Case C-153/21

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 March 2021

Referring court:

Tribunal Administratif (Luxembourg)

Date of the decision to refer:

1 March 2021

Applicants:

A

B

C, legally represented by his parents

Defendant:

Ministre de l'Immigration et de l'Asile

Administrative Court of the Grand Duchy of Luxembourg

Second Chamber

JUDGMENT

I. Subject matter of the main proceedings

1 A and B have brought an action for annulment of a decision adopted on 8 December 2020 by the Ministre de l'Immigration et de l'Asile (Minister of Immigration and Asylum; 'the Minister'), declaring the application for international protection of their child C (a minor) to be inadmissible, and ordering them to leave the territory.

II. Law

1. International and EU Law

2 The Charter of Fundamental Rights of the European Union ('the Charter') provides in Article 24, headed 'The rights of the child':

'…

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

…'.

3 Directive 2011/95/EU [1] provides, in Article 23:

'1. Member States shall ensure that family unity can be maintained.

2. 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, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.

…'.

4 Directive 2013/32/EU [2] provides, in Article 33(2):

'Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection; …'

5 Regulation (EU) No 604/2013 [3] (also referred to below as 'the Dublin III Regulation') provides in Article 21(1):

[1] Directive 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 (recast) (OJ 2011 L 337, p. 9).

[2] Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

[3] Regulation 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 2013 L 182, p. 31).

'Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

…'.

6 Finally, the parties also rely on Article 3 of the ECHR and Directive 2008/115/EC. [4]

2. National law

7 The loi du 18 décembre 2015 relative à la protection internationale et à la protection temporaire (Law of 18 December 2015 on international protection and temporary protection (*Mémorial* A255 of 28 December 2015); 'the Law of 18 December 2015') provides:

'Article 5:

A non-emancipated minor has the right to apply for international protection through his parents or any other adult member of his family, or through an adult exercising parental authority over him, or through an ad hoc guardian'.

'Article 28:

…

2. Besides the cases in which an application is not considered pursuant to paragraph (1), the minister may decide that it is inadmissible, without examining whether the conditions for granting international protection are met, in the following cases:

a) where another Member State of the European Union has granted international protection; …'.

III. Facts and background to the proceedings

8 A and B, who are Syrian nationals, were granted international protection in Greece on 16 November 2018, for themselves and their minor children. On 17 December 2019, they made an application for international protection in the Grand Duchy of Luxembourg, on behalf of themselves and their children. On 27 January 2020, they made an application for international protection on behalf

[4] Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

of their child C, who, in the meantime, had been born in the Grand Duchy of Luxembourg.

9 On 11 February 2020, the Luxembourg authorities made a request to the Greek authorities for readmission of A, B, and their minor children, on the basis of Directive 2008/115/EC. That request was granted by the Greek authorities on 12 February 2020.

10 By decision of 13 February 2020, the Minister declared the applications for international protection inadmissible, on the basis of Article 28(2)(a) of the Law of 18 December 2015, on the ground that the applicants had the benefit of refugee status in Greece, and ordered them to leave the territory.

11 On 4 March 2020, the applicants lodged an action for annulment of the decision of 13 February 2020.

12 By judgment of 3 August 2020, the Administrative Court dismissed that action, except in so far as it related to child C. The grounds of that judgment included the following:

‘*… there is nothing in the administrative file to indicate that, as at the date on which the Minister took the decision, or in other words 13 February 2020, child [C] had been [granted] refugee status by the Greek authorities. Indeed, in their email of 12 February 2020, the Greek authorities indicated that [they] were admitting all the family members to their territory … pursuant to Article 6 of Directive 2008/115/EC, justifying their acceptance on the basis that family members ‘1-7’, or in other words all family members … except [child C], who was eighth on the list, had been granted refugee status. Furthermore the government delegate expressly indicates in his response that child [C] does not yet officially have the status of refugee, which would only be granted, on return to Greece, if the relevant administrative steps were taken. Accordingly, child [C] must be regarded not as having the benefit of international protection, but as an applicant for international protection, the State party not having identified – it should also be said – any legal basis for its assertion that a child is automatically granted refugee status when his or her parents obtain such status. … the contested decision must be annulled in so far as it relates to [child C] …*’.

The Administrative Court dismissed other pleas, under which the applicants on relied material hardship and medical difficulties, and on the risk that the living conditions they would face in Greece would amount to inhuman or degrading treatment.

13 On 27 August 2020, the Greek authorities confirmed that the eight family members would be readmitted to Greece and that, once he had arrived and been registered, child C would be granted a residence permit equivalent to that held by the other family members, and would be entitled to the same benefits as beneficiaries of international protection in Greece.

