Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 24 March 2022 [1]

Case C-720/20

RO legally represented
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the Verwaltungsgericht Cottbus (Administrative Court, Cottbus, Germany))

(Reference for a preliminary ruling – Area of freedom, security and justice – Common policy on asylum and subsidiary protection – Directive 2013/32/EU – Article 33(2)(a) – Rejection of an application for international protection lodged by a child as inadmissible due to the prior grant of international protection to her family members – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining that application for international protection – Best interests of the child)

I. Introduction

1. The present case illustrates the difficulties faced by the Member States in implementing the criteria laid down by Regulation (EU) No 604/2013 [2] when the complexity of social realities is added to the technicality of those rules, in particular, the reality of the family life of refugees. As shown by the numerous disputes currently before the Court, that family life is not fixed in either time or space. [3] Families move from one Member State to another, although the status of beneficiaries of international protection granted to their members does not permit them to settle, at will, in the territory of the European Union. [4] At the same time, families grow, which

1 Original language: French.

2 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).

3 See, in that regard, Opinion of Advocate General Pikamäe in *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)* (C-483/20, EU:C:2021:780) and judgment of 22 February 2022, *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)* (C-483/20, EU:C:2022:103). See also *Ministre de l'immigration et de l'asile* (C-153/21), still pending before the Court, which raises a similar question to the present case, and *Staatssecretaris van Justitie en Veiligheid* (C-745/21), which concerns the rights of the unborn child, where the mother is subject to a decision of transfer to Lithuania, pursuant to Regulation No 604/2013, although the father of that child enjoys international protection in the Netherlands.

4 See, to that effect, Article 33 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), which allows only beneficiaries of international protection to move freely within the territory of the Member State that has granted such protection and to choose their place of residence within that territory, and judgment of 1 March 2016, *Alo and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 37).

then poses the question of the legal status of the child and, in particular, of the Member State responsible for examining the application for international protection of the child born in the territory of a Member State other than that which grants that international protection to his or her family members ('the host State').

2. The present case illustrates such a chain of circumstances. In this case, the members of a family of Russian nationality obtained refugee status in Poland in 2012, before moving and establishing their place of residence in Germany, without a residence permit being issued for that purpose. It was in the latter Member State, in which that family is staying illegally, that, in 2015, another child ('the applicant') was born. That child lodged an application for international protection with the German authorities, which was declared inadmissible on the basis of Article 33(2)(a) of Directive 2013/32/EU. [5]

3. The aim of the request for a preliminary ruling is to determine the procedural rules applicable to the examination of an application for international protection, lodged by that child in the Member State in whose territory she was born and where she lives with her family members, although the latter have obtained refugee status in another Member State, which they have chosen to leave and to which they do not wish to return.

4. It is not disputed that the unity of the family of applicants for, and beneficiaries of, international protection must be preserved and that the child's best interests should be given every consideration as required under Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). It is also essential to ensure the effectiveness of the right to asylum, enshrined in Article 18 of the Charter, so far as concerns both the child's access to a procedure for examining her application for international protection and the enjoyment by her family members of the rights attached to their refugee status. Although Regulation No 604/2013 regulates the transfer of responsibilities relating to the examination of that application for international protection, the provisions it lays down are not sufficient for dealing with all the series of circumstances stemming, in particular, from the movements of families within EU territory. Moreover, the aim of that regulation is not to govern the transfer of responsibilities relating to international protection, equally essential in situations such as that at issue, and currently covered by the Convention relating to the Status of Refugees [6] and the European Agreement on Transfer of Responsibility for Refugees. [7]

5. In this Opinion, I shall explain my reservations regarding the procedural remedies contemplated both in the request for a preliminary ruling and in the course of argument, namely an application by analogy either of Article 9 of Regulation No 604/2013, or of Article 20(3) of that regulation, or of Article 33(2)(a) of Directive 2013/32. I shall therefore invite the Court to take a different route, based on the child's best interests, and suggest that it rule that, in a situation such as that at issue, where the child has lodged her application for international protection in the

[5] 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).

[6] Done at Geneva on 28 July 1951 and entered into force on 22 April 1954 (*United Nations Treaty Collection*, Vol. 189, p. 150, No 2545 (1954)). It was supplemented by the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967 and entered into force on 4 October 1967. See, in particular, Article 28 of that convention.

