Case C-123/23

Request for a preliminary ruling

Date lodged:

1 March 2023

Referring court:

Verwaltungsgericht Minden (Germany)

Date of the decision to refer:

28 October 2022

Applicants:

N. A. K.

E. A. K.

Y. A. K.

Defendant:

Bundesrepublik Deutschland

[…]

VERWALTUNGSGERICHT MINDEN
(ADMINISTRATIVE COURT, MINDEN, GERMANY)

Order

[…]

In the administrative proceedings of

1. Ms N. A. K.,

2. E. A. K., a minor,

3. Y. A. K., a minor,

the second and third applicants represented by the mother, the first applicant,

Applicants,

[…]

v

Bundesrepublik Deutschland (Federal Republic of Germany), represented by Bundesministerium des Innern (Federal Ministry of the Interior), which is represented by Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees), […]

Defendant,

concerning the right to asylum (Gaza Strip)

here: Reference to the Court of Justice of the European Union

the 1st Chamber of the Verwaltungsgericht Minden (Administrative Court, Minden)

ordered on 28 October 2022, without a hearing,

[…]

[…] [formation of the court]:

[…] [procedural issues]

The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Must Article 33(2)(d) of Directive 2013/32/EU, read in conjunction with Article 2(q) of that directive, be interpreted as precluding legislation of a Member State under which an application for international protection lodged in that Member State is to be rejected as inadmissible if an application for international protection previously lodged in another Member State has been finally rejected by that other Member State as unfounded?

Grounds:

1 A. The applicants are stateless Palestinians from the Gaza Strip. According to the birth certificates submitted by them, the first applicant was born on 28 January 1985, the second applicant on 24 December 2012 and the third applicant on 4 January 2015. According to their statements, the applicants entered the Federal Republic of Germany on 11 November 2019 and sought asylum on 15 November 2019. Their formal asylum applications were registered by the Federal Office for Migration and Refugees (‘the Federal Office’) on 22 November 2019.

2 In her hearings, the first applicant stated that she had left the Gaza Strip with her children in 2018 and had travelled to Germany inter alia via Spain and Belgium. In the Gaza Strip, she and her children had been persecuted by Hamas because of her husband's political activities. In addition, her parents had wanted to force her to hand over her children to her husband's family and to return to her parents' house alone. They had lived in Belgium for about a year and had filed applications for international protection there. Her husband had been living in the Federal Republic of Germany for some time.

3 The husband of the first applicant and father of the second and third applicants entered the Federal Republic of Germany in 2014. His application for international protection was rejected with final effect by decision of 31 March 2017 under threat of removal to the Gaza Strip.

4 A Eurodac query by the Federal Office resulted in category 1 hits for the first applicant for Spain and Belgium. A take-back request by the Federal Office to the Spanish authorities was refused by letter dated 28 November 2019. No take-back request was made to the Belgian authorities.

5 A request for information from the Federal Office to the Belgian authorities was answered by the latter in a letter dated 5 March 2021 to the effect that the first applicant's application for international protection of 21 August 2018 had been rejected on 5 July 2019 after an examination of the grounds for asylum and that no appeal had been lodged against that decision. According to the documents sent to the Federal Office by the Belgian authorities, the rejection of the application was based, among other things, on the fact that it had not been credibly demonstrated that the first applicant was threatened with persecution or serious harm in her country of origin. Upon her return to the Gaza Strip, she could call upon the support of the United Nations Relief and Works Agency for Palestine Refugees in the Near East ('UNRWA').

6 By decision of 25 May 2021, the Federal Office rejected the applicants' asylum applications as inadmissible, determined that there were no removal bans pursuant to Paragraph 60(5) and the first sentence of Paragraph 60(7) of the Aufenthaltsgesetz (Law on residence; 'the AufenthG') and threatened the applicants with removal to the Gaza Strip. The principal arguments of the Federal Office were as follows: pursuant to Paragraph 71a(1) of the Asylgesetz (Law on asylum; 'the AsylG') no further asylum procedure was to be carried out. The asylum procedure pursued by the applicants in Belgium had been concluded unsuccessfully. There were no grounds for reopening the procedure pursuant to Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz (Law on administrative procedure; 'the VwVfG'). Neither the factual and legal circumstances had changed, nor had the applicants submitted new evidence.

