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Family refugee protection for core family members benefiting from subsidiary protection

The fact that parents and siblings of a minor refugee were granted subsidiary protection status does not prevent recognition of family refugee protection; if the refugee has reached the age of majority during the procedure, both the family members and the child must have expressed their request for asylum prior to the child reaching the age of majority. This was decided by the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) in Leipzig today.

The claimants, Syrian nationals, are the parents and siblings of a refugee who has since reached the age of majority (principal person entitled (*Stammberechtigte*)). The entire family, including the principal person entitled, had sought asylum in Germany when the principal person entitled was still minor. The claimants were granted subsidiary protection by the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, hereinafter Federal Office) rejecting their applications for asylum with regard to all other aspects. The principal person entitled was granted refugee status afterwards, but only after reaching the age of majority. The action filed by the claimants for the granting of refugee status has remained unsuccessful in the lower instances.

The 1st Senate of the Federal Administrative Court has ordered the defendant to grant refugee status to the claimants pursuant to section 26 (5) first and second sentence in conjunction with (3) first sentence and/or second sentence of the Asylum Act (*AsylG, Asylgesetz*), based on the refugee status of the principal person entitled.

Article 23 (2) of 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 status. According to the intention of the German legislature, section 26 (3) in conjunction with (5) *AsylG* implements the protective objective of maintaining family unity (see article 2 (j) in conjunction with article 23 (2) of Directive 2011/95/EU) by granting international family protection derived from a family member benefiting from protection. As a more favourable national provision to which Member States are entitled under article 3 of Directive 2011/95/EU, such extension of status is permissible. For, it is consistent with the general scheme and objectives of the Directive. The members of the core family of the beneficiary of protection covered by section 26 (3) first and second sentence *AsylG* are regularly in a situation which, insofar as protection by derivation is sought with the aim of maintaining family unity, shows a connection with the purpose of international protection. Granting subsidiary protection by one's own right already allows for maintaining family unity, but does not create a better legal position than the refugee status derived from the principal person entitled. In fact, the Directive's objective of consolidating the unity of the core family is confirmed in a special way by the harmonisation of the protection status provided for in national law, just as by the extension to siblings.

The relevant point in time for assessing the 'minor' status of the principal refugee entitled has been clarified by the case-law of the Court of Justice of the European Union to the effect that it is sufficient if he or she was still a minor both at the point in time when his or her own asylum application as well as when his or her parents' (or siblings') application was filed. Accordingly, the point in time when asylum was requested, not the point in time of the formal application for asylum, is decisive. In view of the requirement that national law be interpreted in conformity with EU law, this interpretation of article 2 (j) of Directive 2011/95/EU is also decisive for section 26 (5) in conjunction with (3) AsylG. The same applies to the elements of being unmarried and having the right of care and custody of the person.

BVerwG 1 C 4.21 - judgment of 25 November 2021