Case C-374/22

Request for a preliminary ruling

Date lodged:

8 June 2022

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

18 May 2022

Appellant:

XXX

Respondent:

Commissaire général aux réfugiés et aux apatrides

CONSEIL D'ÉTAT (COUNCIL OF STATE), ADMINISTRATIVE LITIGATION DIVISION

ELEVENTH CHAMBER

JUDGMENT

No 253.779 of 18 May 2022

[…]

In the proceedings:

XXX,
[…]
v
Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons, Belgium)

I. Subject matter of the appeal

1. By an appeal in cassation lodged on 25 May 2020, XXX sought to have set aside Judgment No 235.262 of 17 April 2020 […] of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium).

II. […]

[…] [procedure]

III. Facts relevant to the examination of the matter

The appellant declares that he is a Guinean national. He arrived in Belgium on 7 November 2007.

The appellant submitted an initial application for international protection, which was rejected.

He then made two further applications for international protection, which the opposing party refused to consider.

On 29 January 2019, the appellant submitted a fourth application for international protection. In support of that application, the appellant relied, inter alia, on the fact that he is the father of two children who were born in Belgium and who have been recognised as refugees, like their mother.

On 2 October 2019, the opposing party found that the fourth application was inadmissible.

On 15 October 2019, the appellant brought an action against that decision of 2 October 2019.

On 17 April 2020, the Council for asylum and immigration proceedings dismissed the action by the judgment under appeal.

IV. First ground of appeal

The appellant enters a first ground of appeal alleging infringement ‘of Articles 39/65 and 48/3 of the loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers (Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals; ‘the Law of 15 December 1980’ or ‘the Law on Foreign Nationals’); Article 23 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') [(OJ 2011 L 337, p. 9)]; Article 288 [TFEU] […]'.

IV.1. […] [irrelevant to the questions referred for a preliminary ruling]

IV.2. Second part

A. Submissions of the parties

The appellant states that '… Article [23(2)] of Directive 2011/95 contains an obligation for Member States to amend their national law so that family members of the beneficiary [of international protection] can claim the benefits [listed] in Articles 24 to 35', that '… Article 23 of Directive [2011/95] has not, however, been transposed … [into] Belgian law in favour, in particular, of parents of a minor recognised as a refugee (such as the appellant)', that '… Article 10 of the Law of 15 December 1980 creates […] a right to family reunification in favour of certain family members of the beneficiary of international protection, provided that they comply with the conditions laid down by law …', that, 'on the one hand, the concept of family member within the meaning of Article 23 of Directive 2011/95 is broader than the family members referred to in Article 10 of the Law of 15 December 1980', that, 'by way of illustration, Article 10(1)(7) of the Law of 15 December 1980 recognises the right to family reunification of the father of a foreign national recognised as a refugee, provided that that foreign national is an unaccompanied foreign minor', that 'if the child is accompanied, as in the case of the appellant's daughter, there is no entitlement to family reunification', that, 'on the other hand, Articles 10 and 12a of the Law of 15 December 1980 impose conditions (on admissibility and substance) for family reunification, such that the right to family life for a refugee is not automatic', that it 'follows from the above that Article 10 of the Law of 15 December 1980 does not fully transpose Article 23 of Directive 2011/95', that 'Article 9a of the Law of 15 December 1980 does not transpose it either', that 'that article relates to permission (and not admission) to stay, with its own conditions of admissibility and substance, which do not allow the family member to enjoy the abovementioned benefits', that '… […], an incomplete transposition of Article 23 of Directive [2011/95] is sufficient to give rise to a right to be granted international protection status', that '… the national law must be interpreted in accordance with Article [23(2)] of Directive [2011/95] to guarantee its effectiveness, in accordance with the abovementioned case-law', that '… the objective pursued by Article 23 of Directive [2011/95] is to maintain the refugee's family unity', that 'that objective is mentioned in […] recitals [16 and 18] of the directive …', that 'the Belgian legislature has not adopted a *sui generis* status, specifically transposing Article 23 of Directive 2011/95, so that the family members of the beneficiary of international protection can claim the benefits referred to in Articles 24 to 35 of Directive 2011/95', that 'in that context, the national court must therefore interpret the ordinary rules on international protection, namely Article 48/3 of the Law, in the light of Article 23 of Directive 2011/95, to ensure that that provision is effective', that 'the granting