7 The applicants brought an action against that decision on 9 June 2021. The applicants' principal arguments were as follows: as a single or divorced woman, the first applicant faced considerable discrimination in the Gaza Strip. In

particular, violence against women was socially legitimised and access to medical care and work was limited. Apart from that, the precarious conditions in the Gaza Strip would not allow them to meet their basic living expenses. A complicating factor was that there was no family support in the Gaza Strip. It was not expected that UNRWA would provide adequate support. The authorities in Belgium had failed to examine this thoroughly enough. Regardless of this, it was de facto impossible for them to return to the Gaza Strip and again place themselves under the protection of UNRWA. On that basis, they should be granted refugee status as stateless Palestinians in accordance with Paragraph 3(3) of the AsylG and Article 1(D) of the Convention relating to the Status of Refugees (Geneva Refugee Convention – GFC) (ipso facto protection).

8 By order of 31 August 2021 […], the referring court ordered the suspensive effect of the action against the threat of removal contained in the contested decision, with the principal argument that, on the basis of the observations of the European Commission ('the Commission') on the concept of 'subsequent application' in Case C-8/20, which the Court of Justice of the European Union ('the Court of Justice') did not address in detail in those proceedings, there were serious doubts as to whether Paragraph 71a of the AsylG was compatible with EU law.

9 B. The legal action must be stayed and referred to the Court of Justice under Article 267 of the TFEU for a ruling on the question concerning Article 33(2)(d) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60, Procedures Directive II, 'Directive 2013/32/EU') read in conjunction with Article 2(q) of that directive. The question referred is relevant to the decision and requires clarification by the Court of Justice.

10 I. The national legal position is as follows:

11 1. If a foreign national files another asylum application following the unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a of the AsylG) in which European Community law on the responsibility for conducting asylum procedures applies, national law refers to this as a second application (Paragraph 71a(1) of the AsylG). The examination of the second application – just like the examination of a subsequent application (Paragraph 71(1) of the AsylG) – is carried out in two stages: The first stage concerns the question as to whether a further asylum procedure is to be conducted (Paragraph 71a(1) of the AsylG). The conditions under which a further asylum procedure is to be conducted follow – in so far as relevant to the present case – from Paragraph 51(1) and (2) of the VwVfG. If there are no grounds for conducting a further asylum procedure, the second application is to be rejected as inadmissible (point 5 of Paragraph 29(1) of the AsylG); in such a case, contrary to Paragraph 31(2) of the AsylG, the reasons put forward by the applicant as to why he or she fears persecution or serious harm in his or her country of origin need not be further examined, but the existence of removal bans under national law must be examined (Paragraph 31(3) of the AsylG). That concludes the second application procedure – subject to judicial

review proceedings. If, on the other hand, there are grounds for conducting a further asylum procedure, the second application is admissible and the competent authority must examine, in a second stage, whether the applicant is to be granted international protection.

12 The difference between a subsequent application (Paragraph 71(1) of the AsylG) and a second application (Paragraph 71a(1) of the AsylG) is that the first asylum procedure will have been conducted in Germany in the case of a subsequent application and in a safe third country in the case of a second application.

> See Verwaltungsgericht (VG) Schleswig (Administrative Court, Schleswig, Germany), judgment of 16 August 2021 – 9 A 178/21 –, DE:VGSH:2021:0816.9A178.21.00, paragraph 20.

13 The spirit and purpose of Paragraph 71a of the AsylG is to place second applications on an equal footing with subsequent applications, thereby placing the third country's decision under asylum law on an equal footing with a decision under asylum law made by the Federal Office.

> See Bundestag Publication 12/4450, p. 27; Bundesverwaltungsgericht (BVerwG) (Federal Administrative Court), judgment of 14 December 2016, 1 C 4.16, DE:BVerwG:2016:141216U1C4.16.0, paragraph 30.

