Case C-456/21

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:

23 July 2021

Referring court:

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

Date of the decision to refer:

23 July 2021

Applicants:

E

F

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The main proceedings concern a dispute between E and F (‘the applicants’), on the one side, and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; ‘the defendant’), on the other side, concerning the refusal of the latter to grant the applicants’ applications for international protection. The applicants argue that, due to their long stay in the Netherlands, they have adopted western norms, values and actual conduct and therefore require protection.

Subject matter and legal basis of the request

This application pursuant to Article 267 TFEU concerns, first of all, the interpretation of Article 10 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (‘the Qualification

Directive'). More specifically, it concerns the question of when can third-country nationals be regarded as 'members of a particular social group' within the meaning of Article 10(1)(d) of the Qualification Directive. Second, the referring court questions the manner in which – and at what stage of the procedure – the best interests of the child must be determined and weighed up. In that regard, the referring court also questions the compatibility with EU law of a national practice whereby, in subsequent applications for international protection, as opposed to initial asylum procedures, it is not assessed whether residence should be granted on ordinary grounds.

Questions referred for a preliminary ruling

1. Must Article 10(1)(d) of the Qualification Directive be interpreted as meaning that western norms, values and actual conduct which third-country nationals adopt while staying in the territory of the Member State and participating fully in society for a significant part of the phase of their lives in which they form their identity are to be regarded as a common background that cannot be changed or characteristics that are so fundamental to identity that a person should not be forced to renounce them?

2. If the answer to the first question is in the affirmative, are third-country nationals who, irrespective of the reasons, have adopted comparable western norms and values through actual residence in the Member State during the phase of their lives in which they form their identity to be regarded as 'members of a particular social group' within the meaning of Article 10(1)(d) of the Qualification Directive? Is the question of whether there is a 'particular social group that has a distinct identity in the relevant country' to be assessed from the perspective of the Member State or must this, read in conjunction with Article 10(2) of the Qualification Directive, be interpreted as meaning that decisive weight is given to the ability of the foreign national to demonstrate that he or she is regarded in the country of origin as belonging to a particular social group or, at any rate, that this is attributed to him or her? Is the requirement that Westernisation can lead to refugee status only if it stems from religious or political motives compatible with Article 10 of the Qualification Directive, read in conjunction with the prohibition on refoulement and the right to asylum?

3. Is a national legal practice whereby a decision-maker, when assessing an application for international protection, weighs up the best interests of the child without first concretely determining (in each procedure) the best interests of the child compatible with EU law and, in particular, with Article 24(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with Article 51(1) of the Charter? Is the answer to this question different if the Member State has to assess a request for the grant of residence on ordinary grounds and the best interests of the child must be taken into account in deciding on that request?

4. Having regard to Article 24(2) of the Charter, in which manner and at what stage of the assessment of an application for international protection must the best interests of the child, and, more specifically, the harm suffered by a minor as a result of his or her long residence in a Member State, be taken into account and weighed up? Is it relevant in that regard whether that actual residence was lawful? Is it relevant, when weighing up the best interests of the child in the above assessment, whether the Member State took a decision on the application for international protection within the time limits laid down in EU law, whether a previously-imposed obligation to return was not complied with and whether the Member State did not effect removal after a return decision had been issued, as a result of which the minor's actual residence in the Member State was able to continue?

5. Is a national legal practice whereby a distinction is made between initial and subsequent applications for international protection, in the sense that ordinary grounds are disregarded in the case of subsequent applications for international protection, compatible with EU law, having regard to Article 7 of the Charter, read in conjunction with Article 24(2) thereof?

Provisions of EU law relied on

– Articles 6 and 10 and Article 15(b) of the Qualification Directive.

