Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 30 September 2021 [1]

Case C-483/20

XXXX
v
Commissaire général aux réfugiés et aux apatrides

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Reference for a preliminary ruling – Common policy on asylum and subsidiary protection – Minor child who has been granted international protection in a Member State – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(a) – Inadmissibility of the parent's application for international protection on the ground of the prior grant of refugee status in another Member State – Right to respect for family life – Best interests of the child – Articles 7, 18 and 24 of the Charter of Fundamental Rights of the European Union – Real and proven risk of being subjected to treatment contrary to the right to respect for family life – Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection – Directive 2011/95/EU)

Table of contents

[1] Original language: French.

1. Migratory journeys are often the result of a combination of two elements: chance and necessity. In the case before the Court, a Syrian national, after travelling through Libya and Turkey, arrived in Austria, where, out of necessity, he lodged an application for international protection. After obtaining refugee status, he went to Belgium to be reunited with his two children, one of whom is a minor, and there lodged a new application for international protection, which was declared inadmissible in view of the prior recognition granted in the first Member State.

2. It is against that background that the question arises, to my knowledge for the first time, whether, in particular, the fundamental right to respect for family life enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with the obligation to take into consideration the child's best interests set out in Article 24(2) of the Charter, can override the inadmissibility mechanism for applications for international protection laid down in Article 33(2)(a) of Directive 2013/32/EU. [2]

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

I. Legal context

A. European Union law

3. In addition to certain provisions of primary law (namely Article 78 TFEU and Articles 7, 18 and 24 of the Charter), Articles 2, 14, 33 and 34 of Directive 2013/32, Articles 2, 23 and 24 of Directive 2011/95/EU[3] and Articles 2, 3 and 10 of Directive 2003/86/EC[4] are relevant in the present case.

B. Belgian law

4. Article 10(1)(7) of the loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980 (*Moniteur belge* of 31 December 1980, p. 14584) provides:

'1. Subject to Articles 9 and 12, the following persons shall be granted leave to reside in the Kingdom for more than three months as of right:

…

7. The father and mother of a foreign national recognised as a refugee within the meaning of Article 48(3) or benefiting from subsidiary protection who are coming to live with the latter, provided that he or she is under eighteen years of age and entered the Kingdom unaccompanied by an adult foreign national responsible for him or her by law and was not effectively taken into the care of such a person thereafter, or was left unaccompanied after he or she entered the Kingdom.

…'

5. Article 57(6) of the Law on access to the territory, residence, establishment and removal of foreign nationals, as amended by the law of 21 November 2017 (*Moniteur belge* of 12 March 2018, p. 19712), provides:

'…

(3) The Commissaire général aux réfugiés et aux apatrides [(Commissioner-General for Refugees and Stateless Persons)] may declare an application for international protection inadmissible where:

…

3. the applicant is already a beneficiary of international protection in another Member State of the European Union;

…'

[3] Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

[4] Council Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

6. On 1 December 2015, the applicant in the main proceedings, a Syrian national, was granted refugee status in Austria. At the beginning of 2016, he moved to Belgium to join his two daughters, one of whom is a minor. Both daughters obtained subsidiary protection status in that State on 14 December 2016. The applicant has parental responsibility for that minor child, with whom he lives, but does not have a residence permit in Belgium.

7. In June 2018, the applicant in the main proceedings submitted an application for international protection in Belgium. On 11 February 2019, the Commissaire général aux réfugiés et aux apatrides (Commissioner-General for Refugees and Stateless Persons, Belgium) declared that application inadmissible on the ground that international protection had already been granted to him by another Member State. By a judgment of 8 May 2019, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) dismissed the action brought by the applicant in the main proceedings against the decision declaring his application to be inadmissible.

8. By notice of appeal lodged on 21 May 2019, the applicant in the main proceedings brought an appeal on a point of law against that judgment before the referring court. He argues that respect for the principle of family unity and the best interests of the child preclude, in the circumstances of the present case, the Belgian State from exercising the option to declare his application for international protection inadmissible. He also maintains that respect for that principle requires that he be granted such protection in order that he may, inter alia, enjoy the benefits provided for by Articles 24 to 35 of Directive 2011/95, which is not entirely unconnected to the rationale of international protection.

9. According to the defendant in the main proceedings, the possibility that the principle of family unity may result in the grant of a 'derivative' status does not apply in the present case, since the applicant in the main proceedings and his children already enjoy international protection. It further takes the view that the best interests of the child alone cannot justify the application of that principle or the grant of that protection.

10. In those circumstances, the Conseil d'État (Council of State, Belgium) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Does EU law, essentially Articles 18 and 24 of the [Charter], Articles 2, 20, 23 and 31 of [Directive 2011/95]/, and Article 25(6) of [Directive 2013/32], preclude a Member State, when applying the powers conferred by Article 33(2)(a) of [Directive 2013/32], from rejecting an application for international protection as inadmissible because of protection already granted by another Member State, where the applicant is the father of an unaccompanied child who has been granted protection in the first Member State, he is the sole parent of the nuclear family present by the child's side, he lives with the child and has been conferred parental responsibility for the child by that Member State? Do the principle of family unity and that requiring compliance with the best interests of the child not require, on the contrary, protection to be granted to that parent by the State where his child has been granted protection?'

III. Procedure before the Court

11. Written observations have been submitted by the European Commission and the Belgian and Italian Governments.

IV. Legal analysis

A. Preliminary considerations

12. It seems to me necessary, at the outset, to make a few remarks concerning the scope of the request for a preliminary ruling in connection with the content of the interested parties' submissions, since that request formally contains two questions addressed to the Court:

– the first concerns whether it is possible for a Member State, on the basis of Article 33(2)(a) of Directive 2013/32, to declare *inadmissible* an application for international protection submitted by a parent living with his or her minor child who is a beneficiary of subsidiary protection in that State, where another Member State has previously granted such protection to that parent.

– the second concerns whether international protection must be *granted* to that parent by the State in which his or her child has obtained subsidiary protection, in accordance with the 'principle of family unity and … compliance with the best interests of the child'.

13. Even though those two questions are undeniably linked, in that they require a general consideration of the Common European Asylum System and the protection of family life it provides, they clearly do not have the same subject matter, since the question of the examination of the admissibility of the application for international protection should not be confused with the question of the assessment of the substance of that application.

14. However, I note that, in their observations, the interested parties are keen to demonstrate that Directives 2011/95 and 2013/32, read in the light of Articles 7, 18 and 24 of the Charter, do not require a Member State to *grant* international protection in a situation such as that of the applicant in the main proceedings. In other words, it is not possible to grant any international protection status to the person concerned on the basis of an application having the sole purpose of ensuring family reunification. Moreover, by a process of deductive reasoning from that substantive assessment, the interested parties have similarly concluded that it is possible for a Member State to exercise the option available to it under Article 33(2)(a) of Directive 2013/32 and consequently to declare inadmissible the application for protection submitted by that applicant. That reasoning seems to me to be open to criticism, in so far as it omits the essential and preliminary analysis of the specific issue of the admissibility of applications for international protection and thus the question of the interpretation of Article 33(2)(a) of Directive 2013/32.

B. The inadmissibility mechanism for applications for international protection laid down in Article 33(2)(a) of Directive 2013/32

15. By its first question referred, the referring court asks, in essence, whether Article 33(2)(a) of Directive 2013/32, read in the light of Articles 7, 18 and Article 24(2) of the Charter,[5] must be interpreted as precluding a Member State from exercising the option available under that provision to reject an application for international protection as inadmissible on the ground that the applicant has already been granted such protection by another Member State, where that applicant is the father of a minor child who has been granted subsidiary protection in the Member State to which the abovementioned application was submitted and he is the sole parent living with the child and having, on that basis, parental responsibility. According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by rules of which it is part.[6]

1. Literal, systematic and teleological interpretation

16. According to Article 1 thereof, the purpose of Directive 2013/32 is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95. Under Article 33(1) of Directive 2013/32, in addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013,[7] Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95 where an application is considered inadmissible pursuant to that article. In that connection, Article 33(2) of Directive 2013/32 sets out an exhaustive list of situations in which the Member States 'may consider' an application for international protection to be inadmissible.[8] It follows from the wording of Article 33(2) of Directive 2013/32 that the EU legislature did not intend to require Member States to introduce into their respective laws an obligation on the part of the competent authorities to carry out an examination of the admissibility of applications for international protection or to provide, where one of the grounds of inadmissibility referred to in that provision applies, for the rejection of an application without a prior examination of the substance.