14 On the basis of the previous case-law of the Court of Justice, it is clear that Paragraph 71a(1) of the AsylG does not apply if the third country is not a Member State of the European Union

> - see CJEU, judgment of 20 May 2021, C-8/20, EU:C:2021:404, paragraph 31 et seq. (Application for asylum rejected by Norway) -

15 or if it is a Member State but not bound by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (OJ 2011 L 337, p. 9, Qualification Directive, 'Directive 2011/95/EU').

> See CJEU, judgment of 22 September 2022, C-497/21, EU:C:2022:721, paragraph 36 et seq. (Application for asylum rejected by Denmark).

16 On the other hand, the Court of Justice has so far expressly left open the question of whether the concept of 'subsequent application' in Article 2(q) and Article 33(2)(d) of Directive 2013/32/EU can be applied across Member States.

> See CJEU, judgments of 20 May 2021, C-8/20, EU:C:2021:404, paragraphs 30 and 40, and of 22 September 2022, C-497/21, EU:C:2022:721, paragraphs 36 and 46.

17 That question arises in two different scenarios: In the first scenario, the competent authority of another Member State has examined the substance of the asylum application filed there and rejected it with final effect. That is the scenario in the

present case. In the second scenario, the competent authority of the other Member State has decided to discontinue the asylum procedure conducted there because the applicant has not pursued that procedure further. That scenario is the subject of further proceedings which the referring court has yet to refer to the Court of Justice for a preliminary ruling.

18 2. The relevant national provisions read as follows:

19 Paragraph 26a of the AsylG (Safe third countries)

20 […]

(2) In addition to the Member States of the European Union, safe third countries are those listed in Annex I. […]

21 Paragraph 29 of the AsylG (Inadmissible applications)

22 (1) An application for asylum shall be inadmissible if:

23 […]

24 5. in the case of a subsequent application under Paragraph 71 or a second application under Paragraph 71a, a further asylum procedure need not be conducted.

25 […]

26 Paragraph 31 of the AsylG (Decisions by the Federal Office on asylum applications)

27 […]

28 (2) In decisions on admissible asylum applications and in decisions pursuant to Paragraph 30(5) it shall be expressly determined whether the foreign national is granted refugee status or subsidiary protection and whether he or she is granted asylum. […]

29 (3) In cases pursuant to subparagraph 2 and in decisions on inadmissible asylum applications it shall be determined whether the conditions in Paragraph 60(5) or (7) of the Law on residence are met. […]

30 Paragraph 71 of the AsylG (Subsequent application)

31 (1) If, after withdrawal or unchallengeable rejection of a previous asylum application, the foreign national files a new asylum application (subsequent application), a new asylum procedure shall be conducted only if the conditions of Paragraph 51(1) to (3) of the Law on administrative procedure are met; this shall be examined by the Federal Office. […]

32 Paragraph 71a of the AsylG (Second application)

33 (1) If the foreign national makes an asylum application (second application) in the federal territory following the unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a) in which European Community law on the responsibility for conducting asylum procedures applies or which has concluded an international agreement thereon with the Federal Republic of Germany, a further asylum procedure shall be conducted only if the Federal Republic of Germany is responsible for conducting the asylum procedure and the conditions of Paragraph 51(1) to (3) of the Law on administrative procedure are met; this shall be examined by the Federal Office.

34 […]

35 Paragraph 51 of the VwVfG (Reopening the procedure)

36 (1) An administrative body shall consider an application from the individual concerned requesting that an administrative measure that is no longer open to challenge be annulled or amended if

37 1. the factual or legal circumstances on which the administrative measure was based have subsequently changed in favour of the individual concerned;

38 2. new evidence has come to light which would have led to a more favourable decision for the individual concerned;

39 3. […]

40 (2) The application is admissible only if the individual concerned was unable, through no serious fault, to assert the ground for reopening in the earlier procedure, in particular by lodging an appeal.

41 II. The question set out in the operative part of the present order requires clarification and is relevant to the decision with regard to the first applicant. With regard to the second and third applicants, the Federal Office has not yet determined whether they also filed asylum applications in Belgium and whether these may also have been rejected. This will have to be clarified as part of the national proceedings.

