Case C-349/24 [Nuratau] [i]

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:

13 May 2024

Referring court:

Krajský soud v Brně (Czech Republic)

Date of the decision to refer:

9 May 2024

Applicant:

A.B.

Defendant:

Ministerstvo vnitra, Odbor azylové a migrační politiky

Background to the main proceedings

The original proceedings concerned an action brought by an Uzbek national, A. B., seeking to annul a decision of the Ministerstvo vnitra, Odbor azylové a migrační politiky (the Ministry of the Interior, Asylum and Migration Policy Department, Czech Republic) (‘the defendant’) of 9 November 2023, denying A.B.’s application for international protection.

Factual and legal context of the request for a preliminary ruling

The referring court is asking the Court of Justice to interpret Article 3 of Directive 2011/95/EU . [1]

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[i] The name of the present case is fictitious; it does not correspond to the actual name of any of the parties to the proceedings.

[1] 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

Question referred for a preliminary ruling

‘Must Article 3 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 (recast) be interpreted as meaning that the legislation of a Member State permitting the granting of subsidiary protection to an applicant seeking international protection may be considered a more favourable standard for determining the persons eligible for subsidiary protection, as defined in that provision, including in the case of a real threat of a type of serious harm that is not recognised by Article 15 of the Directive, which consists in the fact that the departure from the Member State of the applicant seeking international protection would be contrary to the international obligations of that Member State, provided that that infringement of the Member State’s international obligations relates to the situation in the country of origin of the applicant seeking international protection?’

Provisions of European Union law and international law relied on

Article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

Recitals 2, 10, 12, 13, 14, 15, and 34 of Directive 2011/95. Article 2(f), Articles 3, 15, and 18 of Directive 2011/95.

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’).

Provisions of national law relied on

Pursuant to Paragraph 91(1)(b) of zákon č. 325/1999 Sb., o azylu (Law 325/1999 on asylum; ‘the Asylum Law’), in the version effective from 1 January 2000 to 31 August 2006, the obligation to discontinue residence is not to apply, should it be contrary to the international commitments of the Czech Republic.

The provisions of Paragraph 14a(1) of the Asylum Law, in the version effective from 1 September 2006 to 30 June 2023, stipulated that subsidiary protection is to be granted to a third-country national who does not qualify for asylum, should it be established during the proceedings on the granting of international protection that, in his or her case, there are reasonable grounds to believe that, should the third-country national be returned to the state of which he or she is a national, he or she would face a real threat of serious harm and that, due to that threat, he or

protection, and for the content of the protection granted (OJ 2011 L 337 p. 9; corrigendum [relevant for Czech version] OJ 2017 L 167, p. 58) (‘Directive 2011/95’).

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she cannot or is not willing to take advantage of the protection of the state of which he or she is a national. Pursuant to Paragraph 14a(2) of the Asylum Law, in the same version, serious harm pursuant to that Law is understood as: (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of the applicant seeking international protection; (c) a serious threat to the life of a civilian or his or her human dignity by reason of indiscriminate violence in situations of international or internal armed conflict; or (d) should the third-country national's departure from the Czech Republic be contrary to the Czech Republic's international commitments.

The explanatory memorandum for the Law that inserted Paragraph 14a into the Asylum Law stated the following: this provision replaces the institute of obstacles to departure from the Czech Republic, as defined in the past by Paragraph 91 of the Asylum Law. This means that the definition of serious harm was supplemented to extend beyond the scope of Directive 2004/83, [2] stating that harm is to include situations when departure of the third-country national from the Czech republic is not possible, in view of the commitments arising from international agreements by which the Czech Republic is bound (for example, , with regard to respect for private and family life as embodied in Article 8 ECHR).

With effect from 1 July 2023, point (d) of Paragraph 14a(2) was repealed.