17. Accordingly, this is not merely an option available to Member States[9] but also constitutes a derogation from their obligation to examine all applications on the substance, to use the terms of recital 43 of that directive.[10] The Court has therefore stated that Article 33 of Directive 2013/32 seeks to relax the obligation of the Member State responsible for examining an application for

5 The order for reference does not expressly refer to Article 7 of the Charter but refers to the principle of family unity. In any event, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With that in mind, the questions referred for a preliminary ruling must be resolved in the light of all the provisions of the Treaty and of secondary legislation which may be relevant to the problem, including provisions to which the national court has not referred in the order for reference (judgments of 29 October 2015, *Nagy*, C-583/14, EU:C:2015:737, paragraph 21, and of 11 April 2019, *Repsol Butano and DISA Gas*, C-473/17 and C-546/17, EU:C:2019:308, paragraph 38).

6 See judgment of 6 June 2013, *MA and Others* (C-648/11, EU:C:2013:367, paragraph 50 and the case-law cited).

7 Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

8 See judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218, paragraph 29).

9 See judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 58) ('the judgment in *Ibrahim and Others*'). That optional nature necessarily results in potential disparities in national legislation concerning the inadmissibility mechanism for applications for international protection.

10 I would point out that, according to settled case-law, exceptions must be strictly interpreted (judgments of 29 April 2004, *Kapper* (C-476/01, EU:C:2004:261, paragraph 72); of 12 November 2009, *TeliaSonera Finland* (C-192/08, EU:C:2009:696, paragraph 40); and of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 87)).

international protection by defining the cases in which such an application is considered to be inadmissible.[11] Under Article 33(2)(a) of Directive 2013/32, Member States may consider an application for international protection inadmissible where international protection has been granted by another Member State and therefore reject that application without an examination of the substance, an option and ground applied by the Kingdom of Belgium in its legislation.

18. That reference by the Court to a relaxation of the obligation of Member States to examine applications for international protection reflects one of the objectives pursued by the EU legislature in enacting Article 33 of Directive 2013/32, that is to say the objective of procedural economy.[12] The legislature's intention is thus to allow the second Member State to which the application for international protection is addressed not to carry out a new full examination of the substance of that application, which has already been assessed and accepted by the first Member State. The purpose of that inadmissibility mechanism is to simplify and lighten the burden placed on the competent national authorities by the assessment which they must carry out, in order to prevent blockages in the system as a result of the obligation on those authorities to examine multiple applications made by the same applicant.[13] The procedural economy dimension is, moreover, inseparable from the objective of the expeditious processing of applications pursued by Directive 2013/32, the adoption of a decision as soon as possible being described, in recital 18 of that directive, as being in the interests of both the Member States and the applicants for international protection.

19. Last, it is appropriate to mention another objective pursued by the EU legislature through several legal instruments constituting the Common European Asylum System – Regulation No 604/2013,[14] Directive 2011/95[15] and Directive 2013/32[16] – that is to say the limitation of secondary movements of applicants for international protection within the European Union. In that respect, as regards the approximation of procedural rules, imposing on the second Member State the obligation to examine the substance of an application for international protection that has already been granted in the first Member State might encourage some third-country nationals, who have been granted international protection, to seek a better level of protection or more advantageous material living conditions, contrary to the abovementioned objective.

20. However, it cannot be inferred from the foregoing considerations that the implementation of Article 33(2)(a) of Directive 2013/32 results in a form of automatic rejection of the second application for international protection lodged in a Member State by a third-country national who has already obtained that protection in another State.

11 See judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraph 43).

12 See the judgment in *Ibrahim and Others*, paragraph 77.

13 See, by analogy, as regards the Dublin II Regulation, judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 79).

14 See judgments of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraph 52), and of 10 December 2020, *Minister for Justice and Equality (Application for international protection in Ireland)* (C-616/19, EU:C:2020:1010, paragraphs 51 and 52).

15 See recital 13 of Directive 2011/95 and, by analogy with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13), judgment of 10 December 2020, *Minister for Justice and Equality (Application for international protection in Ireland)* (C-616/19, EU:C:2020:1010, paragraphs 51 and 52).

16 See recital 13 of Directive 2013/32.

2. No automatic rejection on grounds of inadmissibility of an application for international protection

21. It is important to point out, in the first place, that a decision on an application for international protection cannot, in any event, be taken as soon as possible, without first carrying out an adequate and complete examination of the applicant's situation, according to recital 18 of Directive 2013/32. [17]

22. In that regard, that directive sets out unequivocally the obligation to give an applicant for international protection the opportunity of a personal interview before a decision is taken on his or her application. Thus, Article 14(1) of Directive 2013/32 provides, as Article 12(1) of Directive 2005/85 did, that, before a decision is taken by the determining authority, the applicant is to be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. That obligation, which forms part of the basic principles and guarantees set out in Chapter II of each of those directives, applies to both decisions on admissibility and decisions on the substance. The fact that that obligation also applies to decisions on admissibility is moreover expressly confirmed in Article 34 of Directive 2013/32, headed 'Special rules on an admissibility interview', which provides in paragraph 1 that, before the determining authority decides on the admissibility of an application for international protection, Member States are to allow applicants to present their views with regard to the application of the grounds referred to in Article 33 of that directive in their particular circumstances and that, to that end, Member States are to conduct a personal interview on the admissibility of the application. [18]

23. Article 34(1) of Directive 2013/32 also specifies that Member States may make an exception to the rule requiring that a personal interview be conducted with the applicant on the admissibility of his or her application for international protection only in accordance with Article 42 of that directive in the case of a subsequent application. [19] The fact that the EU legislature chose, in that directive, to prescribe, first, a clear and express obligation on the Member States to give the applicant for international protection the opportunity of a personal interview before a decision is taken on the application and, second, an exhaustive list of exceptions to that obligation demonstrates the fundamental importance it attaches to the personal interview in the asylum procedure. [20]

24. The right conferred on the applicant by Articles 14 and 34 of Directive 2013/32 to express, in a personal interview, his or her view concerning the applicability of a ground of inadmissibility in his or her particular circumstances must, in principle, be exercised without the presence of family members, in accordance with Article 15(1) of that directive, and is accompanied by specific guarantees, as set out in paragraphs 2 and 3 of that article, which are intended to ensure the effectiveness of that right. [21] It is important to note, however, that the competent national

[17] It follows, moreover, from the judgment in *Ibrahim and Others* (paragraph 98) that, in order to determine whether a third-country national or a stateless person qualifies for international protection, Member States must, in accordance with Article 4(3) of Directive 2011/95, undertake an individual assessment of each application for international protection.

[18] See judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraphs 46 to 48).

[19] It is clear from the order for reference that the dispute in the main proceedings does not involve such a situation, which is provided for in Article 33(2)(d) and Article 40 of Directive 2013/32. In the judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 58), the Court clarified that any subsequent application for international protection has been preceded by an initial application which has been *definitively rejected*, in relation to which the responsible authority has undertaken an exhaustive examination in order to determine whether the applicant concerned qualified for international protection.

[20] See, to that effect, judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraphs 55 and 59).

[21] See, to that effect, judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraph 64).

authority may consider that the presence of other family members is necessary for conducting an adequate examination, which clearly demonstrates that family issues are taken into consideration in the conduct of the procedure.