42 According to the facts of the case and matters at issue as they currently stand, the requirements of Paragraph 71a(1) of the AsylG for the rejection of the first applicant's asylum application as inadmissible have been met (1.). Moreover, the question posed cannot be answered with reference to the *acte clair* doctrine (2.). Accordingly, on the basis of national law the action against point 1 of the contested decision would have to be dismissed with regard to the first applicant. On the other hand, the contested decision would have to be annulled with regard to the first applicant if Paragraph 71a(1) of the AsylG was incompatible with EU law and was consequently inapplicable. In that case, the Federal Office would

have to examine of its own motion whether the first applicant should be granted international protection.

43 1. The requirements of the second alternative of point 5 of Paragraph 29(1) and Paragraph 71a(1) of the AsylG for the rejection of the first applicant's asylum application as inadmissible have been met. An asylum procedure was concluded in another Member State and was unsuccessful in that the Belgian authorities rejected the first applicant's asylum application by decision of 5 July 2019 and she did not appeal against this decision. By deciding to determine the applicants' asylum application, the Federal Office exercised its right to assume responsibility (Article 17(1) of Regulation (EU) No 604/2013); by doing so, at the latest, the Defendant became responsible for conducting their asylum procedure.

44 On the basis of the facts known at this stage of the proceedings, the prerequisites for conducting another asylum procedure are not met. In particular, the factual and legal situation has not changed significantly in favour of the first applicant. When interpreting point 1 of Paragraph 51(1) of the VwVfG in conformity with EU law, such a change is deemed to have occurred if new elements or findings have arisen or have been presented which significantly add to the likelihood that international protection is to be granted to the first applicant.

> See VG Minden (Administrative Court, Minden), judgment of 21 June 2022, 1 K 2351/20.A, DE:VGMI:2022:0621.1K2351.20A.00, juris paragraphs 31 and 32.; VG Köln (Administrative Court, Cologne, Germany), judgment of 3 August 2022, 20 L 800/22.A, DE:VGK:2022:0803.20L800.22A.00, juris paragraph 18 et seq.

45 'New' within the meaning of Article 33(2)(d) of Directive 2013/32/EU includes not only those elements or findings which arose after the procedure relating to a previous application for international protection was definitively concluded, but also those elements or findings which already existed before that procedure was concluded, but which were not relied on at the time by the applicant.

> See CJEU, judgment of 9 September 2021, C-18/20, EU:C:2021:710, paragraph 44.

46 However, new findings and elements must be taken into account only if an asylum applicant was unable, without being seriously at fault, to rely on these findings or elements in the initial proceedings or in subsequent judicial proceedings. This follows from the express reference in Paragraph 71(1) of the AsylG to Paragraph 51(2) of the VwVfG, by which the national legislature has made use of the regulatory discretion granted to it by Article 40(4) of Directive 2013/32/EU in a manner that complies with EU law.

> See VG Düsseldorf (Administrative Court, Düsseldorf, Germany), order of 24 January 2022, 1 L 34/22.A, DE:VGD:2022:0124.1L34.22A.00, juris paragraphs 6 and 7.; VG Minden (Administrative Court, Minden), judgment

of 21 June 2022, 1 K 2351/20.A, DE:VGMI:2022:0621.1K2351.20A.00, juris paragraph 34 et seq.

47 The first sentence of Paragraph 71(1) of the AsylG and Paragraph 51(2) of the VwVfG are also compatible with EU law in all other respects. This is not precluded by the fact that Paragraph 51(2) of the VwVfG ('serious fault') differs in wording from Article 40(4) of Directive 2013/32/EU ('fault of his or her own'). The former provision works in favour of asylum seekers and therefore does not give rise to any objections under EU law (Article 5 of Directive 2013/32/EU).

See VG Minden (Administrative Court, Minden), judgments of 10 February 2022, 2 K 41/19.A, DE:VGMI:2022:0210.2K41.19A.00, juris paragraphs 45 and 46, and of 21 June 2022, 1 K 2351/20.A, DE:VGMI:2022:0621.1K2351.20A.00, juris paragraph 34 et seq.