– Article 7, Article 24(2) and Article 51(1) of the Charter.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicants are part of a seven-person family. They, together with their father, mother, an older sister, an older brother and a younger brother, left their country of origin, Afghanistan, in June 2012 and, after staying in Iran for over three years, entered the Netherlands together on 1 October 2015. Applicant 1 was 11.5 years old on arrival in the Netherlands. Applicant 2 was 10.5 years old at the time of entry. At the time of the hearing, the applicants had been continuously resident in the Netherlands for 5 years and 8.5 months and were therefore both still minors.

2 On 23 October 2015, the applicants and the other family members lodged applications for international protection. Those applications were definitively dismissed by judgments of the Afdeling bestuursrechtspraak van de Raad van State (Chamber for Contentious Administrative Proceedings of the Council of State; 'the Afdeling') of 29 January 2019. Then, on 28 June 2019, the applicants lodged subsequent asylum applications. In this subsequent procedure, the applicants take the position that, as a result of their stay in the Netherlands, they have become westernised and therefore require protection.

The essential arguments of the parties in the main proceedings

3 The applicants have explained that, since their arrival in the Netherlands, they have participated fully in Dutch society. They have gone to school, made friends with boys and girls and undertaken joint activities with their peers. The applicants argue that, given their age and phase of life, the period of their stay in the Netherlands is the period in which they are forming their identity. In the course of this development, they have learned and experienced how to make their own choices about the organisation of their lives. Since being able to make their own decisions about essential choices in their lives as a result of their stay in the Netherlands has become fundamental to their identity, they can no longer change this nor, in any event, can or should this be expected of them. The applicants hereby argue that, due to the way they have grown up and developed in the Netherlands, they can no longer adjust to the rules of life that will apply to them after returning to Afghanistan.

4 The applicants have expressly stated that their norms, values, identity and resulting actual conduct are in no way related to political or religious views. The applicants however argue that if, after returning to Afghanistan, they are unable to adapt to the norms and values prevailing there, their identity and their actual conduct will be regarded by the Taliban as expressions of religious views that are so contrary to the prevailing views that the applicants would consequently fear for their lives.

5 The applicants refer to the formation and development of their identity in the Netherlands and the expression of this identity through their actual behaviour as ‘Westernisation’. The applicants request international protection from the Netherlands authorities on the ground of this Westernisation.

6 The applicants have also taken the position that they have suffered serious harm as a result of the period in which they have actually resided in the Netherlands, their uncertainty about the grant of residence and their fear of a possible return to Afghanistan. They have substantiated this position with a ‘Best Interests of the Child assessment’ (‘BIC assessment’) carried out by experts, as well as a general expert report describing the harm suffered by children who are rooted in (Dutch) society if they remain insecure over the course of a long stay or if they have to return to their country of origin (‘harm note’). In the opinion of the applicants, both reports show that, in order to prevent further harm, it is in their interest to have certainty that they may remain in the Netherlands. The applicants take the position that ‘the best interests of the child’ should lead to protection, or at least to the grant of residence on ordinary grounds.

7 The defendant takes the position that Westernisation can lead to refugee status only if that Westernisation stems from political or religious grounds. Westernised women cannot be regarded as a ‘particular social group’ within the meaning of the Qualification Directive. Furthermore, the defendant is of the opinion that, after their return to Afghanistan, the applicants can and may be expected to adjust their

behaviour to the norms and values prevailing there, as a result of which they will not be at risk of serious harm and will not need to be granted any protection. In the present subsequent asylum proceedings, it is not assessed whether the applicants are eligible for residence on ordinary grounds due to their inability to adapt to the norms and values prevailing in Afghanistan.

8 The defendant further takes the position that the interests of the child have been sufficiently considered and weighed up in the decision-making process and that the BIC assessment and the harm note submitted by the applicants after the completion of the decision-making process do not affect that decision-making.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 In these proceedings, the Rechtbank (District Court) is faced with several legal questions which, in its opinion, require a more thorough interpretation of EU law from the Court of Justice.

Should Westernisation lead to protection and the granting of residence by a Member State?