[7] Done at Strasbourg on 16 October 1980 (ETS No 107). The European Commission provided for the use of that mechanism in the Green Paper on the future Common European Asylum System of 6 June 2007 (COM(2007) 301 final, not published in the OJ, paragraph 2.3, p. 6), to which reference is made in Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1). See, also on that subject, Ippolito, F., 'Reconnaissance et confiance mutuelles en matière d'immigration et d'asile: de l'in(é)volution d'un principe?', in Fartunova-Michel, M., and Marzo, C., *Les dimensions de la reconnaissance mutuelle en droit de l'Union européenne*, Bruylant, Brussels, 2018, pp. 218 to 243, in particular p. 220.

Member State in whose territory she was born and where, together with her family members, she has her habitual residence at the time of lodging that application, Article 3(2) and Article 6(1) of Regulation No 604/2013 are to be interpreted as meaning that it is in the child's best interests for that Member State to be responsible for examining her application.

II. Legal framework

A. European Union law

6. In this Opinion, I will refer to Articles 7, 18 and 24 of the Charter and to Articles 3, 6, 9, 20 and 21 of Regulation No 604/2013. I will also refer to Article 33 of Directive 2013/32 and Article 24 of Directive 2011/95.

B. German law

7. Paragraph 29 of the Asylgesetz (Law on Asylum), in the version published on 2 September 2008,[8] as amended by the Integrationsgesetz (Law on Integration) of 31 July 2016,[9] which entered into force on 6 August 2016, is entitled 'Inadmissible applications' and provides:

'(1) An application for asylum is inadmissible if:

1. another State is responsible for examining the application for asylum

   (a) under Regulation [No 604/2013], or

   (b) under other EU rules or an international agreement

   …'

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

8. The applicant and her family members are Russian nationals, of Chechen origin. On 19 March 2012, when the applicant had not yet been born, her family members obtained refugee status in Poland. They subsequently left that Member State in December 2012 and went to Germany, where they submitted new applications for international protection. The competent German authorities then sent take charge requests as regards the parties concerned to the Polish authorities, which did not grant those requests on the ground that the family members already enjoyed international protection in Poland.[10]

[8] BGBl. 2008 I, p. 1798.

[9] BGBl. 2016 I, p. 1939.

[10] See, in that regard, 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), in which the Court held that 'a Member State cannot properly make a request of another Member State that it take charge of or take back, within the procedures set out by [Regulation No 604/2013], a third-country national who has submitted an application for international protection in the former Member State after having been granted subsidiary protection by the latter Member State' (paragraph 78).

9. On 2 October 2013, the competent German authorities declared those applications for international protection to be inadmissible. They then ordered the family members to leave the territory, on pain of removal, since they were covered by the provisions 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). [11]

10. On 21 December 2015, the applicant was born in Germany. She has Russian nationality, like her family members. She lodged an application for international protection in 2016. According to the referring court, no procedure for determining the Member State responsible was commenced in respect of that application.

11. By decision of the German authorities of 14 February 2019, updated on 19 March 2019, the applicant's family members were again ordered to leave the territory on pain of removal.

12. By decision of 20 March 2019, the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) rejected the applicant's application for international protection as inadmissible. The applicant then brought an action against that decision before the referring court. That court is uncertain as to whether the Federal Republic of Germany is, under Regulation No 604/2013, the Member State responsible for examining that application for international protection and whether, if not, it is nevertheless entitled to reject it as inadmissible on the basis of Article 33(2)(a) of Directive 2013/32.

13. It was in those circumstances that the Verwaltungsgericht Cottbus (Administrative Court, Cottbus, Germany) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of the objective of EU law to avoid secondary movements and the principle of family unity expressed in that regulation, must Article 20(3) of [Regulation No 604/2013] be applied by analogy in a situation where a minor child and his or her parents lodge applications for international protection in the same Member State, but the parents already enjoy international protection in another Member State, whereas the child was born in the Member State in which he or she lodged the application for international protection?

(2) If the question is answered in the affirmative, should the minor child's application for asylum under [Regulation No 604/2013] not be examined and should a transfer decision under Article 26 of the regulation be adopted, having regard to the fact that, for instance, the Member State in which that minor child's parents enjoy international protection is responsible for examining the minor child's application for international protection?

(3) If the previous question is answered in the affirmative, is Article 20(3) of [Regulation No 604/2013] also applicable by analogy in so far as, under the second sentence thereof, it is not necessary to initiate the procedure for taking charge of a child born subsequently, despite the fact that there is then a risk that the host Member State has no knowledge of the possible need to take charge of the minor child or that, in accordance with its administrative practice, it refuses to apply Article 20(3) of [Regulation No 604/2013] by analogy and, consequently, there is a risk that the minor child will become a "refugee in orbit"?