25. In the second place, it should be noted that the Court has already allowed an exception to the implementation of the inadmissibility mechanism provided for by Directive 2013/32, and more specifically by Article 33(2)(a) thereof. According to the case-law of the Court, that provision precludes a Member State from exercising the option granted by that provision to reject an application for international protection as being inadmissible on the ground that the applicant has been previously granted such protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of that protection in that other Member State would expose him or her to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter. [22]

26. According to the Court, the option available under Article 33(2)(a) of Directive 2013/32 constitutes, within the framework of the common asylum procedure established by that directive, an expression of the principle of mutual trust, which allows and requires Member States to presume, in the context of the Common European Asylum System, that the treatment of applicants for international protection in each Member State complies with the requirements of the Charter, the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)) ('the Geneva Convention') and the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (ECHR). Where it is established that this is not in fact the case in a given Member State, that presumption, and the exercise of the option resulting therefrom, cannot be justified. [23]

27. It follows from that case-law that the presumption of respect for fundamental rights, resulting from the principle of mutual trust, is rebuttable and that although, in answering questions referred in that regard by the referring court, the Court has provided for an exception to the implementation of the inadmissibility mechanism provided for by Article 33(2)(a) of Directive 2013/32 in the light of the infringement of Articles 1 and 4 of the Charter, the premiss of the Court's reasoning concerns all fundamental rights, [24] including Article 7 thereof on the protection of family life and Article 24(2) thereof concerning the obligation to take into consideration the child's best interests, as well as Article 18 of the Charter. [25]

28. The question arises, in the context of this reference for a preliminary ruling, whether the declaration of inadmissibility of the application for international protection is, in the circumstances of the main proceedings, such as to lead to an infringement of the applicant's fundamental rights.

[22] See the judgment in *Ibrahim and Others*, paragraph 101, and order of 13 November 2019, *Hamed and Omar* (C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 43).

[23] See, to that effect, the judgment in *Ibrahim and Others* paragraphs 83 to 86, and order of 13 November 2019, *Hamed and Omar* (C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 41).

[24] That conclusion is confirmed by the use of the word 'including' in paragraph 83 of the judgment *Ibrahim and Others*.

[25] In the judgment in *Ibrahim and Others* (paragraphs 95 to 100), the Court also examined a possible infringement of that provision in the light of a systematic refusal, without real examination, by a Member State to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of Directive 2011/95. While the Court found that that treatment could not be regarded as compliant with the obligations stemming from Article 18 of the Charter, it nonetheless held that other Member States may reject a further application as being inadmissible, pursuant to Article 33(2)(a) of Directive 2013/32, read with due regard to the principle of mutual trust, since the Member State that granted subsidiary protection must resume the procedure for the obtaining of refugee status.

C. Serious risk of treatment contrary to Article 7 of the Charter, read in conjunction with Articles 18 and 24 of the Charter

1. The protection of family life offered by Directives 2011/95 and 2013/32

29. It is common ground that the development of the Common European Asylum System reflects the intention of the EU legislature to ensure respect for the fundamental rights of applicants for international protection deriving from the Geneva Convention, the Charter and the ECHR,[26] and, inter alia, the right to respect for family life.

30. Both Directive 2011/95 and Directive 2013/32 were adopted on the basis of Article 78 TFEU, with the aim of achieving the objective set out therein, a common EU policy on asylum, subsidiary protection and temporary protection consistent with the Geneva Convention, and of ensuring compliance with Article 18 of the Charter. Moreover, it follows from recital 3 of those two directives that, drawing inspiration from the conclusions of the Tampere European Council, the EU legislature intended to ensure that the Common European Asylum System which those directives help to define is based on the full and inclusive application of the Geneva Convention.[27] In that regard, the Final Act of the United Nations Conference of Plenipotentiaries, which drew up that convention, expressly recognised the 'essential right' of refugees to the family unity and recommended that the signatory States take the necessary measures to maintain family unity and, more generally, to protect the families of refugees, which is indicative of a close connection between a refugee's right to family unity and the rationale of international protection.[28]

31. Directive 2011/95 seeks to ensure full respect for human dignity and the right to asylum of 'applicants for asylum and their accompanying family members' (recital 16) and expressly requires States to ensure that family unity is maintained, by establishing a number of rights for family members of a beneficiary of international protection (Article 23(1) and (2)), with the objective of facilitating the integration of those persons in the host Member State. Recital 60 of Directive 2013/32 states that that directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, that directive seeks to ensure full respect for human dignity and to promote the application, inter alia, of Articles 18 and 24 of the Charter and has to be implemented accordingly. While the protection of family life, provided for in Article 7 of the Charter, is not one of the main objectives of that directive, it should be recalled that, according to settled case-law, that article must be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with his or her parents.[29]

[26] The right to respect for family life is guaranteed in Article 8 ECHR and, according to the European Court of Human Rights ('the ECtHR'), family unity is an essential right of a refugee (ECtHR, 10 July 2014, *Tanda-Muzinga v. France*, CE:ECHR:2014:0710JUD000226010, § 75). The Court held in the judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 53), that even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his or her family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) ECHR.

[27] See, to that effect, the judgment in *Ibrahim and Others*, paragraph 97, and judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 54).

[28] See Opinions of Advocate General Mengozzi in *Ahmedbekova* (C-652/16, EU:C:2018:514, point 51), and of Advocate General Richard de la Tour in *Bundesrepublik Deutschland (Maintenance of family unity)* (C-91/20, EU:C:2021:384, point 66).

[29] See 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, paragraph 34 and the case-law cited).

32. Recital 33 of Directive 2013/32 clearly states that the best interests of the child must be a primary consideration of Member States when applying the directive, [30] in accordance with the Charter and the UN Convention on the Rights of the Child of 1989, [31] and this is reflected in an express and general obligation laid down in Article 25(6) of the directive. In assessing the best interest of the child, Member States must in particular take due account of the minor's well-being and social development, including his or her background. Accordingly, the provisions of Directive 2013/32 cannot be interpreted in such a way that they disregard the fundamental right of a child to maintain personal relations with his or her parents on a regular basis, the respect for which undeniably merges into the best interests of the child. [32] I recall that the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union. [33]

33. In that context, [34] it must be concluded that, if an applicant for international protection will be exposed, in the event of his or her return to the Member State which initially granted him or her refugee status or subsidiary protection, to a serious risk of being subjected to treatment contrary to Article 7 of the Charter, read in conjunction with Articles 18 and 24 thereof, the Member State with which the new application has been lodged should not be able to declare that application inadmissible. In my view, that situation is sufficiently exceptional in nature, in accordance with the case-law of the Court, [35] to rebut the presumption arising from the principle of mutual trust.

34. The assessment of whether there is a serious risk of being subjected to treatment contrary to Article 7 of the Charter, read in conjunction with Articles 18 and 24 thereof, can be made only after an applicant has been given the opportunity to set out, during the personal interview on the admissibility of the application provided for in Article 14(1) and Article 34(1) of Directive 2013/32, all the factors, in particular those of a personal nature, capable of confirming that such a risk exists. Therefore, if the determining authority is inclined to find that an application for international protection is inadmissible on the ground referred to in Article 33(2)(a) of Directive 2013/32, that interview must give the applicant the opportunity not only to state whether international protection has in fact already been granted to him or her in another Member State, but in particular to present all of the factors which differentiate his or her specific situation in order to enable the determining authority to rule out the possibility that the applicant, if returned to that other Member State, would be exposed to the abovementioned risk. [36]

30 Taking into account the child's best interests is, moreover, a cross-cutting concern of all the legal instruments making up the Common European Asylum System.

31 The Convention on the Rights of the Child, which was adopted by the United Nations General Assembly in its resolution 44/25 of 20 November 1989, entered into force on 2 September 1990 and is binding on all Member States, also recognises the principle of respect for family life. The Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9 of the Convention thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will (paragraph 1) and are to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (see, to that effect, judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 57).

32 See, by analogy, judgment of 5 October 2010, *McB.* (C-400/10 PPU, EU:C:2010:582, paragraph 60 and the case-law cited).