of international protection status to family members of a beneficiary of such protection is the only mechanism allowing […] family unity to be maintained and family members to claim the benefits referred to in Articles 24 to 35', that '… those benefits are linked to refugee or international protection status, and are grouped together under the heading "Content of international protection"', that 'by way of an example, Article 24 of the directive requires the Member State to issue a residence permit "as soon as possible after international protection has been granted"', that 'Article 25 provides that Member States are to issue … to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require', that 'that benefit is accessible only to beneficiaries of international protection', that '… […] the judgment under appeal[, according to which] "the fact that the transposition of Article 23 of Directive [2011/95] is incomplete, if proven, is not sufficient to give rise to a right to be granted international protection status [for the] family members of a beneficiary of such protection", […] undermines […] the effectiveness of Article 23 of Directive 2011/95 and Article 288 [TFEU]', […], that in 'the absence of the full transposition of Article 23 of the directive, Article 48/3 of the Law of 15 December 1980 must be interpreted in accordance with Article 23 of the directive in order to comply with Article 288 of the Treaty', that 'in the absence of an amendment to national law so that a refugee's family members can claim the benefits [listed] in Article 23, the judicial authorities are required to take all necessary measures to achieve the result prescribed by the directive', that 'the only way to achieve that result – that is to say, to maintain the family unity of a child refugee by allowing that child's father to claim certain benefits, including being granted a travel document – is to grant that father derivative international protection', […]. [reiterations or irrelevant considerations]

In response, the opposing party submits that '… [the appellant remains] unable to explain why the Council for asylum and immigration proceedings could not lawfully find, as the Court of Justice of the European Union has found, that Article 23 of Directive [2011/95] does not refer to the granting of international protection status, but only to the benefits referred to in Articles 24 to 35 of that directive', that 'although the appellant submits that an incomplete transposition of Article 23 is sufficient to give rise to a right to be granted international protection status, he is unable to put forward any relevant argument to demonstrate that that provision relates to the granting of international protection status to the family members of a beneficiary of international protection, and not solely to the benefits referred to in Articles 24 to 35 of Directive [2011/95]', that 'Article 3 of that directive allows a Member State to provide, [by means of] a "more favourable standard", for the benefit of international protection to be extended to a family member', that 'that possibility is not sufficient to give rise to a right that persons may claim when the State has not made use of that [option]', that 'Belgium has not adopted more favourable standards […],' that 'if the appellant considers that Article 23 of Directive [2011/95] has not been validly transposed into Belgian law, it is ineffective that he present his arguments in that regard before the

Council for asylum and immigration proceedings, which in any event has no jurisdiction to rule as regards the granting of the benefits referred to in Articles 24 to 35 of that directive, irrespective of whether the transposition of Article 23 is complete or not', that 'the arguments based on the primacy of EU law and the principles of interpretation cannot lead the Council for asylum and immigration proceedings to claim jurisdiction that it does not have', that 'the Council for asylum and immigration proceedings was able lawfully to decide that the consideration of the best interests of the child and respect for the family life of the appellant did not in any event allow to establish a right for a family member of a beneficiary of international protection to be granted the same status as the latter …'.

