Court of Justice in accordance with article 267 of the Treaty on the Functioning of the European Union (TFEU), as the correct application of EU law within the meaning of the *acte clair* doctrine (see, most recently, CJEU, judgment of 6 October 2021 - C-561/19 [ECLI:EU:C:2021:799] - para. 39) in the light of the case-law of the Court of Justice (see, in particular, CJEU, judgments of 4 October 2018 - C-652/16 - and of 9 November 2021 - C-91/20 -) is so obvious as to leave no scope for any reasonable doubt concerning the answer to the questions raised by the statement of reasons for the appeal on points of law.
- 22 1.2 In the case of claimants no. 1 and no. 2, the conditions listed in section 26 (5) first and second sentences in conjunction with (3) first sentence AsylG are thus met; the contrary assessment of the Higher Administrative Court denies, in violation of federal law (section 137 (1) no. 1 VwGO), that they are parents of a minor refugee within the meaning of that provision.
- 23 Pursuant to section 26 (3) first sentence AsylG, the parents (a) of a minor (b) unmarried (c) refugee are recognised as refugees on application if 1. the granting of refugee status is incontestable (a), 2. the family within the meaning of article 2 (j) of Directive 2011/95/EU has already existed in the state in which the refugee is being politically persecuted (a), 3. they entered the federal territory prior to being granted refugee status or they filed the application for asylum immediately after entry (a), 4. the recognition of the refugee is not to be revoked or withdrawn (a) and 5. they have the right of care and custody for the refugee (d). There is no need for an actual resumption of family life between the parent and the principal person entitled (e).
- 24 a) According to the binding factual findings of the Higher Administrative Court (section 137 (2) VwGO), the granting of refugee status to the principal person entitled within the meaning of section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first sentence AsylG is incontestable, the claimants no. 1 and no. 2 are the father and mother of the principal person entitled and thus her parents within the meaning of article 2 (j) third indent first variant of Directive 2011/95/EU and have within the meaning of section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first sentence no. 3 AsylG entered the federal territory before the refugee status was granted to the principal person entitled. They have stayed here after their joint entry also in connection with their application for international protection in the federal territory (see article 2 (j) of Directive 2011/95/EU), (...). The fact that there is no reason to revoke or withdraw the refugee status granted to the principal person entitled within the meaning of section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first

sentence no. 4 AsylG, and that the family within the meaning of article 2 (j) of Directive 2011/95/EU already existed in the Syrian Arab Republic as the state in which the principal person entitled would be subject to persecution, has never been in dispute between the parties. In addition, the Administrative Court did not have to examine reasons for revocation or withdrawal of the granting decision within the framework of section 26 (5) first sentence and second sentence first alternative in conjunction with (3) first sentence no. 4 AsylG, since it is the sole responsibility of the Federal Office to decide whether to initiate such a procedure (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 9 May 2006 - 1 C 8.05 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 126, 27 para. 17).