Succinct presentation of the facts and procedure in the main proceedings

1 In April 2019, A. B. filed an application for international protection that indicates as follows: A. B. arrived in the Czech Republic in July 2006 and stayed in the country on the basis of a residence permit on grounds of engaging in business. In August 2018, he applied for an extension of his residence permit, which was not granted. Allegedly, A.B.'s travel documents were stolen in 2011 or 2012 as well as documents pertaining to his permanent residence. He last visited Uzbekistan in 2008 on a holiday. His brother lives there, but they have no contact. The police in Uzbekistan killed his son and, in December 2018, his wife died in the Czech Republic. Furthermore, A. B. presented a medical report according to which he suffers from mental problems. In terms of his fear of returning, he stated that he feared the police detaining him at the airport, as he is not registered at the embassy and is therefore facing a fine or imprisonment.

2 By its decision rendered in February 2020, the defendant did not grant international protection to A. B. (the defendant's first decision). By its judgment of 17 June 2021, the Krajský soud v Praze (Prague Regional Court) annulled the decision, on the grounds that it was unreviewable (*nepřezkoumatelné*) in relation to Paragraph 14a (2)(d) of the Asylum Law, criticising the defendant in particular

[2] Formerly applicable Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; [Czech] Special Edition 19/07, p. 96) ('Directive 2004/83').

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for not taking into account facts pertaining to A.B.'s family and private life and the ensuing ties A. B. has to the Czech Republic, as well as the state of his health and the murder of his son.

3 By its decision of 20 October 2022, the defendant again did not grant international protection to A. B. (the defendant's second decision). In particular, it stated that, in his case, there are no grounds for granting subsidiary protection pursuant to Paragraph 14a(2)(d) of the Asylum Law, as the facts established did not indicate that he had developed strong social or private ties in the Czech Republic.

4 The defendant's second decision was annulled by a judgment of the Brno Regional Court of 17 May 2023, on the grounds that it was still unreviewable in relation to Paragraph 14a(2)(d) of the Asylum Law. That court criticised the defendant for taking into account primarily those facts that were unfavourable for A. B. (the fact that he had no accommodation, that he had not resolved his unauthorised residence, that he had spent most of his life in Uzbekistan), despite A. B. having relied on several facts due to which he had considered his departure from the country to constitute undue interference in his private life. In this regard, A. B. pointed out, in particular, how long he had lived in the Czech Republic, his age, and medical problems, the absence of social and family ties in Uzbekistan, and his good knowledge of Czech. Furthermore, the Regional Court in Brno noted that the defendant should have assessed the entire duration of A.B.'s residence in the Czech Republic, rather than the period immediately before the issuance of the decision. Previously, A.B. did have accommodation and a job and he had had a valid residence permit for most of the time he had spent in the Czech Republic. The Brno Regional Court added that, for the purpose of a proper assessment of the solidity of A.B.'s social ties in the Czech Republic, the defendant should have sought far more information from him about his private life and examined his immigration history.

5 By its decision of 9 November 2023, which constitutes the subject of the present proceedings in the action brought before the referring court, the defendant again did not grant international protection to A. B. (the defendant's third decision). In particular, on the basis of an interview in which A. B. gave a detailed account of his private life, the defendant inferred that A. B. did not have strong social or private ties to the Czech Republic. This conclusion was supported by A. B.'s statement pertaining to the remains of his wife, the presence of which regional courts in previous proceedings identified as a potential private tie to the Czech Republic. A. B. did not know where the urn with his wife's remains was and he had not collected it, even after he obtained valid documents in 2019. Finally, the defendant noted that A. B.'s state of health also did not constitute grounds for granting subsidiary protection, pursuant to Paragraph 14a(2)(d) of the Asylum Law.

6 In his action challenging the defendant's third decision, A. B. criticised the defendant for failing to carry out a comprehensive assessment of his private and family life and of the facts that constitute grounds for granting international

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protection, in particular on the ground of interference in his private life. It operated on the basis of the period preceding the issuance of the decision, without taking into account A. B.'s previous long-term residence, during which he had both a job and accommodation and had integrated into Czech society successfully. In particular, the defendant failed to take into account that A. B. was ill and that he was of retirement age.