33 See judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 54 and the case-law cited).

34 In addition, it is also possible to cite recital 17 and Article 17(2) of Regulation No 604/2013, from which it is apparent that any Member State is able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in that regulation.

35 See the judgment in *Ibrahim and Others*, paragraph 84.

36 See, by analogy, judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraphs 49 and 53).

35. As regards the assessment of the serious risk of infringement of that fundamental right to respect for family life, carried out in conjunction with the obligation to take into consideration the child's best interests, two elements must be taken into account: the legal status of the applicant for international protection in the Member State in which he or she resides with the family member who is the beneficiary of that protection, on the one hand, and the nature of the relationship between the person concerned and the family member benefiting from the protection, on the other.

2. The status of the applicant in the host Member State

36. The fact that the applicant has a status which provides him with a certain degree of stability and security as regards his residence in the host Member State seems to me to be such as to eliminate any risk of return to the first Member State and, accordingly, to guarantee family unity in the host State. In that regard, I note that the interested parties argue that the right to respect for family life and the best interests of the child are guaranteed by legal instruments appropriate to the circumstances of the present case, namely Article 23 of Directive 2011/95 and Directive 2003/86, the implementation of which makes it possible to offer an appropriate status to the applicant in the main proceedings.

(a) Article 23 of Directive 2011/95

37. Chapter VII of Directive 2011/95, entitled 'Content of international protection', is intended to define the rights which candidates for refugee or subsidiary protection status, whose claims have been upheld, may enjoy,[37] rights which include maintaining family unity in accordance with Article 23 of that directive. The latter requires Member States to amend their national laws so that family members, within the meaning referred to in Article 2(j) of that directive, of the beneficiary of refugee status or subsidiary protection status are, under certain conditions, entitled to claim the benefits referred to in Articles 24 to 35 of Directive 2011/95, which include, inter alia, a residence permit, access to employment or to education, which are intended to maintain family unity.[38] The objective of those specific legal rules is to ensure the best possible integration of the beneficiary of international protection and his or her family members in the host Member State.

38. The application of Article 23 of Directive 2011/95 is made subject to three cumulative conditions being met. First, the potential beneficiary of the benefits in question must be a family member within the meaning of Article 2(j) of that directive. Secondly, he or she must not individually qualify for international protection. Thirdly, his or her personal legal status must be compatible with the grant of the benefits provided for in Directive 2011/95.[39] It seems to me relevant to examine more closely the first two conditions.

39. First, Article 2(j) of Directive 2011/95 applies to family members of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection, in so far as the family already existed in the country of origin. The father, mother or other adult responsible for a minor falls within the definition of 'family

[37] See, by analogy, judgment of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 68).

[38] See, to that effect, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 68).

[39] It should be noted that fulfilment of those three conditions may not be sufficient if the person in question is in one of the situations of exclusion from the grant of international protection provided for in Chapters III and V of Directive 2011/95. Similarly, Article 23(4) of that directive states that Member States may always refuse, reduce or withdraw the benefits referred to in paragraphs 1 and 2 of that article for reasons of national security or public order.

member'. The family ties must therefore have existed prior to the family's entry into the host Member State [40] and the family members in question must be present in that State 'in relation to the application for international protection', which is admittedly not very explicit. In that regard, I share the understanding of Advocate General Richard de la Tour of that expression as set out in his Opinion in *Bundesrepublik Deutschland (Maintenance of family unity)*,[41] to the effect that such a condition implies that the family members accompanied the beneficiary of international protection from the country of origin to the host Member State for the purposes of submitting his or her application, thereby demonstrating their wish to remain united. That reading follows from recital 16 of Directive 2011/95, which states that the EU legislature must ensure full respect for the rights of 'applicants for asylum and their accompanying family members'.[42]

40. As the father of a minor daughter who is apparently unmarried and enjoys the status conferred by subsidiary protection, the applicant in the main proceedings is likely to fall within the category of 'family members' referred to in the third indent of Article 2(j) of Directive 2011/95, provided that he fulfils the two subconditions referred to above, which, with respect to the second of those subconditions, is not apparent from the documents before the Court. It is clear from the order for reference and from the appeal on a point of law brought by the applicant in the main proceedings that he fled his country at the end of 2013 and arrived in Austria in 2014, where he was granted refugee status on 1 December 2015. He then left Austria at the beginning of 2016 to 'join' his daughters, in Belgium, who had been granted subsidiary protection status in that country on 14 December 2016, and only lodged his application for international protection there on 14 June 2018. It can be deduced from that summary of the facts that the applicant and his children had a separate migratory journey, as the applicant did not accompany his daughters on their journey from their country of origin to the host Member State.

41. Secondly, Article 23(2) of Directive 2011/95 applies only to family members of a beneficiary of international protection who do not individually *qualify for* international protection.[43] The application of that provision thus presupposes that the application for international protection lodged by the family member in question has been examined as to the substance, resulting in a finding of a failure to satisfy the material conditions for the granting of refugee status or subsidiary protection status laid down in Articles 9 to 10 and 15 of Directive 2011/95, respectively. According to Article 32 of Directive 2013/32, Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to Directive 2011/95. It is common ground that a declaration of inadmissibility of an application for international protection adopted pursuant to Article 33 of Directive 2013/32 is not preceded by any assessment of the substance of the application, of which the EU legislature specifically intended to relieve the Member State concerned for reasons of procedural economy. Article 23(2) of Directive 2011/95 applies only to situations in which the application for international protection is not rendered inadmissible on any ground.

[40] Directive 2011/95 is not intended to protect family ties created after the asylum seeker's entry into the host Member State. This distinguishes it from Directive 2003/86, which applies also to family relationships formed after the sponsor's arrival on the territory of the Member State concerned (see Article 2(d) of Directive 2003/86).

[41] C-91/20, EU:C:2021:384, point 55.

[42] That second requirement constitutes a further distinction from the family reunification rules laid down by Directive 2003/86, since the latter provides, in Article 5(3), that the application for reunification is to be submitted, unless otherwise provided, 'when the family members are residing outside the territory of the Member State in which the sponsor resides'.

[43] In other words, the family member concerned cannot benefit from maximum protection, since the existence of a risk of persecution or serious threat to him or her is not established, but he or she is eligible, with a view to maintaining family unity with the beneficiary of protection, for various benefits placing him or her in a situation close to that of that beneficiary.

42. It is also reasonable to raise the issue of the possibility of taking into account, in relation only to that specific question of the applicability of Article 23(2) of Directive 2011/95, the specific ground of inadmissibility provided for in Article 33(2)(a) of Directive 2013/32. The initial decision to grant international protection, after examination of the substance of an application for such protection, forms part of the system of rules including concepts and criteria common to the Member States established by Directive 2011/95. I recall that Article 33(2)(a) of Directive 2013/32 constitutes, in the context of the Common European Asylum System established by that directive, an expression of the principle of mutual trust, which requires, particularly with regard to the area of freedom, security and justice, each of the Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law.[44] Although, as the law stands, there is no 'European' refugee or subsidiary protection status which is common to all Member States, the implementation of Article 33(2)(a) of Directive 2013/32 constitutes a form of implicit recognition that the first Member State correctly assessed the merits of the application for international protection.

43. In those circumstances, whether the decision declaring the application to be inadmissible is considered solely from the point of view of its procedural nature or in combination with the specific ground of inadmissibility referred to above, the situation which this creates appears to me to be such as to justify the conclusion that the applicant in the main proceedings, whose refugee status has been established, is ineligible for the benefits provided for in Articles 24 to 35 of Directive 2011/95, since Article 23(2) of that directive is not applicable.[45] That provision therefore cannot provide the applicant in the main proceedings with a means of obtaining a residence permit allowing him to reside in the same Member State as his children and thereby avoid any risk of infringement of the fundamental right to respect for family life.