- 25 b) The assessment of the 'minor' status of the principal person benefiting from international protection within the meaning of section 26 (5) first and second sentences in conjunction with (3) first sentence AsylG must, if the principal person entitled filed an application as a minor, be based on the point in time of the application of the applicant parent (aa), not on the point in time of the last decision by the court responsible for finding the facts (...). The application for asylum within the meaning of section 26 (5) first and second sentences in conjunction with (3) first sentence AsylG is deemed to have been already filed when a request for protection is made informally to an authority responsible for its registration or to an authority to which such a request is likely to be made (bb); a formal application for asylum within the meaning of section 14 AsylG is not needed for this purpose.
- 26 aa) The concept of family members of an unmarried minor beneficiary of protection, which is the basis of section 26 (5) first and second sentence in conjunction with (3) AsylG does, in accordance with the insofar clear legislative history of section 26 (3) first sentence AsylG, adopt the corresponding concept of Directive 2011/95/EU. The legislative materials expressly state that it was the intention of the legislature to take up the requirements laid down in particular in article 2 (j) third indent of Directive 2011/95/EU (BT-Drs. 17/13063 p. 21), not only with regard to the group of beneficiaries of an extension of international family protection, but also with regard to the reference person benefiting from protection. This also follows from the intention to fully comply with the requirements of article 23 of Directive 2011/95/EU in national law.
- 27 This determination of the 'minor' status of the beneficiary of protection by EU law significantly binds its interpretation to the case-law of the Court of Justice on this issue. Accordingly, article 2 (j) third indent of Directive 2011/95/EU must be interpreted autonomously and uniformly throughout the European Union, taking into account, in particular, the context of the provision and the objective pursued by the legislation in question (CJEU, judgment of 9 September 2021 - C-768/19 [ECLI:EU:C:2021:709], SE - para. 34 et seq.). In this regard, particular importance must be attached to the respect for family life. Thus, based on article 24 (2) and (3) of the Charter of Fundamental Rights of the European Union (CFR), recitals 16 and 18 of Directive 2011/95/EU particularly emphasize the best interests of the child, which must be a primary consideration in all measures concerning children in the context of the application of the Directive (CJEU, judgment of 9 September 2021 - C-768/19 - para. 36 et seqq. and 44). In the light of the above, the Court of Justice has ruled that in a situation where an applicant for asylum, who has entered the territory of the host Member State in which his unmarried minor child is present, intends to derive from the international protection status obtained by that child the right to the benefits referred to in articles 24 to 35 of Directive 2011/95/EU or to the protection status itself, where, in accordance with article 3 of Directive 2011/95/EU, this is provided for by national law, the relevant point in time for assessing whether the beneficiary of international protection is a 'minor' within the meaning of article 2 (j) third indent of Directive 2011/95/EU, for the purpose of deciding on the application for asylum filed by his or her parent, is the point in time when the application for protection was filed by both the reference person and the parent (CJEU, judgment of 9 September 2021 - C-768/19 - para. 42 et seq.). Both the beneficiary of international protection and his or her parent must therefore have filed their respective applications for protection at a point in time when the beneficiary of international protection was still a minor within the meaning of article 2 (k) of Directive 2011/95/EU (CJEU, judgment of 9 September 2021 - C-768/19 - para. 43). Reliance on a later point in time for the assessment of the 'minor' status would neither be consistent with articles 7 and 24 CFR nor with the principles of equal treatment and legal certainty (CJEU, judgment of 9 September 2021 - C-768/19 - para. 40 et seq.) nor with the *effet utile*.
- 28 bb) An application for asylum within the meaning of section 26 (5) first and second sentence in conjunction

with (3) first sentence AsylG is deemed to have been filed when a request for protection is made informally to an authority responsible for its registration or to an authority to which such a request is likely to be made. The application for asylum in the substantive sense as described in section 13 (1) AsylG is thus sufficient. This, too, follows from an interpretation of national law in conformity with EU law, following a decision of the Court of Justice on the interpretation of article 2 (j) of Directive 2011/95/EU to the effect that, when assessing the 'minor' status, the point in time of the application was decisive and that the informal submission of the application for asylum was sufficient for this purpose. This is because, under Directive 2013/32/EU, an application for asylum is already "made" when a third-country national or stateless person expresses his or her wish to apply for international protection to an authority responsible for registering asylum applications or to another authority to which such an application is likely to be made (see CJEU, judgments of 9 September 2021 - C-768/19, SE - para. 45 et seqq. and of 25 June 2020 - C-36/20 [ECLI:EU:C:2020:495], PPU - para. 86 et seqq.).