10 The questions which the Rechtbank must answer concern the issue, first, of whether Westernisation can lead to refugee status or subsidiary protection. If no claim for international protection as referred to in the Qualification Directive arises due to Westernisation, the question arises as to whether Westernisation constitutes private life which is worthy of protection or whether it should be assumed to be an obstacle to removal, or whether Westernisation should perhaps lead to the grant of residence on other, ordinary grounds. For the foreign national, the basis on which residence is granted is important; the principle of non-refoulement is absolute, whereas the assessment of whether residence should be granted on the basis of a private life built up in the Netherlands or on other ordinary grounds will involve a weighing up of various interests. In this weighing up of interests, weight will also have to be given to the scope for Member States to pursue a particular admission policy, and to the circumstance of whether a private life has been progressively built up during lawful or unlawful residence in the territory of the Member State. The extent to which a Member State complies with its obligation under EU law to remove foreign nationals who are not lawfully resident in the territory of the Member States may also be relevant in that regard. If, however, it must be assumed that Westernisation leads to grounds for persecution, there is no scope for such a weighing up of interests. The procedural position of the foreign national therefore depends on the question of the stage of the decision-making process at which the asylum grounds of the applicants must be assessed, and to what classification those grounds of the applicants lead. Also relevant to this question is that, in subsequent applications for international protection, as opposed to initial asylum procedures, national legal practice makes no assessment of whether residence should be granted on ordinary grounds such as private life considered worthy of protection.

11 The Rechtbank is faced with the question of which factors are decisive in order to define as a 'social group', within the meaning of Article 10 of the Qualification Directive, foreign national minors who reside in the Netherlands for a considerable period of time in the phase of their lives in which they form their identity, when they originate from a country where girls and women do not have equal rights to boys and men and where they are also not enabled to make essential choices about the organisation and form of their existence. The Afdeling has previously assumed that 'westernised women' do not constitute a particular social group because it is too large and too diverse a group. However, the present proceedings do not concern 'westernised women', but rather third-country nationals who are actually in the territory of a Member State for a considerable portion of the phase of life during which an individual forms his or her own identity and who participate fully in society there. The Rechtbank seeks to ascertain from the Court whether there is a requirement that 'members of a particular social group' know each other and/or recognise each other as such and therefore consider themselves to be individual members of a social group and whether and how the decision-making authority should examine and assess this. This question is also relevant in the assessment of whether there is a common background. If third-country nationals actually reside in the Member State in the phase of their lives in which they form their identity, whereas the norms and values in that Member State, if expressed, may lead to persecution in the country of origin, such residence can no longer be reversed. For that reason alone, does this mean that everyone who has that background belongs to a social group, even without their being aware that a number of other third-country nationals are in that position?

12 If it appears from the answers of the Court to the aforementioned questions that the applicants can be regarded as members of a particular social group on account of Westernisation, the question arises as to how the phrase '*that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society*' should be interpreted. The Rechtbank infers from the judgment of the Court of 4 October 2018 in the *Ahmedbekova* case (C-652/16, EU:C:2018:801, paragraph 89) that this requirement of a 'distinct identity' and the requirement that the members of the group display an 'innate characteristic' or have a 'common background that cannot be changed' or share a characteristic or belief 'that is so fundamental to identity or conscience that a person should not be forced to renounce it' are cumulative requirements for being able to refer to a 'particular social group'. In that regard, the Rechtbank wishes to ascertain in particular whether the assessment of whether the applicants should be regarded as members of a particular social group should be made from the perspective of the Member State or from the perspective of the actor of persecution. Article 10 of the Qualification Directive stipulates that what must be assessed first is whether a reason for persecution exists, and only then whether the characteristics exist that have been attributed to such a reason for persecution. This wording of the provision assumes that the assessment is first made from the perspective of the Member State and that, if this does not lead to the determination of a reason for persecution, the applicant can still demonstrate that an actor attributes the

characteristics of a reason for persecution to him or her. In the case of the persecuted group classified as a 'particular social group', a complicating factor is that the individuals which constitute a group will not always make themselves known as a group in the country of origin precisely because of the fear of persecution. The parties agree that expressing the norms and values to which the applicants subscribe or exhibiting the actual behaviour which they now exhibit will lead to persecution in Afghanistan. Should refugee status be granted on the basis of those facts and circumstances, despite the fact that it has not yet been established, which reason for persecution applies?