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

7 The referring court asks whether EU law prevents a Member State providing for subsidiary protection in its national law, the granting of which it renders conditional on another type of serious harm, beyond the scope of the types of serious harm listed in Article 15(a) to (c) of Directive 2011/95, consisting in the departure from the Member State of the applicant for international protection being contrary to the international commitments of the Member State concerned, provided that this infringement relates to the situation in the applicant's country of origin. In particular, the referring court asks whether such legislation may be deemed to constitute a more favourable standard, within the meaning of Article 3 of Directive 2011/95.

8 First, the referring court first referred to the case-law of the Court of Justice pertaining to the interpretation of Article 3 of Directive 2011/95.

9 The court noted that Directive 2011/95 does not apply to persons who are allowed to remain in the territories of the Member States, not due to a need for international protection, but on a discretionary basis on compassionate or humanitarian grounds .[3] Furthermore, it pointed to the *B. and D. judgment*, which shows that a national provision granting a right to asylum to a person excluded from refugee status on the basis of the exclusion clause in Directive 2004/83 is incompatible with the Directive; nevertheless, Member States may grant asylum to such a person pursuant to their national law, provided that that other form of protection does not entail a risk of confusion with refugee status, within the meaning of Directive 2004/83.

10 In its judgment in *M'Bodj*, the Court of Justice stated that the granting of a right to position or status under Directive 2004/83 to third-country nationals who are in a situation that lacks any link to the logic of international protection would be contrary to scheme and objectives of the Directive. Hence, a national provision under which the right to remain in the territory of a Member State is granted, within the framework of subsidiary protection, to a seriously ill person who would not be provided with adequate medical care in the country of his or her origin

[3]See recital 15 of Directive 2011/95 and judgments of the Court of Justice of 9 November 2010, *B. and D.*, C-57/09 and C-101/09 ('*B. and D.* judgment'), and of 18 December 2014, *M'Bodj*, C-542/13 ('*M'Bodj* judgment'), which pertain to Directive 2004/83.

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cannot qualify as a more favourable standard within the meaning of Article 3 of the Directive. [4]

11 In its judgment of 4 October 2018, *Ahmedbekova*, C-652/16 ('*Ahmedbekova judgment*"), the Court of Justice concluded, with a reference to Article 23 of Directive 2011/95, that Article 3 of the Directive permits a Member State, when granting international protection to a family member pursuant to the system established by that directive, to provide for an extension of the scope of that protection to other family members, provided that they do not fall within the scope of a ground for exclusion and that their situation is, due to the need to maintain family unity, consistent with the rationale of international protection. [5]

12 Furthermore, the referring court stated that the principles arising from the above case-law are summarised in a judicial analysis produced under the leadership of the Europe Chapter of the International Association of Refugee and Migration Judges (IARMJ) and published by the European Union Agency for Asylum (EUAA), concerning qualification for international protection, which draws, in particular, the following conclusions.

13 National rules may grant the right to asylum to persons who do not fall within the scope of Directive 2011/95, but a distinction must be made between national protection and international protection under that Directive. Such international protection requires that it be possible to identify the originator of the persecution or serious harm. Furthermore, it is unlikely that Directive 2011/95 would apply to the situation of a person who experienced a traumatic event in his or her country of origin that is unrelated to current fears of persecution or current real risk of serious harm. In such a case, discretionary protection on grounds of compassion or for humanitarian reasons could be considered. On the contrary, Article 3 of Directive 2011/95 applies to refugee status or subsidiary protection status granted to family members of a person who has been granted such position or status on the basis of the Directive. The Court of Justice has, however, yet to render a definitive decision on when more favourable standards fall within the scope of the Directive, in particular, in terms of the more favourable rules governing the requirements for obtaining refugee status or subsidiary protection status.