(b) Directive 2003/86

44. According to Article 1 thereof, the purpose of Directive 2003/86 is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. Generally speaking, the objectives pursued by that directive, as set out in recitals 4 and 8 thereof, are (i) to facilitate the integration of the third-country nationals concerned by enabling them to lead a normal family life and (ii) to lay down more favourable conditions for the exercise by refugees of their right to family reunification, having regard to their special situation.[46]

45. Those conditions, provided for in Chapter V of Directive 2003/86, are literally concerned only with family reunification for 'refugees'. Article 3(2)(c) of that directive specifies, inter alia, that the latter does not apply where the sponsor is a third-country national authorised to reside in a Member State on the basis of 'a subsidiary form of protection' in accordance with international

[44] See, to that effect, the judgment in *Ibrahim and Others*, paragraphs 84 and 85.

[45] I note that, in paragraph 39 of its observations, the Commission accepted that Article 23(2) of Directive 2011/95 was inapplicable in view of the status of the applicant in the main proceedings as a refugee, as did the defendant in the main proceedings. By contrast, the Italian Government maintains (paragraph 27 of its observations) that, 'although he cannot obtain refugee status (which has already been recognised in another Member State), the applicant in the main proceedings will in any event be able to obtain a residence permit in the State in which his minor daughter has obtained subsidiary protection' and the other benefits provided for in Article 23(2) of Directive 2011/95. For that claim, which is inadequately reasoned, to be well founded, it would have to be possible to take the view that the competent Belgian authorities could take into account the fact that the applicant has been granted refugee status both to declare the second application for international protection inadmissible on the basis of Article 33(2)(a) of Directive 2013/32 and to justify the application of Article 23(2) of Directive 2011/95 on the ground that he does not qualify for refugee status, which may seem inherently illogical.

[46] See judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 34 and 58).

obligations, national legislation or the practice of the Member States. That wording is explained by the fact that at the time of the adoption of Directive 2003/86, subsidiary protection status did not exist in EU law. It is clear that the European legislative framework governing asylum has developed considerably with the recognition of that status in Directive 2004/83/EC [47] and the approximation of the two protection regimes with Directive 2011/95. It is clear from recitals 8, 9 and 39 of the latter that the EU legislature intended to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified. [48]

46. In spite of those significant developments and the questions raised by the Council of Europe Commissioner for Human Rights [49] as to the difference in treatment of the two statuses concerned, the Court has ruled that Directive 2003/86 must be interpreted as not applying to third-country national family members of a beneficiary of subsidiary protection. It held, in that regard, that, in so far as the common criteria for granting subsidiary protection were inspired by rules existing in the Member States which they were intended to harmonise, where relevant by replacing them, the effectiveness of Article 3(2)(c) of Directive 2003/86 would be greatly undermined if it were interpreted as not referring to beneficiaries of the subsidiary protection laid down in EU law. [50] It is common ground that the minor child of the applicant in the main proceedings, who is the potential 'sponsor' within the meaning of Article 2(c) of Directive 2003/86, has a residence permit in Belgium on the basis of her subsidiary protection status, which precludes family reunification in that country in accordance with the case-law referred to above.

47. In the light of the foregoing consideration, the Commission refers, first, to the possibility of submitting an application for family reunification in Austria, a country in which the applicant in the main proceedings holds refugee status, and, secondly, to Belgian legislation permitting such reunification where the sponsor is a beneficiary of subsidiary protection status, in particular for the father or mother of such a beneficiary who are coming to live with the latter, provided that he or she is under 18 years of age and entered Belgium without being accompanied by an adult foreign national responsible for him or her by law and was not effectively taken into the care of such a person thereafter, or was left alone after entering. With regard to the first approach mentioned above, it seems to me to raise several difficulties which might be considered 'insurmountable'.

[47] Council Directive 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).

[48] See judgments of 1 March 2016, *Alo and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 32), and of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713, paragraph 42). It is important to point out that in 2011, by means of a Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) (COM(2011) 735 final), the Commission launched a debate on the possible reform of that directive. One of the matters under discussion was in fact concerned with the exclusion of subsidiary protection from the scope of the directive. Despite the support of many international organisations, that directive was not recast to include beneficiaries of subsidiary protection within its scope.

[49] The Council of Europe Commissioner for Human Rights has expressed doubts as to the compatibility with the ECHR of excluding beneficiaries of subsidiary protection from the regime provided for in Directive 2003/86 ('Realising the right to family reunification of refugees in Europe', Issue Paper, 2017). When called upon to rule on whether it was compatible with Article 8 ECHR to impose a three-year waiting period for granting family reunification to beneficiaries of subsidiary or temporary protection status, the ECtHR found that that provision had been infringed in its judgment of 9 July 2021, *M.A v. Denmark* (CE:ECHR:2021:0709JUD000669718). However, the ECtHR ruled that the position is not quite the same for beneficiaries of subsidiary protection as for refugees (§ 153) and that an extensive margin of discretion was left to the Member States when it came to granting family reunification for persons under subsidiary protection (§ 155). Thus, the distinction between the two protective statuses is not called into question by the ECtHR.

[50] See judgments of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraph 33), and of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 34). As regards the observation in the legal literature that Directive 2003/86 is to be interpreted narrowly, see Peers, S., *EU Justice and Home Affairs Law (Volume 1: EU Immigration and Asylum Law)*, 4th ed., OUP, Oxford, 2016, p. 402.

48. In the first place, the implementation of Directive 2003/86 is likely to lead to temporary family separation. In accordance with Article 2(a) to (d) of Directive 2003/86, that directive applies only to sponsors who are third-country nationals, that is to any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU, 'residing lawfully in a Member State' and applying for family reunification, or whose family members are applying for family reunification, and to family members of a third-country national who join the sponsor in order to preserve the family unit, whether the family relationship arose before or after the sponsor's entry. That application must, in principle, be lodged and examined while the family members are residing outside the territory of the Member State in which the sponsor resides.[51] The applicant in the main proceedings could therefore, if necessary, be forced to leave Belgium and his daughters[52] to go and settle alone in Austria, a country in which he may reside lawfully in view of the refugee status which he has been granted. His children, on the other hand, are unable to enter that country while the application is being examined, which may take nine months, a period which is liable to be extended. However, the second subparagraph of Article 5(3) and recital 7 of Directive 2003/86 allow Member States to derogate from the general rule in the first subparagraph and accept an application submitted when the family members are already in its territory 'in appropriate circumstances', the determination of which falls within their broad discretion.

49. In the second place, it is possible that the applicant in the main proceedings may be unable to benefit from all the provisions of Directive 2003/86 providing for more favourable treatment of applications for family reunification of refugees. By way of derogation, Article 12(1) of that directive provides that Member States may not require, in the case of a refugee and his or her family, proof that the sponsor has adequate accommodation, sickness insurance and stable resources to maintain himself or herself and his or her family. Apart from the fact that that derogation does not apply to the reunification of adult children, subparagraph 3 of that article allows Member States to require the refugee to meet the conditions set out in Article 7 of that directive, if the application for family reunification is not submitted within a period of three months after the granting of the refugee status. In the present case, it is clear that the application for family reunification will be submitted more than three months after the granting of refugee status, which occurred on 1 December 2015. The fulfilment of those conditions could prove particularly problematic for the applicant in the main proceedings who has been living in Belgium for several years with his children.

50. In the third place, the implementation of Directive 2003/86 is likely to lead to separation of the siblings.[53] Article 4(2)(b) of the directive provides that Member States 'may' authorise the entry and residence of the adult unmarried children of the sponsor where the latter are 'objectively unable to provide for their own needs on account of their state of health'. There is therefore no obligation on Member States to allow the sponsor's adult children to enter their territory and, if they do, the authorisation is necessarily conditional upon the requirement of proof of a relationship of dependency with the parent concerned, a situation which is not apparent from the documents before the Court.

[51] Article 5(1) of Directive 2003/86 provides that Member States are to determine whether an application for entry and residence is to be submitted by the sponsor or by the family member or members.

[52] The situation appears particularly complex, since, according to the appeal on a point of law, he lives with his minor daughter, his partner (a Syrian refugee) with whom his daughter has been placed in a foster family, their common child and the children of his partner.