13 From the judgments of the Court of 5 September 2021, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraphs 78 to 80) and 7 November 2013, *X, Y and Z* (C-199/12, EU:C:2013:720, paragraphs 74 and 75), the Rechtbank infers that, if there is a reason for persecution, applicants for international protection do not have to adjust their behaviour in order to avoid actual persecution. The Rechtbank wishes to ascertain whether, if there is no reason for persecution and therefore no reason for granting refugee status on the basis of Westernisation, the persons concerned can be expected to bring their norms, values and the actual behaviour to which these give rise into line with the prevailing norms, values and actual behaviour in the country of origin after their return there and whether there can still be grounds for granting subsidiary protection. The Rechtbank asks the Court to clarify whether the applicants can be expected to try to avoid persecution by concealing their norms and values and therefore to exercise restraint, and whether those requirements are more onerous when it comes to avoiding persecution on the basis of attributed reasons for persecution. From the perspective of the Member State, if westernised individuals such as the applicants are not regarded as a social group, there will be no reasons for persecution. Do the applicants then nevertheless qualify for refugee status because of attributed political or religious views which deviate from the prevailing norm? Or must Article 10 of the Qualification Directive be interpreted as meaning that they do not qualify for refugee status, but perhaps only for subsidiary protection?

The best interests of the child

14 The other major question that the Rechtbank will have to answer is how the best interests of the child should be taken into account and weighed up in these asylum proceedings. The Court considered in paragraph [45] of its judgment of 14 January 2021 in *TQ* (C-441/19, EU:C:2021:9; 'the *TQ* judgment') that Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. That obligation implies that the decision-making authority must also determine those best interests; otherwise Article 24(2) of the Charter would be deprived of its effectiveness. Furthermore, the facts and circumstances put forward by the applicants call for an assessment of whether the harm sustained in the territory of the Member States as a result of the passage of time must give rise to protection. The applicants have substantiated the seriousness and extent of this harm with a multidisciplinary scientific report. In

this context, the Rechtbank should assess whether and how that harm, which does not stem from asylum grounds but does serve to substantiate the best interests of the child in a procedure initiated by an application for international protection, should be taken into account and weighed up. The best interests of the child as described in these procedures relate mainly to the harm caused by actual long residence in the Netherlands and not so much by experiences in the country of origin or events to be feared upon returning there. The questions that arise here are whether a Member State must be considered capable of weighing up the best interests of the child if the decision-making authority does not first determine what those best interests of the child are and whether, if a subsequent application for protection is lodged, less or no weight should be accorded to the best interests of the child if those best interests of the child could lead only to a decision to grant residence on ordinary grounds. In that regard, the question also arises whether the western norms and values adopted by the applicants form part of private life as protected and guaranteed by Article 7 of the Charter. If there is no question of refugee status, and in order to prevent a situation as referred to in Article 15(b) of the Qualification Directive, may the applicants be expected to conceal their identity as formed in the Netherlands? Or can Westernisation serve to underpin private life which, after a weighing up of interests, might possibly lead to the granting of residence on ordinary grounds?