[11] Moreover, in view of the short duration of their stay in Poland, they are not covered by Directive 2003/109.

(4) If Questions 2 and 3 are answered in the negative, can a decision on inadmissibility under Article 33(2)(a) of [Directive 2013/32] be adopted by analogy in respect of a minor child who has lodged an application for international protection in a Member State even if it is not the child himself or herself but his or her parents who enjoy international protection in another Member State?'

14. The applicant, the Belgian, German, Italian, Netherlands and Polish Governments and the Commission presented their written and/or oral observations at the hearing held on 14 December 2021.

IV. Analysis

A. Preliminary considerations

15. As a preliminary point, I think it is necessary to make a few observations concerning the scope of the request for a preliminary ruling in relation to the content of the observations lodged by the interested parties and the oral arguments.

16. The referring court addresses four questions to the Court of Justice the structure of which follows that of Article 33(1) of Directive 2013/32. That article distinguishes the cases in which an application for international protection is not examined in accordance with Regulation No 604/2013, the Member State in receipt of that application then transferring responsibility for examining it to the Member State that it considers responsible, from those in which such an application may be rejected as inadmissible. [12]

17. The first, second and third questions referred concern, therefore, the extent to which responsibility for examining the application for international protection of a child born in the territory of a Member State may be transferred to another Member State which has previously granted refugee status to his or her family members. In particular, the referring court is asking the Court of Justice whether it is possible to apply by analogy Article 20(3) of Regulation No 604/2013 and, if so, whether it is then possible, on the basis of Article 26 of that regulation, to transfer that child to the Member State in which his or her parents enjoy international protection, in order for his or her application to be examined.

18. If such application by analogy is not possible, that court then asks the Court, by its fourth question, whether it is possible to declare that application for international protection inadmissible on the basis of an application by analogy of Article 33(2)(a) of Directive 2013/32.

19. In a first step, I shall set out the reasons why none of the procedures contemplated in the request for a preliminary ruling appear appropriate, each of the parties appearing, moreover, to have difficulty in making an application by analogy acceptable for one or other of those procedures. That application by analogy requires the situation subject to a legal vacuum and that which is expressly regulated to be, if not identical, then at least similar. The situations referred to in Article 20(3) of Regulation No 604/2013 and in Article 33(2)(a) of Directive 2013/32 differ greatly from that at issue in the main proceedings, both in their wording and their raison d'être.

[12] See, to that effect, order of 5 April 2017, *Ahmed* (C-36/17, EU:C:2017:273, paragraph 38).

20. In a second step, I shall examine other procedures. First, I shall analyse that suggested by the Commission in its observations, namely the application by analogy of the criterion laid down in Article 9 of Regulation No 604/2013, entitled 'Family members who are beneficiaries of international protection'. The parties were able to express their opinions on recourse to that provision, both in their written replies to the questions put by the Court and at the hearing. Second, in view of the limits of such an application by analogy, I shall propose to the Court an alternative to that procedure, the guiding principle of which is the best interests of the child.

21. As the parties agreed at the hearing, the Court is invited to find a solution for the future since, in the case in the main proceedings, the Federal Republic of Germany acknowledges that it has become responsible for examining the child's application on account of the time limits set by Regulation No 604/2013 for submitting take charge requests having expired. That future is not so far off since the Court is seised of a similar problem in Case C-153/21, *Ministre de l'immigration et de l'asile*,[13] stayed on 11 November 2021.

B. Examination of the request for a preliminary ruling

1. The application by analogy of Article 20(3) of Regulation No 604/2013, relating to the taking into account of a child's situation in the procedure for determining the Member State responsible (first, second and third questions referred)

22. By its first question, the referring court is asking the Court, in essence, whether, in order to limit secondary movements and to preserve the fundamental right to family life, enshrined in Article 7 of the Charter, Article 20(3) of Regulation No 604/2013 may be applied by analogy to the situation in which a child lodges his or her application for international protection in the Member State in which he or she was born, although his or her family members enjoy international protection in another Member State.

23. For the reasons I am going to set out, to allow that analogy would be to disregard the wording and *ratio legis* of Article 20(3) of Regulation No 604/2013.

24. Article 20 of that regulation defines the rules applicable to the commencement, or 'start', to use the word in its title, of the procedure for determining the Member State responsible for examining an application for international protection.