The Greek authorities' letter reads as follows:

'*As already mentioned in your email, the competent national authorities have conceded in readmitting the ... family of Syrian nationals (all 8 members), according to art. 6 of Directive 2008/15/EC, on the grounds that all family members, with the exception of the minor [C], born in [Luxembourg] on ..., were granted refugee status by the Greek Asylum Authorities and provided with residence permits valid from ... to ...*

With reference in particular to the [latter], [C], we would like to inform you that as family member of beneficiary of international protection, he shall receive, upon the arrival of the family to Greece, at the request of his parents and the production of the child's birth certificate, a residence permit with the duration of the validity of the permit of the beneficiary, and shall be entitled to all the benefits referred to in Articles 24 to 35 of the Directive 2011/95/EU, in line with the national legal framework ...'.

14 By decision of 8 December 2020 ('the contested decision'), the Minister declared child C's application for international protection to be inadmissible, on the ground that he had refugee status in Greece. The reasons given for that decision were as follows:

'*... it must be observed that by ministerial decision of 13 February 2020, the applications for international protection concerning the entire family were declared inadmissible, given that you have the benefit of international protection in Greece.*

…

As the Administrative Court has decided to annul the ministerial decision only in so far as it concerns your son [C], it must be emphasised that the decision as to the inadmissibility of the applications for international protection made by the other seven members of your family is now res judicata *and enforceable.*

It should be observed however that on 12 February 2020, the Greek authorities gave a first indication to the Luxembourg authorities that they would issue a residence permit to your son upon your return to Greece.

On 27 August 2020, ... the Greek authorities ... stated, in relation to your son born in Luxembourg, that he would be issued with a residence permit equivalent to your own, and would have all the benefits of refugee status in Greece, in accordance with Articles 24 to 35 of Directive 2011/95/EU.

Finally, on 4 November 2020, in connection with a request to take charge sent to them pursuant to the Dublin III Regulation and relating solely to your son [C], the Greek authorities confirmed that [C] would obtain the benefit of all rights associated with refugee status following your arrival in Greece, simply on parental request. Greece refused to take [C] back under the Dublin III

Regulation, given that you already have refugee status and that [readmission] to Greece had already been authorised in respect of the entire family, including [C].

[Consequently, in accordance with Article 28(2)(a) of the Law of 18 December 2015], *the application for international protection of your son [C] is also inadmissible … .*

Furthermore, it is clearly in the best interest of the child, and thus in [C]'s interest, for him to grow up living with his parents, and hence for family unity to be maintained with regard to him. You are under an obligation to leave the territory for Greece, and it is therefore clearly in the interest of [C] to remain with his parents and to accompany you when you are returned to Greece, especially since he has a formal and express guarantee from the Greek authorities that he will enjoy the rights of a beneficiary of international protection.

Finally, it should be pointed out that it does not appear from the material before us that either you or your son have reason to fear inhuman and degrading treatment within the meaning of Article 3 of the European Convention on Human Rights, or indeed of Article 4 of the Charter of Fundamental Rights of the European Union.

…'.

15 On 28 December 2020, the applicants brought an action for annulment of the decision before the Administrative Court.

IV. Discussion

1. Submissions of the applicants

16 The applicants state that they are Syrian Kurds, and that they did not find the protection and security they were seeking in Greece. They indicate that the accommodation provided to them as applicants for international protection was extremely basic, and that they lost all rights to accommodation when they were granted such protection. They lived in such deprivation that they had to look for food in restaurant bins. Their children did not receive any education. They were subjected to aggression because of their Kurdish ethnicity. When their child [D] was diagnosed with cancer, they had to travel to a hospital 350 km from home. While [D] was receiving treatment, over a period of several months, they had to sleep in parks or at the homes of acquaintances. After months of hoping to be allocated new accommodation, fearful of living on the street and with B pregnant, the applicants decided to come to Luxembourg. Their child [D] received treatment on arrival in Luxembourg as well as oncological follow-up, and is now in remission.

17 In law, the applicants rely on infringement of Article 28(2)(a) of the Law of 18 December 2015, which transposes Article 33(2)(a) of Directive 2013/32 into

national law. They submit that the situation of their son C does not fall within that provision, which only applies where the person concerned has been granted international protection. Moreover, there is no evidence that such protection would be granted to him on arrival in Greece, given that the grant of a residence permit would be dependent on steps they would have to take themselves. Furthermore, even assuming that they took the necessary steps, they submit, the Greek authorities have not explicitly undertaken to grant international protection, but have merely indicated that it would be possible for C to obtain the benefit of the rights enjoyed by beneficiaries of international protection. Finally, to remove C to Greece would defeat the rights flowing from his status as an applicant for international protection, and particularly the right to have his application considered individually.