In reply, the appellant states that 'the respondent advocates an approach to Article 23 of the directive that deprives that provision of any effectiveness', that 'it is not the direct effect of Article 23 of the directive (and thus the direct benefit of the European provisions not transposed into Belgian law) that is under discussion, but the interpretation of national law in conformity with Article 23, in order to guarantee its effectiveness', that 'to refer the appellant to a multitude of institutions and judicial authorities so that he may assert individually the rights referred to in Articles 24 to 35 of Directive [2011/95], which the European legislature describes as "content of international protection", deprives Article 23 of Directive 2011/95 of its effectiveness and certainly does not pursue the objective of the directive (including maintaining the refugee's family unity and considering the best interests of the child)', that 'the incomplete transposition of Article 23 places a refugee who is a minor in a precarious situation, if his parent does not enjoy a status that guarantees him the benefits [listed] in Articles 24 to 35 of the directive (including the right to a residence permit, but also access to employment, education, health care, housing, etc.)', that 'as to the jurisdiction of the Council for asylum and immigration proceedings, Article 39/2 of the Law of 15 December 1980 provides that the Council may vary the contested decision', that, 'accordingly, it has every authority to grant the appellant the refugee status sought', that it 'is further required, in the words of the Court of Justice, to interpret the national law, "so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU"', that 'the Court of Justice […] [has specified] that the requirement for a consistent interpretation of national law is indeed inherent in the TFEU system in that it allows national courts to ensure, within the scope of their jurisdiction, the full effectiveness of EU law', that 'the granting of derivative refugee status is moreover fully compatible with EU law (judgment [of 4 October 2018, *Ahmedbekova*, C-652/16, EU:C:2018:801])', that 'the appellant deplores the fact that the best interests of the child, and the effectiveness of the refugee status of the minor, are again examined marginally (by the respondent and by the Council for asylum and immigration proceedings), without those best interests being a primary consideration', that 'the appellant … emphasises the relevance of the questions referred for a preliminary ruling', that they 'are indeed different from

those giving rise to the *Ahmedbekova* judgment'. [reiterations or irrelevant considerations]

The parties were asked at the hearing about the applicability of Article 23 of Directive [2011/95] to the appellant's situation, since it is clear from Article 2[(j)] of that directive that the family members of the beneficiary of international protection […] are covered by [that] directive […]/[…] 'in so far as the family already existed in the country of origin', and it follows from the appellant's explanations that his family did not exist in the country of origin but did so in Belgium, once his children were born there.

The appellant argued, in essence, that his family did not exist in the country of origin, that it does not come within the material scope in the strict sense of Directive [2011/95], that he nevertheless relied on his children's dependency on him, that the best interests of his children require him to qualify for international protection, that it is necessary to extend the concept of family members within the meaning of Directive [2011/95], in accordance with its recitals 18, 19 and 38, in order to take account of the best interests of children and the circumstances of dependency. […].

The opposing party stated, in essence, that the combined reading of Article 2(j) and Article 23 of Directive [2011/95] leads to the exclusion from the scope of Article 23 of members of a family that [did not] exist in the country of origin, that the reading of recitals 18, 19 and 38 [could] not alter that conclusion, that, even if extended, the concept of family member means that the family existed in the country of origin, that that is not the case here, and that although recitals 18, 19 and 38 require the best interests of the child to be taken into account, that is intended to guide Member States in the interpretation of the directive, but cannot run counter to the unequivocal wording of Article 2(j) or justify the application of Article 23.

B. Assessment

[…] [irrelevant]

Article 23 of Directive [2011/95] provides:

'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. …

[…]' [irrelevant].

The family members of the beneficiary of international protection are defined in Article 2(j) of the directive, which states that:

'the following definitions shall apply … "family members" means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

– […] [irrelevant]

– the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;'

One of the benefits referred to in Articles 24 to 35, which Article 23[(2)] requires to be granted, is the residence permit provided for in Article 24 of Directive [2011/95]. The opposing party does not dispute that Belgian law does not grant a right of residence for the appellant in his situation, in respect of the transposition of Directive [2011/95]. The appellant is the father of two minor children who were born in Belgium and were recognised as refugees there. The family therefore existed in Belgium and did not already exist in the country of origin.