14 Finally, the referring court referred to the opinion of J. Richard de la Tour of 12 May 2021 in *Bundesrepublik Deutschland (Maintaining family unity)* (C-91/20), stating that a Member State may not 'use its discretion to define those common concepts and criteria differently and to adopt legislation under which refugee status or subsidiary protection status may be granted on grounds other than those expressly referred to in Directive 2011/95 …'.

[4] The Court of Justice arrived at the same conclusion in its judgment of 18 December 2014, *Abdida*, C-562/13 ('*Abdida* judgment').

[5] The Court of justice confirmed that conclusion in its judgment of 9 November 2021, *Bundesrepublik Deutschland (Maintaining family unity)*, C-91/20 ('*Bundesrepublik Deutschland* judgment').

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15 In the present case, the referring court has doubts as to the above-cited Paragraph 14a(2)(d) of the Asylum Law, which set out additional types of serious harm that go beyond the types of serious harm listed in Article 15(a) to (c) of Directive 2011/95 and that consist in a third-country national's departure from the country being contrary to the international commitments of the Czech Republic.

16 The aim and purpose of that national provision [6] was to replace a specific obstacle to departure from the country, set out in the above-cited Paragraph 91(1)(b) of the Asylum Law, and to prevent violation of Article 8 ECHR in respect of those third-country nationals who were not granted any form of asylum. Hence, by means of Paragraph 14a(2)(d) of that law, the Czech legislature sought to fulfil its positive obligations arising under that article of the ECHR.

17 Previously, national case-law had interpreted the aforementioned Paragraph 14a(2)(d) in an fixed manner – the straightforward departure from the Czech Republic of an applicant for international protection in violation of the international commitments of the Czech Republic could constitute grounds for granting subsidiary protection. That could apply to cases where an applicant had established such family or personal ties in the Czech Republic that merely having to depart from the country would constitute a disproportionate interference with his or her family or private life.

18 After the judgment in *M'Bodj* was rendered, domestic case-law concluded that Paragraph 14a(2)(d) of the Asylum Law had been introduced into Czech law in breach of EU law. That breach, however, operated solely in favour of the applicant for international protection. Directive 2011/95 could not have a direct effect to the detriment of an individual, and administrative authorities and administrative courts were thus unable to take that breach into account.

19 On 15 February 2024, however, the Extended Chamber of the Nejvyšší správní soud (the Supreme Administrative Court) ('the Extended Chamber') issued an order reversing the hitherto used interpretation of Paragraph 14a(2)(d) of that law, interpreting it, with the support of the indirect effect of Directive 2011/95, to the detriment of applicants for international protection. It held that that form of subsidiary protection may be granted to a third-country national who would face a risk of serious harm, in the form of a breach of the Czech Republic's international commitments, in his country of origin – but excluded a risk of harm faced in the host Member State.

20 The Extended Chamber operated on the assumption [7] that a provision of national legislation specifically introduced in order to implement the Directive must be

[6] See reference to the explanatory memorandum of the Act inserting in the Asylum Act Section 14a, contained in the part of this summary titled 'Provisions of national law relied on'.

[7] In this regard, it relied on Court of Justice judgments of 10 April 1984, *Von Colson*, [14/83], paragraph 26; of 13 November 1990, *Marleasing*, C-106/89, paragraph 8; of 14 July 1994, *Faccini Dori*, C-91/92, paragraph 26; or of 5 October 2004, *Pfeiffer and Others*, C-397/01, paragraphs 113 to 116.