18 Furthermore, the applicants submit, the contested decision infringed Article 21(1) of the Dublin III Regulation, in that the Minister ought to have considered the return of child C to Greece on the basis of that regulation given that, in Greece, he would not be a beneficiary of international protection, but would simply be regarded as an applicant for such protection.

19 The applicants rely on infringement of Article 3 of the ECHR and Article 4 of the Charter, submitting that Greece is '*the prototypical example of a flawed system*'. In that regard, they refer to the judgment of 11 January 2011, *M.S.S.* v. *Belgium and Greece* (CE:ECHR:2011:0121JUD003069609), in which, they submit, the ECtHR held that the reception conditions for applicants for international protection in Greece constituted treatment contrary to Article 3 of the ECHR and Article 4 of the Charter. They also refer, in that regard, to the judgments of the Court of Justice of 19 March 2019, *Ibrahim and Others*(C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219) and *Jawo* (C-163/17, EU:C:2019:218).

20 Furthermore, they submit that the contested decision infringed Article 24 of the Charter. It is in the best interest of C, they argue, for his application to be considered in Luxembourg. The Minister has not given reasons showing that his decision is proportionate. In its judgment of 21 December 2001, *Şen* v. *Netherlands* (CE:ECHR:2001:1221JUD003146596), the ECtHR held that there were three factors to be taken into account in balancing the public interest against the best interest of the child: the age of the child, the situation in the country of origin and the extent to which the child was dependent on the parents. It refined this approach, the applicants submit, in its judgment of 3 October 2014, *Jeunesse* v. *Netherlands* (CE:ECHR:2014:1003JUD001273810). It would be in the best interest of C to remain in Luxembourg with his family. In support of that position, the applicants submit that the other family members are vulnerable, that a change of environment could be traumatic for their children, and that the entire family would suffer deprivation in Greece. The applicants also submit that their removal might, in itself, constitute an infringement of Article 4 of the Charter. In that regard, they rely on the judgment of 16 February 2017, *C.K. and Others*(C-578/16 PPU, EU:C:2017:127, paragraph 68), in which the Court held that the suffering which flows from naturally occurring illness, whether physical

or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment for which the authorities can be held responsible.

21 Finally, they submit that it would be appropriate to make a reference to the Court for a preliminary ruling, and that the questions referred could be formulated as follows:

'*1. Does Article 33(2)(a) of [Directive 2013/32/EU] permit a Member State to declare an application for international protection inadmissible on the ground that another Member State has given it an assurance that, provided that the individual concerned attends to the necessary formalities, it will grant him a residence permit, together with the rights guaranteed by Articles 24 to 35 of [Directive 2011/95/EU]?*

2. If so, must the decision as to whether or not to apply Article 33(2)(a) of Directive 2013/32/EU to a child be annulled (or can it be annulled) on the basis of international law on the rights of the child, and particularly on the basis of the International Convention on the Rights of the Child and the case-law of the Committee of the Rights of the Child?'

2. Submissions of the Minister

22 The Minister contends that the action should be dismissed. First, the contested decision is based on Article 28(2)(a) of the Law of 18 December 2015. That provision is not rendered inapplicable, the Minister submits, by the mere fact that child C is not yet officially a beneficiary of international protection in Greece; the Greek authorities have simply been unable to grant such protection because C is in Luxembourg. Furthermore, the Greek and Luxembourg authorities have given due consideration to the best interest of the child. As A and B are beneficiaries of international protection in Greece, their children – even if born after international protection was granted – will *de facto* enjoy the same protection. Indeed, the Greek authorities have expressly acknowledged that C would not be an applicant for international protection but a beneficiary of such protection, indicating that his parents need only regularise his administrative situation. The Greek authorities refused the request to take charge of child C made by the Luxembourg authorities on the basis of the Dublin III Regulation on the ground that the child was to be regarded as a beneficiary of international protection. In that regard, the Minister refers to emails of 4 November 2020 and 27 August 2020 from the Greek authorities. In the latter email, the Greek authorities refer to the rights granted to a beneficiary of international protection and the provisions of Directive 2011/95, which shows (the Minister argues) that they regard C as a beneficiary of international protection.

23 Secondly, the Minister was entitled to take an initial decision in respect of the entire family, so as to avoid infringing the principle of the best interest of the child. C's best interest does not lie in remaining in Luxembourg, but in accompanying his family to Greece, where all the other family members have the

benefit of international protection. National case-law confirms that the outcome of an application for international protection made by a minor child, even if born in Luxembourg, will mirror that of the parents' application.

24 As to the plea based on infringement of Article 3 of the ECHR and Article 4 of the Charter, the Minister refers to the judgment of the Administrative Court of 3 August 2020, in which it was held that the applicants would not be at risk of treatment contrary to those provisions if they were to return to Greece. He submits that there is no serious argument to the effect that child C would be at risk of being personally subjected to such treatment.