Article 10(1)(1)(7) of the Law [of 15 December 1980] provides for a right of residence for 'the father and mother of a foreign national recognised as a refugee within the meaning of Article 48/3 or enjoying subsidiary protection, who come to live with him or her, provided he or she is under the age of 18 and has entered the Kingdom without being accompanied by an adult foreign national responsible for him or her by law and has not been effectively taken into the care of such a person subsequently, or has been left unaccompanied after entering the Kingdom'. That provision does not apply to the appellant, since his minor children did not enter Belgium without being accompanied by an adult foreign national responsible for them.

The Conseil d'État (Council of State, Belgium) is uncertain as regards the applicability of Article 23 of Directive [2011/95] to the appellant's situation, given that Article 2(j) of that directive states that the family members of the beneficiary of international protection … are covered by Directive 2011/95/EU […] 'in so far as the family already existed in the country of origin'. […] [reiterations]

Accordingly, the Court of Justice of the European Union should be asked for a preliminary ruling on the applicability of Article 23 of Directive [2011/95] to the appellant's situation. The [first two] questions [set out in the operative part] should be referred for a preliminary ruling.

– […] [text of the first two questions].

If the Court of Justice of the European Union should find that Article 23 of Directive [2011/95] does apply to the appellant's situation, the appellant submits, in essence, that, in the absence of having been validly transposed into Belgian law, that provision has direct effect, meaning that Belgium is under an obligation to grant him international protection. At the same time, the appellant asserts that the national law must be applied in a manner consistent with EU law and that, in order to give effect to Article 23 of Directive [2011/95], which has not been transposed, Article 48/3 of the Law of 15 December 1980 on the granting of refugee status must be interpreted as allowing him to be granted international protection.

The Council of State considers that, pending the judgment of the Court of Justice of the European Union on the questions referred for a preliminary ruling by the present judgment, Article 23 of Directive [2011/95] does not seem to require international protection to be granted to the family members of the beneficiary of international protection covered by that directive. That provision seems to provide only for the granting of the benefits referred to in Articles 24 to 35 to family members who do not individually qualify for international protection. Moreover, Article 48/3 of the Law of 15 December 1980 does not offer the possibility of granting international protection to persons, such as the appellant, who do not individually qualify for such protection. The interpretation of Article 48/3 of the Law of 15 December 1980, relied on by the appellant, according to which international protection could be granted to him under that provision, is therefore a *contra legem* interpretation.

It seems to the Council of State, pending the judgment of the Court of Justice of the European Union ruling on the questions referred for a preliminary ruling by the present judgment, that if Article 23 of Directive [2011/95] did apply to the appellant and had direct effect in the absence of transposition, the appellant could claim the benefit of what appears to be provided for in Article 23, namely the granting of the benefits referred to in Articles 24 to 35 and in particular the residence permit provided for in Article 24, which would enable him to reside legally in Belgium with his family. By contrast, the direct effect of Article 23 of Directive [2011/95] does not seem to imply that the appellant is entitled to something not provided for by that article, namely international protection when the appellant does not individually qualify for such protection.

Since the Council of State is adjudicating at last instance, it is obliged to refer the matter to the Court of Justice of the European Union, as requested by the appellant, concerning the possible direct effect of Article 23 of Directive [2011/95] and its consequences.

The [third and fourth] questions [set out in the operative part] should therefore be referred for a preliminary ruling.

– […] [text of the third and fourth questions]

This question [constitutes the fifth question set out in the operative part].

– […] [text of the fifth question]

V. Second ground of appeal

A. Submissions of the parties

The appellant enters a second ground of appeal alleging infringement 'of Articles 39/65, 48/3 and 57/1(4) of the Law of 15 December 1980 […]; Articles 20 and 23 of Directive 2011/95 […]; Article 8 of the European Convention on Human Rights ['the ECHR']; Articles 7 and 24 of the Charter of Fundamental Rights of the European Union ['the Charter']; Article 3 of the International Convention on the Rights of the Child […]'.