15 It follows from the judgment of the Court of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452; 'the *M'Bodj* judgment') that subsidiary protection status can be granted only if a foreign national runs a real risk of suffering serious harm as referred to in Article 15 of the Qualification Directive. According to Article 6 of the Qualification Directive, that harm must be caused by one of the 'actors' of serious harm, namely, the State, parties or organisations controlling the State or non-state actors against whom the State or those parties are unable or unwilling to provide protection. The harm suffered by the applicants is not linked to asylum grounds. In the present case, it could be argued that, just as in the situation referred to in the *M'Bodj* judgment, there is no actor who has caused or will continue to cause that harm if residence is not granted. However, in the light of the *TQ* judgment, the best interests of the child must be a primary consideration in all proceedings and at every stage of the proceedings. If the *M'Bodj* judgment applies also to the facts and circumstances of the present proceedings, however, the best interests of the child, as evidenced by the reports submitted, can be accorded little substance in these proceedings. It could, however, be argued that the length of the proceedings and the failure to remove the foreign nationals after the initial proceedings are partly attributable to the Member State. In view of this, the Rechtbank asks the Court to clarify how the *M'Bodj* and *TQ* judgments must be interpreted in the present situation and how those judgments relate to each other.

16 The present proceedings involve subsequent asylum applications. When the Vreemdelingenwet (Law on foreign nationals) 2000 entered into force, national legal practice opted for a so-called strict watershed between asylum procedures and ordinary residence procedures. The term 'watershed' gives expression to the

fact that, in an asylum procedure, no aspects relating to ordinary residence are taken into account and that, conversely, in an ordinary residence procedure, no asylum grounds are assessed. One of the consequences of this is that, in subsequent applications, there is no automatic assessment of whether residence should be granted on ordinary grounds. Consequently, if Westernisation does not lead to protection in the present proceedings, on the basis of national legal practice practically no weight can be attached to the expert reports and thus to the best interests of the child. However, in the *TQ* judgment, the Court explicitly stated that in all actions relating to children, the best interests of the child must be a primary consideration, and that Article 24(2) of the Charter, read in conjunction with Article 51(1) of the Charter, affirms the fundamental nature of the rights of the child. Also, in the judgment of 10 June 2021 in the *LH* case (C-921/19, EU:C:2021:478; 'the *LH* judgment'), the Court considered, inter alia, that, as regards the examination of documents and compliance with the obligation to cooperate, such a distinction between initial and subsequent procedures for international protection is contrary to EU law. The Rechtbank asks the Court, in essence, whether, in the light of the *TQ* judgment, the *LH* judgment should be deemed to apply *mutatis mutandis* when assessing whether it is permissible to draw a distinction between initial and subsequent procedures for requesting international protection and, consequently, for the grant of residence.

Acte clair/acte éclairé

17 It has not become apparent that there is an acte clair with regard to the questions raised by the Rechtbank, since Article 10 of the Qualification Directive does not provide any guidance on the definition and scope of the concepts of 'common background' and 'fundamental characteristics of an identity', and Article 24(2) of the Charter does not expressly provide that the decision-making authority must determine the best interests of the child in every procedure, or have them determined, and what weight must then be accorded to those interests. Nor is it apparent from EU law whether the Netherlands legal practice of maintaining a strict watershed between asylum procedures and procedures for ordinary residence is compatible with EU law. Moreover, the provisions in question have not been formulated so clearly that there can be no doubt as to their interpretation or scope. After all, the question is whether national legal practice in relation to the legal questions formulated by the Rechtbank is in accordance with the Qualification Directive and with the Charter. In addition, there is no acte éclairé with regard to the questions, since the Court has not formulated clear answers to them in the past, nor can the answers to the questions be found in the settled case-law of the Court in similar cases.

Conclusion

18 The Rechtbank considers it necessary to refer questions for a preliminary ruling in order to be able to give a ruling in the main proceedings and therefore submits the questions formulated above to the Court of Justice. Furthermore, an answer to

these questions is important to a number of minors who find themselves in a similar situation. The Rechtbank requests the Court to deal with the questions by the expedited procedure (PPU) in order to limit as much as possible the further passage of time and to prevent further developmental damage to the applicants.