V. Assessment of the referring court

25 In essence, the second of the applicants' proposed questions is intended to establish whether a decision declaring the application for international protection to be inadmissible would, in the present case, be in conformity with Article 24 of the Charter, which enshrines the principle of the best interest of the child in EU law.

26 The court refers to its judgment of 3 August 2020, in which it found that that, at the time of the ministerial decision of 13 February 2020, there was nothing to demonstrate that child C had been given refugee status by the Greek authorities, or that a child would automatically acquire refugee status when it was granted to his parents.

27 In the judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 68), the Court held: '*It should be noted that Directive 2011/95 does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status. It follows that Article 23 of that directive merely requires Member States to amend their national laws so that family members, within the meaning referred to in Article 2(j) of the directive, of the beneficiary of such a status are, if they are not individually eligible for the same status, entitled to certain benefits, which include, inter alia, a residence permit, access to employment or to education, which are intended to maintain family unity*'.

28 It follows that the family members of a beneficiary of international protection do not automatically acquire that status, even though, in practice, they have access to the same benefits as a person who has been granted such protection.

29 The Greek authorities acknowledge, in their email of 27 August 2020, that child C is not a beneficiary of international protection in their country, and state that he will be able to obtain a residence permit, as well as the benefits referred to in Articles 24 to 35 of Directive 2011/95, provided that his parents make a request to that effect and supply his birth certificate.

30 Furthermore, there is nothing to indicate that Greek law provides for refugee status to be granted automatically to minor children of beneficiaries of international protection. The Greek authorities indicate only that child C would have available to him the same benefits as were granted to his parents; they do not expressly state that he would be granted refugee status.

31 Thus, applying Article 28(2)(a) of the Law of 18 December 2015 strictly, it was not open to the Minister to adopt the contested decision. The Greek authorities have not granted refugee status to child C, and their email of 27 August 2020 does not indicate that they intend to grant him such status upon arrival in Greece. Rather, they simply refer to the benefits granted to beneficiaries of international protection.

32 In *Bundesrepublik Deutschland* (C-720/20), the fourth of the questions referred to the Court for a preliminary ruling was worded as follows: '… *can a decision on inadmissibility under Article 33(2)(a) of Directive 2013/32/EU be adopted by analogy in respect of a minor child who has lodged an application for international protection in a Member State even if it is not the child itself but its parents who enjoy international protection in another Member State?*'

33 Unlike the German authorities who, in that case, had taken a decision on the basis of the Dublin III regulation, the Luxembourg authorities took a decision on the basis of Article 28(2)(a) of the Law of 18 December 2015, which transposes Article 33(2)(a) of Directive 2013/32 into national law.

34 The Greek authorities have given an assurance that child C will have available to him, on arrival in Greece, the same benefits granted to the other members of his family, all of whom have refugee status in that country. In so far as the Minister put the reasoning for the contested decision on the basis that child C would be entitled to the benefits associated with refugee status, it is necessary to interpret the words '*has granted international protection*', in Article 33(2)(a) of Directive 2013/32, read in conjunction with Article 23 of Directive 2011/95 on maintaining family unity, and with Article 24 of the Charter.

VI. Reasons for the referral

35 The national court is under a duty to give full effect to provisions of EU law, if necessary refusing to apply any provision of national law. [5]

36 In the present case, the Administrative Court is the court of final jurisdiction. It must interpret the words '*has granted international protection*' in Article 33(2)(a) of Directive 2013/32. Bearing in mind that the applicants' other pleas are only relevant if the Minister was entitled to base the reasoning for the contested decision on Article 28(2)(a) of the Law of 18 December 2015, which transposes

[5] Judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49).

Article 33(2)(a) of Directive 2013/32 into domestic law, an interpretation of those words is required in order for the court to give judgment.

VII. The question referred for a preliminary ruling

37 The Administrative Court seeks a preliminary ruling from the Court of Justice of the European Union on the following question:

Can Article 33(2)(a) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, read in conjunction with Article 23 of Directive 2011/95/EU 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, and with Article 24 of the Charter of Fundamental Rights of the European Union, be interpreted as permitting a declaration of inadmissibility in respect of an application for international protection made by the parents of a minor, in the name and on behalf of that minor, in a Member State (in this case Luxembourg) other than that which has previously granted international protection to the parents, brothers and sisters of the child, but not to the child himself (in this case Greece), on the ground that the authorities of the country which granted international protection to the parents, brothers and sisters, prior to their departure from that country and prior to the birth of the child, have guaranteed that, on arrival of the child and return of the other family members, the child will be granted a residence permit and will have the same benefits available to him as are granted to beneficiaries of international protection, though without stating that he will be granted international protection in his own right.