48 On this basis, the first applicant has not submitted any new elements or findings that would lead to another asylum procedure. In so far as she refers to actual events prior to her departure from the Gaza Strip in order to substantiate her asylum application, it is not apparent for what reasons she was prevented, without being seriously at fault, from presenting those circumstances in the context of the asylum procedure conducted in Belgium or in any court proceedings following that procedure. In so far as the first applicant raises the issue of the status of women in the Gaza Strip, the living conditions there, UNRWA's ability to support the population there and the option of returning to the Gaza Strip, it is not apparent that the situation has since changed. With regard to the alleged divorce of the first applicant from her husband (and father of the second and third applicants), it is not apparent at this stage of the proceedings to what extent this circumstance significantly adds to the likelihood of the first applicant being granted international protection.

49 2. Following the Commission's statements in Case C-8/20, the question raised cannot (or can no longer) be answered with reference to the *acte clair* doctrine.

Correctly Oberverwaltungsgericht (OVG) Nordrhein-Westfalen (NRW) (Higher Administrative Court, North Rhine-Westphalia, Germany), decisions of 9 December 2021, 17 B 1728/21.A, DE:OVGNRW:2021:1209.17B1728.21A.00, juris paragraph 6, and of 31 March 2022, 1 B 375/22.A, DE:OVGNRW:2022:0331.1B375.22A.00, juris paragraph 7 et seq.; Niedersächsisches OVG (Higher Administrative Court, Lower Saxony, Germany), decision of 22 June 2022, 8 MC 74/22, DE:OVGNI:2022:0622.8MC74.22.00, juris paragraph 9; different opinion OVG Bremen (Higher Administrative Court, Bremen, Germany), judgment of 3 November 2020, 1 LB 28/20, DE:OVGHB:2020:1103.1LB28.20.00, juris paragraph 45 et seq.; Niedersächsisches OVG (Higher Administrative Court, Lower Saxony), decision of 28 December 2022, 11 LA 280/21, DE:OVGNI:2022:1228.11LA280.21.00, juris paragraph 53.

50 In the aforementioned proceedings, the Commission took the view that EU law precluded the application of the concept of 'subsequent application' across Member States. In its reasoning, it essentially stated that the application of this concept across Member States implied a certain degree of mutual recognition of negative asylum decisions and that such recognition is not provided for in the EU's current asylum law. There was much to be said for the assumption that such a step towards mutual recognition had to be decided by the EU legislature expressly and with sufficient clarity, especially since the consequences of classifying an application as a subsequent application were considerable for asylum applicants.

> See pleadings of 20 May 2020, paragraphs 34 and 35, retrieved from https://ec.europa.eu/dgs/legal_service/submissions/c2020-8-obs_de.pdf.

51 An *acte clair* exists if the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.

> See CJEU, judgment of 6 October 1982, 283/81, EU:1982:335, paragraph 16, and of 6 October 2021, C-561/19, EU:C:2021:799, paragraphs 33 and 39 et seq.

52 Those conditions are not met in this case. Commission opinions on the interpretation of EU law are of great significance due to its role as 'guardian of the Treaties', which is inter alia responsible for monitoring the Member States' compliance with EU law (see, inter alia, Article 258 of the TFEU). Furthermore – irrespective of whether one agrees with the Commission on the merits – the Commission's reasoning is not clearly unfounded. Finally, the Commission's reasoning is not refuted by the Advocate General's submissions.

> However, this is how the Niedersächsisches OVG (Higher Administrative Court, Lower Saxony) ruled, decision of 28 December 2022, 11 LA 280/21, DE:OVGNI:2022:1228.11 LA 280.21.00, juris paragraph 54.

53 This line of argument fails to recognise the position of the Advocate General. In his or her role as a 'thought leader' for the Court of Justice, the Advocate General is responsible for presenting reasoned submissions (second paragraph of Article 252 of the TFEU); the final decision on the interpretation of EU law is the sole responsibility of the Court of Justice (Article 267 of the TFEU).