[53] The ECtHR recognises that family life can exist among siblings and has stated that in proceedings concerning the placement of children, the separation of siblings should be avoided, as it may be against the best interests of the child (ECtHR, 18 February 1991, *Moustaquim v. Belgium*, CE:ECHR:1991:0218JUD001231386, § 36, and of 6 April 2010, *Mustafa and Armağan Akın v. Turkey*, CE:ECHR:2010:0406JUD000469403, § 19).

51. In the fourth place, family reunification in Austria would result in the de facto loss for the children of the status conferred by the subsidiary protection recognised by the Kingdom of Belgium and of the benefits deriving therefrom. Moreover, if the persons concerned decided to lodge applications for international protection in Austria, those applications could be declared inadmissible on the same ground as that given in relation to their father's application forming the subject matter of the dispute in the main proceedings. [54] Following family reunification obtained under Directive 2003/86, the children of the applicant in the main proceedings would have the status of family members of the sponsor, which means that, legally, it is possible that their dependence on that sponsor might last for several years before they could acquire an autonomous residence permit. [55] Moreover, there are real differences between the benefits enjoyed by the family members of a third-country national under Directive 2003/86 and the rights conferred on persons enjoying international protection, with the comparison being unfavourable to the former. [56] In addition, there are foreseeable adaptation difficulties linked to a new residency in another Member State, after several years spent in Belgium, and a severance of the social and emotional ties forged in that country.

52. In that context, it should be recalled that the provisions of Directive 2003/86 must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the Charter, as is moreover apparent from recital 2 and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life. In addition to the latter objective, that directive aims to give protection to third-country nationals, in particular minors. [57] It seems to me difficult to argue, in the light of the above considerations, that implementation of Directive 2003/86 for the purposes of family reunification in the Member State which granted refugee status, thus rendering that provision applicable, is consistent with the abovementioned fundamental rights of the minor child. That approach would entail, in particular, loss of the status conferred by subsidiary protection and of the benefits deriving from it, which in principle cannot be recouped in the new host country, and possible separation of the siblings, a consequence which is paradoxical, to say the least, in a context of family reunification.

53. With regard to the second approach based on family reunification authorised under certain conditions by the Belgian legislation, it should be recalled that Article 3(5) of Directive 2003/86 allows Member States to grant, solely on the basis of their national law, a right of entry and residence under more favourable conditions. In that regard, the Commission has, in its guidance for the application of Directive 2003/86, stated that the humanitarian protection needs of persons benefiting from subsidiary protection did not differ from those of refugees and therefore encouraged Member States to adopt rules conferring similar rights on refugees and beneficiaries

[54] The Austrian legislation transposing Directive 2013/32 provides that the asylum application is to be rejected as inadmissible if international protection has been granted by another Member State: Paragraph 4(a) of the Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005 – AsylG 2005), available (in German) at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240.

[55] See Articles 13 and 15 of Directive 2003/86. In the judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 47), the Court held that it follows from the objective of Directive 2003/86, as set out in recital 4, and a reading of the whole of that directive, in particular Article 13(3) and Article 16(3) thereof, that, as long as the family members concerned have not acquired an autonomous right of residence on the basis of Article 15 of that directive, their right of residence is a right derived from that of the sponsor concerned and intended to assist the latter's integration.

[56] Articles 29, 30 and 32 of Directive 2011/95 provide for a number of rights and benefits for beneficiaries of international protection, to which no reference is made in Directive 2003/86 for the sponsor's family members, namely access to social welfare, healthcare and accommodation. The sponsor's family members are entitled to access to employment and self-employed activity under Article 14 of Directive 2003/86, but Member States may set a time limit of 12 months before allowing the exercise of such activity and restrict such access for adult unmarried children.

[57] See judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraphs 46 and 56).

of subsidiary or temporary protection.[58] Although a large number of Member States provide, in their national rules, for the possibility for beneficiaries of subsidiary protection to apply for family reunification under the same conditions as refugees, there are still disparities in those rules, some of which still contain considerable differences in the treatment of refugees and beneficiaries of subsidiary protection as regards the conditions for access to family reunification.[59] In the present case, it is clear from the appeal on a point of law brought before the referring court by the applicant in the main proceedings that his attempts to obtain family reunification with his minor daughter were unsuccessful because he was unable to produce the relevant documents required by the competent municipal authority. It is also stated in the order for reference that the person concerned does not have a residence permit in Belgium.[60]

54. That said, and in general, it is conceivable that a third-country national, who is already a beneficiary of international protection granted in a first Member State, may successfully reach another Member State to join his or her family, submit a new application for protection in that other State and be issued, at the same time, with a residence permit under Article 13(2) of Directive 2003/86 or in accordance with more favourable national legislation transposing that directive. If not, that third-country national may be granted national protection status for reasons not due to a need for international protection, that is to say on a discretionary basis and on compassionate or humanitarian grounds, which fall outside the scope of Directive. 2011/95. It is clear from the closing words of Article 2(h) of Directive 2011/95 that that directive allows for host Member States to be able to grant, in accordance with their national law, 'another kind' of national protection which includes rights enabling individuals who do not enjoy refugee or subsidiary protection status to remain in their territory.[61] In both situations, it would be necessary to verify whether those statuses would be such as to guarantee a certain stability of residence and, subsequently, of family unity in that State. If so, the host Member State should, in my view, be able to exercise the option available to it under Article 33(2)(a) of Directive 2013/32 to declare the application for international protection inadmissible, irrespective of any analysis of the relationship between the applicant and the family member in question.[62]

3. The relationship between the applicant and the family member

55. It is important to point out that, as can be seen from the Explanations relating to the Charter, and in accordance with Article 52(3) thereof, the rights guaranteed by Article 7 of the Charter have the same meaning and scope as those guaranteed by Article 8 ECHR, as interpreted by the

[58] COM(2014) 210 final, point 6.2, pp. 25 and 26.

[59] Moreover, faced with challenges relating to the 2015 migration crisis, some States, such as the Federal Republic of Germany and the Kingdom of Sweden, temporarily restricted the possibility of family reunification for persons enjoying subsidiary protection (Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, of 29 March 2019, COM(2019) 162 final, p. 4; UNHCR 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification', pp. 142 to 145 and 'Realising the right to family reunification of refugees in Europe', Issue Paper, published by the Council of Europe Commissioner for Human Rights, 2017, pp. 32 to 34).

[60] The applicant in the main proceedings is therefore present in the territory of a Member State, without apparently fulfilling the conditions for entry, stay or residence in that State, and is, by that fact alone, staying illegally, even though he has a valid residence permit in another Member State on the grounds that the latter has granted him refugee status. In those circumstances, he must return immediately to the territory of that other State under Article 6(2) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) and may, where appropriate, be subject to forced transfer to that other State in accordance with the national rules of the State in which he is residing (judgment of 24 February 2021, *M and Others (Transfer to a Member State)* (C-673/19, EU:C:2021:127, paragraphs 30, 33, 45 to 48)).

[61] See judgments of 9 November 2010, *B and D* (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 116 to 118), and of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 61).