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interpreted in light of the wording and purpose of the Directive, and in principle, a Member State may uphold that interpretation vis-à-vis an individual.[8] On the basis of the case-law of the Court of Justice,[9] the Extended Chamber noted that Article 3 of Directive 2011/95 prevents a Member State from introducing or maintaining a provision that grants subsidiary protection to third-country nationals who have found themselves in a situation lacking any link to the logic of international protection.[10] The formerly advanced interpretation of Paragraph 14a(2)(d) of the Asylum Law, according to which subsidiary protection may be granted if the departure of an applicant for international protection from the country in itself contravenes the international commitments of the Czech Republic, however, does not respect that logic, as it fails to take into account the fact that, by its very nature, subsidiary protection should protect the applicant from serious harm in his or her country of origin. According to the Extended Chamber, such an interpretation is therefore obviously inconsistent with Article 3 of Directive 2011/95 and the case-law of the Court of Justice.

21 On the other hand, the Extended Chamber held that a situation when subsidiary protection is directed only at the harm faced by an applicant for international protection in his country of origin as a result of his or her departure from the host Member State is consistent with EU law; in other words, if the conflict with the international commitments of the Czech Republic relates to the country of origin and not to the host Member State. That would be the case, for example, if a third-country national faces the risk of child labour in his or her country of origin, of forced marriage, of conviction for an act which did not constitute a criminal offence at the time it was committed, or of refusal to be provided with medical treatment despite the risk of serious injury to health. In such cases, the applicant for international protection would not be able to obtain subsidiary protection under Paragraph 14a(2)(a) to (c) of the Asylum Law [which corresponds to Article 15(a) to (c) of Directive 2011/95].

22 In concluding, the Extended Chamber noted that it would be desirable for the Czech legislature to take a broader view of cases that do not fall under either asylum or subsidiary protection. It cannot, however, do so by extending subsidiary protection contrary to its logic. Subsidiary protection is based on EU law, which significantly limits the national legislature in its implementation. Protection against departure from the country as such is only provided in proceedings concerning the imposition of the obligation to depart from the country or expulsion proceedings.

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[8] See Court of Justice judgments of 8 October 1987, *Kolpinghuis Nijmegen*, 80/86, paragraphs 12 to 14, and of 5 July 2007, *Kofoed*, C-321/05, paragraph 45.

[9] Judgments in *M'Bodj*, *Bundesrepublik Deutschland*, and *Ahmedbekova*.

[10] This issue was considered *éclairé*, and hence, no question was referred to the Court of Justice for a preliminary ruling.

23 The referring court has, however, doubts as to whether the interpretation of Paragraph 14a(2)(d) of the Asylum Law by the Extended Chamber is compatible with EU law.

24 In this regard, the referring court firstly notes that the Extended Chamber referred to the judgments in *Bundesrepublik Deutschland* and *Ahmedbekova* as examples of the fact that the automatic granting of refugee status under national law to family members of the person who was granted that status does not lack a link to the logic of international protection. Even though in those two judgments, the Court of Justice indeed admitted that international protection on family grounds may be granted on the basis of Article 3 of Directive 2011/95, the referring court maintains that the Court of Justice did so because the obligation to grant an essentially similar status to the family members of a person enjoying international protection is imposed on Member States by the Directive itself in Article 23 thereof. As concerns the extraterritorial effects of Article 8 ECHR [11] – which are, according to the Extended Chamber, the only possible effects in the interpretation and application of the aforementioned Paragraph 14a(2)(d) – Directive 2011/95 does not, however, envisage any such thing.

25 From the judgments in *M'Bodj* and *Abdida*, the referring court concluded that the Court of Justice excluded from the logic of international protection situations when harm is sustained [12] by an applicant for international protection in his or her country of origin. According to the referring court, it does not follow from those judgments and the judgments in *Bundesrepublik Deutschland* and *Ahmedbekova* that the restriction of the scope of application of Paragraph 14a(2)(d) of the Asylum Law solely to extraterritorial cases of violation of Article 8 ECHR (or any other provisions of that convention) is consistent with Directive 2011/95. The referring court therefore asks whether a national provision interpreted in this way could, in the light of the judgments in *M'Bodj* and *Abdida*, be deemed to constitute national legislation providing protection for rights under the ECHR which do not fall within the scope of the Directive.