54 III. The referring court takes the following position on the question raised:

55 The referring court, in accordance with the Opinion of Advocate General Saugmandsgaard Øe of 18 March 2021 in Case C-8/20 (ECLI:EU:C:2021:221), argues that the question should be answered to the effect that Article 33(2)(d) of Directive 2013/32/EU, read in conjunction with Article 2(q) of that directive, must be interpreted as **not** precluding legislation of a Member State under which an application for international protection lodged in that Member State is to be

rejected as inadmissible if an application for international protection previously lodged in another Member State has been finally rejected as unfounded by that other Member State. That legal interpretation also corresponds to the largely unanimous national case-law **before** the European Commission's position became known.

> See, for example, Sächsisches OVG (Higher Administrative Court, Saxony, Germany), decision of 27 July 2020, 5 A 638/19.A, DE:OVGSN:2020:0727.5A638.19.A.00, juris paragraph 12 et seq.; OVG Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany), decision of 22 October 2018, OVG 12 N 70.17, DE:OVGBEBB:2018:1022.0VG12N70.17.00, juris paragraph 7; VG Minden, judgment of 9 December 2019, 10 K 995/18.A, DE:VGMI:2019:1209.10K995.18A.00, juris paragraphs 34 and 35; VG Cottbus (Administrative Court, Cottbus, Germany), judgment of 14 May 2020, 8 K 1895/18.A, DE:VGCOTTB:2020:0514.8K1895.18.A.00, juris paragraph 21; but see also BVerwG, judgment of 14 December 2016, 1 C 4.16, BVerwGE 157, 18 paragraph 26 (left open).

56 For further justification, reference is made in full to the submissions of Advocate General Saugmandsgaard Øe of 18 March 2021 in Case C-8/20 (points 49 to 86), in particular to the submissions on the wording of Article 2(q) of Directive 2013/32/EU (point 75) as well as the submissions on the prevention of secondary movements (point 77 et seq.). In addition, the referring court points out that Article 40(1) of Directive 2013/32/EU does not lead to a different result. The concept of 'subsequent application' used therein, which presupposes that further representations or a subsequent application are made 'in the same Member State', contains, on the basis of the definition of 'subsequent application' in Article 2(q) of Directive 2013/32/EU, along with Article 41(1)(b) of Directive 2013/32/EU, a special provision for a subgroup of subsequent applications, namely those filed in the same Member State.

> See Sächsisches OVG (Higher Administrative Court, Saxony), decision of 27 July 2020, 5 A 638/19.A, DE:OVGSN:2020:0727.5A638.19.A.00, juris paragraph 18 et seq.; VG Minden (Administrative Court, Minden), decision of 31 July 2017, 10 L 109/17.A, DE:VGMI:2017:0731.10L109.17A.00, juris paragraphs 22 and 23

57 Furthermore, it should be noted that the Court of Justice has already assumed that the concept of 'subsequent application' is to be applied across the Member States with regard to Article 25 of Council Directive 2005/85/EU of 1 December 2005 (OJ 2005 L 326, p. 13, Procedures Directive I, 'Directive 2005/85/EU').

> See CJEU, judgment of 6 June 2013, C-648/11, EU:C:2013:367, paragraphs 63 and 64

58 It reads (emphasis added by the referring court):

> ‘63 Furthermore, such an interpretation … does not … mean that an unaccompanied minor whose application for asylum is **substantively rejected** in one Member State can subsequently compel another Member State to examine an application for asylum.
>
> 64 It is clear from Article 25 of Directive 2005/85 that, in addition to cases in which an application is not examined in accordance with Regulation (EU) No 343/2003, Member States are not required to examine whether the applicant is a refugee where an application is considered inadmissible because, inter alia, the asylum applicant has lodged an identical application after a **final decision has been taken** against him.’

59 These comments refer to Article 25(2)(f) of Directive 2005/85/EU, the predecessor of Article 33(2)(d) of Directive 2013/32/EU.

60 Finally, reference is made to Advocate General Bot’s assessment that ‘Member States … agree to recognise asylum decisions issued by other Member States where they are negative.’

> See Opinion of 13 June 2018 in Case C-213/17, EU:C:2018:434, paragraph 107.