[62] It is certainly likely that, in practice, the benefit of such a status is capable of preventing the submission of an application for international protection in the family's host Member State or of leading to its withdrawal.

case-law of the ECtHR. In cases concerning family life [63] and immigration, the ECtHR balances the competing interests, namely the personal interests of the individuals concerned in leading a family life within a given territory and the general interest pursued by the State, in this case the control of immigration. Where children are involved, the ECtHR considers that their best interests must be taken into account. On this particular point, the ECtHR reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the ECtHR pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents. [64]

56. I note that that concept of 'relationship of dependency' is also used by the Court in its case-law concerning migration disputes. [65] This is the case with the grant to a third-country national, on the basis of Articles 20 and 21 TFEU, of a derived right of residence in the territory of the European Union, acquired through a family member having the status of Union citizen, where there exists between the two a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany that third-country national and to leave the territory of the European Union as a whole. [66] Reference may also be made to the case-law of the Court concerning the case-by-case examination of applications for reunification which is required by Article 17 of Directive 2003/86 and must take account of all the relevant aspects of the particular case, paying particular attention to the interests of the children concerned and to promoting family life, one of those aspects being the extent to which those children are dependent on relatives. [67]

57. In those circumstances, the assessment by the competent national authority of the serious risk of treatment contrary to Article 7 of the Charter, read in conjunction with Article 24 thereof, following the personal interview provided for in Articles 14 and 34 of Directive 2013/32, must be carried out in the light of all the relevant aspects of the case, including in particular the age of the child, his or her situation in the country in question [68] and the degree of dependence of the child on his or her parents, taking into account the child's physical and emotional development and the extent of the child's emotional ties to his or her parents, all of which are indicative of the risks which separation from the parents might entail for the parent-child relationship and for the child's equilibrium. Accordingly, the fact that the parent lives with the minor child is one of the relevant factors to be taken into consideration in order to determine whether there is a relationship of dependency between them, but is not a prerequisite. [69]

63 Since 2016, the applicant in the main proceedings has resided in Belgium and lives under the same roof as his minor daughter. In that situation there is unquestionably 'family life' as required by the ECtHR in its case-law on Article 8 ECHR, bearing in mind that the notion of 'family life' can encompass the relationship between a legitimate or natural child and his or her father, regardless of whether or not the mother is present in the home, and that the protection guaranteed by Article 8 ECHR extends to all members of the family (ECtHR, 3 October 2014, *Jeunesse v. Netherlands*, CE:ECHR:2014:1003JUD001273810, § 117).

64 ECtHR, 3 October 2014, *Jeunesse v. Netherlands* (CE:ECHR:2014:1003JUD001273810, §§ 109 and 118).

65 It follows, moreover, from recital 16 and Article 16 of Regulation No 604/2013 that, in order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant for international protection and certain members of his or her family constitutes a binding responsibility criterion.

66 See, to that effect, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 52).

67 See, to that effect, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 59).

68 It follows from the judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 54), that account may be taken of the duration of residence of the child, as well as of his or her parent, in the host Member State, the age at which that child arrived in that Member State and the possibility that he or she has been brought up and received an education there, and whether the parent and the child have family, economic, cultural and social ties with and in that Member State.

69 See, by analogy, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraphs 71 to 73).

D. Interim conclusion

58. In the light of all of the foregoing, I propose that the Court rule that Article 33(2)(a) of Directive 2013/32 must be interpreted as precluding a Member State from exercising the option available under that provision to reject an application for refugee status as inadmissible on the ground that the applicant has already been granted such status by another Member State, where the applicant runs a serious risk of being subjected, if returned to that other Member State, to treatment incompatible with the right to respect for family life, provided for in Article 7 of the Charter, read in conjunction with the obligation to take into consideration the child's best interests, enshrined in Article 24(2) of the Charter. That interpretation seems to me not to contradict the objectives of that directive and, more generally, those of the Common European Asylum System.

59. As regards procedural economy, it cannot validly be argued that an additional or disproportionate workload would be imposed on the competent national authorities in the light of the procedural requirements already laid down by Directive 2013/32, and in particular the obligation to conduct an individual interview prior to any decision, including one concerning the inadmissibility of the application. Conducting such an interview makes it possible both to clarify the applicant's family situation and to assess, where appropriate, the applicant's need for international protection. That procedure therefore enables the competent authority best to assess the applicant's situation, and to do so promptly, in the interests of both the person concerned and the Member State, which contributes to the objective of the expeditious processing of applications and the requirement for a complete examination of the application.

60. As regards the prevention of secondary movements, it seems to me that the situation of the applicant in the main proceedings, who moved to another Member State after obtaining refugee status in order to join his children and to live with them, is not, strictly speaking, covered by that concept. His movements within the European Union were not, contrary to what is stated in recital 13 of Directive 2013/32, prompted solely by a difference in legal frameworks between Member States, but were motivated by the fulfilment of a fundamental right provided for in Article 7 of the Charter. In other words, the applicant's actions do not constitute what is commonly referred to as asylum 'forum shopping', as he did not seek to obtain better legal protection or to exploit differences in the level of social protection offered by the Member States in order to obtain better material living conditions. Moreover, in view of the requirements governing the prohibition on Member States implementing Article 33(2)(a) of Directive 2013/32, the prospect of 'blockages' in the system seems improbable to me.

61. The approach advocated in this Opinion is, in my view, fully consistent with other objectives pursued by the EU legislature in developing the Common European Asylum System, namely the harmonisation of rules relating, in particular, to asylum procedures, the protection and integration of beneficiaries of international protection and their family members in the host Member State and the primacy of the best interests of the child in decision-making. The proposed interpretation of Article 33(2)(a) of Directive 2013/32 seems to me appropriate in a context marked by the wide range of possible situations of applicants for international protection within the European Union. The fact that that provision is optional for the Member States, that refugee status is automatically recognised, as a derived right, for a family member of the beneficiary of international protection by some national laws implementing Article 3 of Directive 2011/95 and that the transposition of Directive 2003/86 into national law has sometimes resulted in the alignment of refugee status with subsidiary protection status have contributed to that

diversity, which is contrary to the objective of a process of harmonisation intended to ensure that applicants for international protection are treated in the same way and in an appropriate manner, wherever they are in the territory of the European Union.

E. The consequences of the admissibility of the application for international protection

62. By its second question, the referring court asks, in essence, whether Directive 2011/95 must be interpreted as requiring the host Member State to extend the benefit of the international protection granted to a minor child to the parent living with him or her in accordance with the right to respect for family life enshrined in Article 7 of the Charter, read in conjunction with the obligation to take into consideration the child's best interests laid down in Article 24(2) of the Charter. In answering that question, it is necessary, in my view, to make a number of observations relating to the consequences of it being impossible for the host Member State to exercise the option available to it under Article 33(2)(a) of Directive 2013/32, and, thus, of the admissibility of the application for international protection.

63. In the first place, it should be recalled that the inadmissibility mechanism laid down by Article 33(2)(a) of Directive 2013/32 is a derogation from the obligation of Member States to examine the substance of all applications for international protection, that is to say to assess whether the applicant concerned is eligible for international protection in accordance with Directive 2011/95. That directive lays down, in accordance with Article 1, standards, first, for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, secondly, for a uniform status for refugees or for persons eligible for subsidiary protection and, lastly, for the content of the protection granted. As the Court has previously held, it is clear from Articles 13 and 18 of Directive 2011/95, read in conjunction with the definitions of 'refugee' and 'person eligible for subsidiary protection' set out in Article 2(d) and (f) thereof, that the international protection referred to in that directive must, in principle, be granted to a third-country national or stateless person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, or faces a real risk of suffering serious harm, within the meaning of Article 15 of the directive.[70]

64. Therefore, should a Member State be faced with a situation preventing it from exercising the option available to it under Article 33(2)(a) of Directive 2013/32, that Member State must examine the application for international protection submitted to it and verify that the applicant for international protection satisfies the material conditions for the grant of that protection as described above. The Member State must therefore regard and treat the third-country national concerned as a first-time applicant for international protection, irrespective of the protection already granted to him or her by another Member State. The consequences of such a situation were clearly envisaged by the EU legislature in the context of the inadmissibility mechanism laid down by Article 33(2)(a) of Directive 2013/32[71] and, unless that provision is to be deprived of all

[70] See judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 48 and 49).