The appellant submits that 'the concept of the best interests of the child introduced in Article 3 of the International Convention on the Rights of the Child is also taken up […] in Article [20(5)] of Directive 2011/95, and in Article 24 of the [Charter]', that 'it is also a question of the appellant's family life with his daughter, recognised as a refugee in Belgium, protected by Article 8 of the [ECHR] and [Article] 7 of the Charter', that 'the Council for asylum and immigration proceedings finds that it does not see how "taking into account the best interests of the child would be sufficient to give the ascendant of a beneficiary of international protection a right to benefit from the same status as the latter"', that 'neither the opposing party nor the [Council for asylum and immigration proceedings] give the best interests of the appellant's daughter primary consideration', [that a] 'simple option for the benefit of a Member State, provided for by an act of secondary EU legislation, may become a legal obligation for that Member State in order to guarantee respect for the fundamental rights enshrined in the [Charter] […]', […] that '… even in the absence of a formal obligation laid down in Article 23 of Directive 2011/95 to grant the parent of a recognised refugee the same international protection status, that obligation stems from the combined reading of Articles 20 and 23 of Directive [2011/95], read in the light of Articles 7, 18 and 24 of the Charter, [Article] 8 of the European Convention on Human Rights and [Article] 3 of the International Convention on the Rights of the Child', that 'as Belgian law currently stands, under which the appellant is not entitled to family reunification in respect of his daughter, the [Council for asylum and immigration proceedings] […] [had to] make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned', that '… consideration of the best interests of the child may suffice to entitle the family member of a minor beneficiary of international protection to the same status as the child', that 'the best interests of the child are indeed an interpretative rule which must guide the Council for asylum and immigration proceedings in its application of Article 23 of the directive', […] [reiterations or irrelevant considerations]

– […] [text of the sixth question].

In response, the opposing party argues that […] [reiterations] [‘]the only obligations arising from Article 23 were to grant the benefits referred to in Articles 24 to 35 of Directive [2011/95] and no obligation arose to grant international protection status to the family members of a beneficiary of international protection’, that ‘… the Council for asylum and immigration proceedings cannot be required to grant international protection status on the basis of Article 23 of the directive, when that provision does not provide for it’, that ‘… the Council for asylum and immigration proceedings was able lawfully to conclude that the fact that the transposition of Article 23 of Directive [2011/95] is incomplete, if proven, is not sufficient to give rise to a right to be granted international protection status for the family members of a beneficiary of such protection’, that ‘… the Court of Justice has already ruled on the scope of Article 23 of Directive [2011/95] and the fact that that article might not be fully transposed into Belgian law cannot under any circumstances lead to the granting of international protection status to the appellant’, […]. [reiterations or irrelevant considerations]

In reply, the appellant states […] that ‘… the best interests of the child must be a primary consideration for the United Nations, the European Union and the Belgian legislature; accordingly, Member States, when implementing EU law, must make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play (see, in particular, judgment of 26 March 2019, *SM (Child placed under Algerian kafala)*, C-129/18, EU:C:2019:248), in which the Court of Justice interpreted the concept of another family member extensively, in the name of the best interests of the child – but also the recent judgment of 16 July 2020, *État belge (Family reunification – Minor child)*, C-133/19, C-136/19 and C-137/19, EU:C:2020:577); a simple option for a Member State, provided for by an act of secondary EU legislation, may become a legal obligation for that Member State to guarantee respect for the fundamental rights enshrined in the Charter of the European Union’ […]. [reiterations]

B. Assessment

[…] [irrelevant]

In the present second ground of appeal, the appellant submits, in essence, that the consideration of the best interests of the child referred to in Article 20 of Directive [2011/95] and respect for family life implies that international protection must be granted, under Article 23 of that directive, to the father of children recognised as refugees in Belgium and who were born there, even if the father does not individually qualify for such protection.