- 29 cc) The principal person entitled, who was born in January 1998, was still a minor at the relevant point in time in September 2015 when - according to the factual findings of the Higher Administrative Court, which are binding on the Federal Administrative Court under section 137 (2) VwGO - both she as well as the claimants no. 1 and no. 2 made their application seeking asylum.
- 30 c) Whether the beneficiary of protection was unmarried within the meaning of section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG is also to be assessed at the point in time when the application for asylum in the meaning of the submission of the application for protection by both the beneficiary of protection and his or her parent was made.
- 31 (...)
- 32 It is not disputed between the parties that at the relevant point in time when her application for asylum and that of claimants no. 1 and no. 2 were made, the principal person entitled was unmarried within the meaning of section 26 (3) first sentence AsylG and of article 2 (j) third indent of Directive 2011/95/EU respectively.
- 33 d) Section 26 (5) first and second sentence in conjunction with (3) first sentence no. 5 AsylG must be interpreted in accordance with article 2 (j) third indent of Directive 2011/95/EU and the case-law of the Court of Justice on this issue (see CJEU, judgment of 9 September 2021 - C-768/19 -) to the effect that the question of whether the parent has the right of care and custody of the beneficiary of international protection is also to be assessed in relation to the point in time the respective application for protection was submitted.
- 34 It is true that the use of the present tense in section 26 (3) first sentence no. 5 AsylG ("have") as well as the use of the present and perfect tense in article 2 (j) third indent of Directive 2011/95/EU ("is", "has been granted") may argue in favour of a later point in time being decisive for the assessment (...). However, as regards the element of having the right of care and custody of the person, it would be contrary to the purpose of both provisions, namely to protect family unity and to provide for the welfare and social development of the minor, as well as to the principles of equal treatment and legal certainty, to consider a later point in time than that of the application for asylum, in the meaning of the submission of the request for protection by the parent, to be decisive (...).
- 35 It is not disputed between the parties that the claimants no. 1 and no. 2 had the right of care and custody of the principal person entitled until she reached the age of majority and thus also at the point in time they made their request for asylum.
- 36 e) Furthermore, the case-law of the Court of Justice has clarified that article 2 (j) third indent of Directive 2011/95/EU does not require that the parent actually resumes family life with the principal person entitled in the host Member State. Rather, as a matter of principle, it is up to the holders of the right to respect for family life to decide on the manner in which and the intensity with which they conduct their family life (CJEU, judgment of 9 September 2021 - C-768/19 - para. 54 et seqq.). Just as little as article 2 (j) third indent of Directive 2011/95/EU does section 26 (5) first and second sentence in conjunction with (3) first sentence AsylG stipulate any requirements with regard to actual resumption of family life in the federal territory. Even within the framework of section 26 (3) first sentence AsylG, interpreted in conformity with EU law, the arrangement of family life is left to the decision of the family members. Whether one can claim

the right to family protection even in cases where taking up of family life in any form is expressly and unequivocally refused by the principal person entitled or his or her parent (...) does not need to be decided here, as such a refusal is neither established by the court responsible for finding the facts nor is it otherwise evident.

- 37 2. The claimants no. 3 and no. 4 are to be granted refugee status on the basis of section 26 (5) first and second sentence in conjunction with (3) second sentence in conjunction with first sentence no. 1 to 4 AsylG.
- 38 In accordance with the statements under 1., the legislature was not prevented from extending international family protection to such members of the core family who are not covered by article 2 (j) of Directive 2011/95/EU, and thereby also to the minor unmarried siblings of the beneficiary of international protection, to the extent that their inclusion serves to protect the unity of the core family.
- 39 Measured against this, the conditions of section 26 (5) first and second sentence in conjunction with (3) second sentence in conjunction with first sentence no. 1 to 4 AsylG are also fulfilled with regard to the claimants no. 3 and no. 4. According to the factual findings of the Higher Administrative Court, they are the minor biological sisters within the meaning of section 26 (3) second sentence AsylG of the principal person entitled, who entered the federal territory together with the principal person entitled and the claimants no. 1 and no. 2 and filed an application for asylum. It is not disputed between the parties that the claimants no. 3 and no. 4, who were nine and six years old respectively at the point in time of their application, were unmarried and that the family within the meaning of article 2 (j) of Directive 2011/95/EU already existed in the Syrian Arab Republic as the state in which the principal person entitled would be subject to persecution.