[71] According to Article 32 of Directive 2013/32, without prejudice to Article 27 thereof, concerning withdrawal of the application, Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to Directive 2011/95. An application may even be rejected as manifestly unfounded, in accordance with the combined provisions of Article 31(8)(b) and Article 32(2) of Directive 2013/32, if the situation in question is defined as such in the national legislation, which may be the case where the application for international protection is submitted by a national of a safe country of origin.

practical effect, the fact that international protection has already been granted by a first Member State cannot again be taken into account in any way in the context of the examination of the application on the substance. [72]

65. In the second place, all the interested parties point out, in essence, that the application submitted by the applicant in the main proceedings is intended to ensure or is motivated solely by family reunification, since the person concerned is not driven by a need for international protection, which has already been granted in Austria. His application for international protection is therefore not really an application for international protection as such and cannot, in the light of the wording, general scheme and objectives of Directive 2011/95, give rise to the grant of a status falling within the scope of that protection. In that regard, it seems to me necessary to draw a clear distinction between the legal instrument itself, the application for international protection, the content of the arguments and evidence supporting it, as well as the possible underlying motivation of the applicant for international protection.

66. The concept of 'application for international protection' is defined in Article 2(b) of Directive 2013/32 as 'a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of [Directive 2011/95], that can be applied for separately'. That application is deemed to have been made as soon as the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever. [73] It is readily apparent from the order for reference that, on 14 June 2018, the applicant in the main proceedings submitted an application in Belgium which was regarded as an application for international protection and was treated as such by the competent authorities, which declared it inadmissible on the basis of national provisions transposing Article 33(2)(a) of Directive 2013/32.

67. On the substance, the Court has held that, pursuant to Article 13 of Directive 2011/95, Member States are to grant refugee status to all third-country nationals or stateless persons who satisfy the material conditions for qualification as a refugee in accordance with Chapters II and III of that directive, without having any discretion in that respect. [74] This applies by analogy to subsidiary protection status in view of the similar wording of Article 18 of Directive 2011/95. [75] The fact that the applicant is motivated by the underlying and legitimate aim of maintaining family unity in the Member State concerned is irrelevant in the present case, if the abovementioned conditions are fulfilled. In that context, the assessment of an application for international protection based solely on the need for family unity with a beneficiary of such protection, irrespective of any claim of a risk of persecution or serious threats to the applicant, can, in the light of the provisions of Directive 2011/95, result only in a rejection on the substance. In that regard, it is important to point out that that directive does not provide for the extension of

[72] In that regard, I consider irrelevant the observations of the Belgian Government (paragraphs 36, 37, 56, 58 and 61) to the effect that recognition of international protection status is reserved solely for persons who satisfy the conditions for entitlement, which is not the case for third-country nationals, such as the applicant in the main proceedings, who have already been granted that status in a Member State, thereby protecting them from any kind of persecution or serious harm.

[73] See judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 97).

[74] See judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 89).

[75] See, to that effect, judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 36).

refugee status or subsidiary protection status to the family members of a person granted that status, which does not mean that the family tie can never be taken into account so far as concerns the granting of international protection.[76]

68. In the third place, as is apparent from recital 12 of Directive 2011/95, the provisions thereof are intended to ensure the application of common criteria for the identification of persons in need of international protection and to ensure that a minimum level of benefits is available for those persons in all Member States.[77] Moreover, under recitals 11 and 12 and Article 1 of Directive 2013/32, the framework for granting international protection is based on the concept of a 'single procedure' and minimum common rules.[78] In those circumstances, it is reasonable to take the view that the situations of applicants for international protection which are genuinely similar should be treated in the same way by the competent national authorities of the various Member States and result in the same outcome as to the substance. In other words, the applicant in the main proceedings should, in principle, be granted refugee status in Belgium, which would lead to a situation in which international protection is duplicated. Although neither the existence of such a situation nor its cessation is expressly provided for by Directives 2011/95 and 2013/32, it is nevertheless a possible consequence of the optional nature of implementation of Article 33(2)(a) of Directive 2013/32 and has been implicitly, but necessarily, accepted by the Court in its case-law relating to that provision.[79]

69. For the sake of completeness in the assessment of such a situation, I would note that, with regard in particular to refugee status, Article 14 of Directive 2011/95, read in conjunction with Article 11 thereof, sets out the situations in which Member States may or must revoke, end or refuse to renew that status. None of the situations provided for, which must be interpreted restrictively, according to the United Nations High Commissioner for Refugees,[80] covers that of dual recognition. However, it is important to point out that Article 45 of Directive 2013/32, which determines the guarantees to be enjoyed by the person concerned when the competent national authority considers withdrawing, in accordance with Article 14 of Directive 2011/95, the international protection granted to him or her, provides for a derogation in paragraph 5 thereof. Article 45(5) provides that Member States may decide that such protection is to lapse by law where the beneficiary has unequivocally renounced his or her recognition as such, which in my view could cover the situation of an application for and subsequent obtaining in a second Member State of the protection granted in a first State. Finally, it is more than likely that the situation of dual recognition will result in non-renewal of the temporary residence permit automatically obtained in the first Member State under Article 24 of Directive 2011/95, in the absence of an application for renewal by the person concerned or in view of the latter's absence from the national territory for a given time and the acquisition of a new residence permit in the second Member State. However, recital 40 of Directive 2011/95 states that, within the limits set

[76] See judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 68). In that judgment, the Court stated that Article 3 of Directive 2011/95 allows a Member State, where international protection has been granted to a family member, to extend, under certain conditions, the benefit of that protection to other members of that family. It also ruled that if an application for international protection cannot be granted as such on the ground that one of the applicant's family members has a well-founded fear of being persecuted or faces a real risk of suffering serious harm, by contrast, account must be taken of such threats in respect of one of the applicant's family members for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself or herself exposed to the threat of persecution or serious harm.

[77] See judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 79).

[78] See judgment of 25 July 2018, *A* (C-404/17, EU:C:2018:588, paragraph 30).

[79] See the judgment in *Ibrahim and Others*, and order of 13 November 2019, *Hamed and Omar* (C-540/17 and C-541/17, not published, EU:C:2019:964).

[80] Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, UNHCR/1P/4/ENG/REV. 3, paragraph 116.

out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit. Those factors place in context the importance and practical consequences of dual recognition of international protection.

70. Finally, it should be noted that even a strong probability is never a certainty, and it cannot be ruled out that an individual assessment of a second application for international protection, after such protection has been granted by a first Member State, might lead to a rejection of that application. Although the system of rules established by Directives 2011/95 and 2013/32 constitutes definite progress towards a Common European Asylum System, it does not reflect complete harmonisation. As Advocate General Richard de la Tour [81] points out, certain concepts which are fundamental to the implementation of Directive 2011/95 are not defined *strictu sensu*, which leaves room for differing assessments by the Member States and results in requests being made to the Court for interpretations of EU law. I note, however, that in the event of a rejection of that application on the substance, the second Member State may, where appropriate, grant to the individual whose application has been rejected the benefits provided for in Articles 24 to 35 of Directive 2011/95, in accordance with Article 23 of that directive.

V. Conclusion

71. In the light of the foregoing considerations, I propose that the Court reply as follows to the Conseil d'État (Council of State, Belgium):

(1) Article 33(2)(a) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as precluding a Member State from exercising the option available under that provision to reject an application for international protection as inadmissible on the ground that the applicant has already been granted such protection by another Member State, where returning that applicant to that other State would expose him or her to a serious risk of being subjected to treatment contrary to the right to respect for family life as laid down in Article 7 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 18 and Article 24(2) thereof.

The fact that an applicant for international protection is the parent of a minor child who is a beneficiary of such protection in the host Member State may lead to the finding that such a risk exists, subject to the verification, which it is for the competent national authorities to carry out, that the applicant does not have a legal status guaranteeing him or her stable residence in that State and that the child's separation from his or her parent is likely to harm their relationship and that child's equilibrium.

(2) Where the application for international protection submitted by that applicant is admissible, it is necessary to carry out an examination of the substance of that application in order to check compliance with the requirements for the grant of international protection laid down in Articles 13 and 18 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

[81] Opinion in *Bundesrepublik Deutschland (Maintenance of family unity)* (C-91/20, EU:C:2021:384, point 108).

persons eligible for subsidiary protection, and for the content of the protection granted. That directive does not provide for the extension of refugee status or subsidiary protection status to family members of the person to whom that status is granted.