The Council of State, pending the judgment of the Court of Justice of the European Union ruling on the questions referred for a preliminary ruling by the present judgment, does not consider [this to be the case] […]. [reiterations]

Assuming that Directive [2011/95] applies to the father of children who were recognised as refugees in Belgium and who were born there, it seems possible that the best interests of the child referred to in Article 20 of Directive [2011/95] and respect for family life can be achieved by granting a residence permit allowing the father to reside legally in Belgium with his family, without it being necessary to grant him international protection when he does not individually qualify for such protection. If the Court of Justice of the European Union should find that Article 23 of Directive 2011/95/EU applies to the appellant and that, in the absence of transposition of that provision, it has direct effect, the appellant could claim from the Belgian State the benefits referred to in Articles 24 to 35, including a residence permit allowing him to reside legally in Belgium with his family.

Since the Council of State is adjudicating at last instance, it is obliged to refer the matter to the Court of Justice of the European Union, as requested by the appellant, as to whether the consideration of the best interests of the child, as referred to in Article 20 of Directive 2011/95/EU, and respect for family life, means that international protection must be granted, under Article 23 of that directive, to the father of children who were recognised as refugees in Belgium and who were born there, even if the father does not individually qualify for such protection.

It is therefore necessary to ask the question raised by the appellant. This question [is the sixth question in the operative part].

– […] [text of the sixth question]

ON THOSE GROUNDS,

THE COUNCIL OF STATE HEREBY FINDS:

[…]

Pursuant to [the third paragraph of] Article 267 [TFEU], the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

– ‘Are Article 2(j) and Article 23 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” to be interpreted as applying to the father of two children who were born in Belgium and who have been recognised as refugees there, whereas Article 2(j) of Directive 2011/95/EU specifies that the family members of the beneficiary of international protection who are covered by Directive 2011/95/EU are such “in so far as the family already existed in the country of origin”?’

– ‘Does the fact relied on by the appellant at the hearing, that his children are dependent on him and that, according to the appellant, the best interests of his children require that international protection be granted to him, mean, in the light of recitals 18, 19 and 38 of Directive 2011/95/EU, that the concept of family members of the beneficiary of international protection, covered by Directive 2011/95/EU, is extended to a family that did not exist in the country of origin?’

– ‘If the first two questions referred for a preliminary ruling are answered in the affirmative, can Article 23 of Directive 2011/95/EU, which has not been transposed into Belgian law to provide for the granting of a residence permit or international protection to the father of children who were recognised as refugees in Belgium and who were born there, have direct effect?’

– ‘If so, does Article 23 of Directive 2011/95/EU confer, in the absence of transposition, on the father of children recognised as refugees in Belgium and born there the right to claim the benefits referred to in Articles 24 to 35, including a residence permit allowing him to reside legally in Belgium with his family, or the right to obtain international protection even if the father does not individually qualify for such protection?’

– ‘Does the effectiveness of Article 23 of the Qualification Directive, read in the light of Articles 7, 18 and 24 of the Charter of Fundamental Rights of the European Union and recitals 18, 19 and 38 of the Qualification Directive, require Member States that have not amended their national laws so that family members (within the meaning of Article 2(j) of that directive or in respect of whom there are particular circumstances of dependency) of the beneficiary of such status may, if they do not individually qualify for such status, claim certain benefits, to grant those family members the right to derivative refugee status so that they may claim those benefits in order to maintain family unity?’

– ‘Does Article 23 of the Qualification Directive, read in the light of Articles 7, 18 and 24 of the Charter of Fundamental Rights of the European Union and recitals 18, 19 and 38 of the Qualification Directive, require Member States that have not amended their national laws, so that the parents of a recognised refugee can claim the benefits listed in Articles 24 to 35 of the directive, to [allow those parents to] enjoy derivative international protection in order to give primary consideration to the best interests of the child and to ensure the effectiveness of that child’s refugee status?’

[…]

[procedure and composition of the formation of the Court]