26 Furthermore, the referring court states that, in its view, Paragraph 14a(2)(d) of the Asylum Law is incompatible with Directive 2011/95, as it is an undesirable merger of the rule formerly conceived as an obstacle to departure from the country with EU subsidiary protection. Although it could be argued that subsidiary protection in the EU sense was in fact never laid down in that provision, and that, from a substantive perspective, it replaces an obstacle to departure from the country, the identity documents of persons enjoying subsidiary protection pursuant to that provision do not state that they are issued other than under EU

[11] Or another provision of the ECHR, with the exception of Articles 2 and 3.

[12] In those cases, harm would consist in the non-existence of adequate medical treatment in the country of origin.

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subsidiary protection and hence, those persons enjoy all rights arising from that status in other Member States . [13]

27 In relation to cases in which, in the view of the Extended Chamber, its interpretation of Paragraph 14a(2)(d) of the Asylum Law might apply, the referring court noted that in a number of them, the applicant for international protection would be entitled to be granted refugee status or subsidiary protection status under Article 15(b) of Directive 2011/95. The referring court therefore has doubts as to whether the cases of serious harm established beyond the scope of that Directive and based on the extraterritorial effects of any article of the ECHR (with the exception of Articles 2 and 3) are compatible with the Directive.

28 According to the referring court, an approach recognising the reverse vertical effect of Directive 2011/95 would be more accurate. It follows from Article 3 of the Directive that the more favourable national standards must be compatible with that directive. Paragraph 14a(2)(d) of the Asylum Law grants subsidiary protection status to third-country nationals even in cases not envisaged by Article 15 of the Directive. Hence, the rule arising from Article 3 that Member States may not introduce more favourable standards for determining the persons entitled to subsidiary protection if they are incompatible with this Directive is directly applicable. The Czech legislature has infringed that rule.

29 Although the conditions for the direct effect of that rule have been met in the present case (i.e., clarity, unconditional nature, and expiry of the transposition period), it is a direct effect against an individual which is inadmissible under the case-law of the Court of Justice . [14]

30 If Paragraph 14a(2)(d) of the Asylum Law is incompatible with EU law, the correct solution was, according to the referring court, the one advocated by earlier case-law, [15] that that inconsistency should not be to the detriment of applicants for international protection.

31 For the reasons stated above, the referring court has therefore decided to refer a question to the Court of Justice for a preliminary ruling. Should the Court of Justice find that Paragraph 14a(2)(d) of the Asylum Law runs contrary to EU law, the referring court could, on the basis of the so-called reverse vertical direct effect of Directive 2011/95, continue to apply that provision in its entirety. As a result,

[13] In this regard, the referring court pointed to the judgment in *B. and D.*, in which the Court of Justice permitted the granting of asylum status pursuant to national constitutional law, but this national concept was distinct from the EU concept, both in terms of terminology and function.

[14] See judgments 5 July 2007, *Kofoed*, C-321/05, paragraph 42; of 8 October 1987, *Kolpinghuis Nijmegen*, 80/86, paragraphs 9 and 13; of 11 June 1987, *Pretore di Salò v. X*, 14/86, paragraphs 19 to 20; of 26 September 1996, *Arcaro*, C-168/95, paragraphs 36 to 37; of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, paragraphs 73 to 74, and judgment of 27 February 2014, *OSA*, C-351/12, paragraph 47.

[15] See paragraph 18 of this summary.

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the legal opinions of the Prague Regional Court and the Brno Regional Court would remain relevant, as well as their criticisms of the defendant's previous decision-making, as it did not, according to both courts, sufficiently assess whether the interference in A.B.'s private life in that host Member State was in accordance with the Czech Republic's international commitments. The referring court would then factually examine whether the defendant has complied with those legal opinions. Should the Court arrive at the opposite conclusion, it would have a direct impact on the grounds of A.B.'s objections, which are based on Paragraph 14a(2)(d) of the Asylum Law.

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