61 It follows from the above that the amendment of the secondary legislation on asylum pursued by the Commission

> - see Article 42(1) of the proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 467 final) of 13 July 2016 -

62 merely serves the purpose of clarification. The concept of ‘subsequent application’ may already be applied across Member States under the currently applicable EU law.

63 IV. Given that neither the requirements of Article 99 of the Rules of Procedure of the Court of Justice for a decision by order nor the requirements of Article 105 of the Rules of Procedure for the conduct of an expedited procedure are met in the present proceedings, the referring court suggests that the President of the Court order that the present proceedings be given priority pursuant to Article 53(3) of the Rules of Procedure. In addition, the Court of Justice is asked to examine whether individual procedural steps, in particular a hearing (Article 76(2) of the Rules of Procedure) and a submission from the Advocate General (fifth paragraph of Article 20 of the Statute of the Court of Justice) may be dispensed with.

64 In the view of the referring court, there are special circumstances which justify a priority decision: The question referred for a preliminary ruling concerns a fundamental issue of the Common European Asylum System, namely the application of the concept of ‘subsequent application’ across Member States and thus indirectly the mutual recognition of (negative) decisions of other Member

States on asylum applications. The question raised concerns a considerable number of asylum applications, at least in Germany. In Germany, 4 110 second applications were rejected as inadmissible in 2020, and 3 166 such applications in 2021.

65 In addition, it must be taken into account that after the Commission's position became known in the second half of 2020, in proceedings in which the Federal Office had rejected an asylum application as inadmissible on the basis of the second alternative of point 5 of Paragraph 29(1) of the AsylG and Paragraph 71a(1) of the AsylG, many German courts have ordered the suspensory effect of legal actions and suspended proceedings pending a decision by the Court of Justice.

> See, for example, OVG NRW (Higher Administrative Court, North Rhine-Westphalia), decisions of 9 December 2021, 17 B 1728/21.A, DE:OVGNRW:2021:1209.17B1728.21A.00, and of 31 March 2022, 1 B 375/22.A, DE:OVGNRW:2022:0331.1B375.22A.00, and of 10 January 2023, 19 B 1030/ 22.A, DE:OVGNRW:2023:0110.19B1030.22A.00; Niedersächsisches OVG (Higher Administrative Court, Lower Saxony), decision of 22 June 2022, 8 MC 74/22, DE:OVGNI:2022:0622.8MC74.22.00; VG Minden (Administrative Court, Minden), decision of 31 August 2021, 1 L 547/21.A, DE:VGMI:2021:0831.1L547.21A.00; VG Wiesbaden (Administrative Court, Wiesbaden), decision of 16 March 2022, 1L 226/22.WI.A, DE:VGWIESB:2022:0316.1L226.22.WI.A.00.

66 Since the Court of Justice – as has already been shown – left the question open both in Case C-8/20 and in Case C-497/21, clarification of this question, which is important for national asylum practice, has now been pending for more than two years. That further delays a final decision on a large number of asylum applications. This can hardly be considered compatible with the basic objective of Directive 2013/32/EU to decide on asylum applications as soon as possible (see Article 31 of Directive 2013/32/EU as well as Recital 18 to that directive).

67 The suggestion to consider waiving individual procedural steps is justified as follows: The question referred for a preliminary ruling was – as has already been shown – already the subject of Cases C-8/20 and C-497/21. In Case C-8/20, the Commission had raised this question in its written statement of 20 May 2020 (paragraph 23 et seq.), and in Case C-497/21, the referring court.

> See VG Schleswig (Administrative Court, Schleswig), order for reference of 16 August 2021 – 9 A 178/21 –, ECLI:DE:VGSH:2021:0816.9A178.21.00, question 1.

68 As has already been set out, the Advocate General has already commented on the question raised in detail in his Opinion in Case C-8/20 (points 49 to 86). The referring court is not aware of any new, previously unconsidered aspects regarding

this question. It is presumably not least for this reason that, in Case C-497/21 and in Case C-364/22, which also refers to the Advocate General's Opinion in Case C-8/20, a hearing and the (renewed) submission of the Advocate General's Opinion were dispensed with.

[…] **[[Names of the judges who took part in the deliberations]**

[…]

[…] [Attestation clause]