25. In Article 20(1) and (2) of that regulation, the EU legislature states, in the first place, that the process of determining the Member State responsible starts 'as soon as an application for international protection is *first lodged with a Member State*'[14] (paragraph 1) and that such an application is deemed to have been lodged once the competent authority has received either the form submitted by the applicant to that end or the report prepared by the competent national authorities (paragraph 2).

[13] In that case, the members of a Syrian family left Greece, although they had refugee status in that Member State, and went to Luxembourg where the last sibling was born. It was in the latter Member State that the child lodged an application for international protection, which was held to be inadmissible also on the basis of Article 33(2)(a) of Directive 2013/32.

[14] Emphasis added.

26. In the second place, in Article 20(3) of the same regulation, that legislature lays down the circumstances in which the competent national authority must take account of the 'situation of a minor' in that process. That paragraph is worded as follows:

'For the purposes of this Regulation, the situation of a minor who is accompanying the *applicant* and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, *provided that it is in the minor's best interests*. The same treatment shall be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.' [15]

27. First, the EU legislature refers to the situation of a minor whose family members have lodged a first application for international protection in a Member State, for the purposes of Article 20(1) and (2) of Regulation No 604/2013, the competent national authorities being therefore involved in a process for determining the Member State responsible for examining those applications. [16]

28. There is no possible analogy between the situation of a minor whose family members are applicants for international protection and that of a minor whose family members are already beneficiaries of such protection. The concepts of person making an 'application for international protection' and 'beneficiary of international protection' are defined differently in Article 2(b), (c) and (f) of Regulation No 604/2013 and cover different legal statuses the recognition and content of which are governed by specific provisions. Moreover, that is why the EU legislature distinguishes, in Article 9 of that regulation, between the situation of the minor whose family members are *beneficiaries* of international protection and, in Article 10 and Article 20(3) of the regulation, the situation of the minor whose family members are *applicants* for international protection. To allow such an analogy between the situation referred to by that legislature in Article 20(3) of that regulation and that referred to by the referring court would therefore undermine the distinction made by that legislature between those two concepts. That would lead, in essence, to the establishment of a criterion of responsibility other than those listed exhaustively in Chapter III of Regulation No 604/2013, different from that expressly laid down in Article 9 thereof.

29. Second, to make such an analogy would be to deny the *ratio legis* of Article 20(3) of Regulation No 604/2013.

30. This is set out in the *travaux préparatoires* of Regulation (EC) No 343/2003, [17] Article 4(2) of which was repeated, in essence, in Article 20(3) of Regulation No 604/2013. It is apparent from the Explanatory Memorandum of the Commission's proposal [18] leading to the adoption of Regulation No 343/2003 that that rule is designed to preserve the unity of the family group, while proceeding with a transfer of the minor and his or her family members to the Member State responsible for examining the applications for international protection they have lodged, irrespective of whether

[15] Emphasis added.

[16] In that regard, I note, as does the Commission, that the fact that the applicant's family members lodged applications for international protection in Germany seems to be irrelevant. Those applications were declared inadmissible pursuant to Article 33(2)(a) of Directive 2013/32.

[17] Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

[18] See, to that effect, the Commission's explanatory memorandum to its proposal for a Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (COM(2001) 447 final).

the minor is formally an applicant under the law of the Member State with which those applications were lodged. That rule must make it possible to avoid Member States applying in different ways the provisions relating to the determination of the Member State responsible, in view of the fact that they govern differently the formalities which a minor must complete in order to be regarded as an applicant when accompanying an adult.

31. Provided that it is in the best interests of the child, the EU legislature therefore wishes to draw a parallel between the situation of that child and the situation of his or her family members, which it considers 'indissociable' when the Member State responsible is determined, since their applications are linked in time and space.

32. A situation such as that at issue is fundamentally different from that referred to by the EU legislature in Article 20(3) of Regulation No 604/2013. Unlike the situation envisaged in that article, the minor formally and personally lodged an application for international protection, so that she must be regarded as the applicant. Moreover, in the absence of applications for international protection lodged by her family members, the competent national authority has no reason to initiate the process for determining the Member State responsible for examining those applications. Owing to the date and place of birth of the child, the application for international protection which she has lodged, and the corresponding process for determining the Member State responsible, are therefore dissociated in time and space from the applications for international protection lodged previously by her family members in another Member State.[19] From that point of view, that child's situation is de facto dissociable from that of her family members.

33. Third, I do not think that an application by analogy of Article 20(3) of Regulation No 604/2013 may be based on the objective of combating 'secondary movements' pursued by EU law. As the Court has pointed out, the provisions laid down by that regulation are designed to prevent *movements of applicants for international protection*. The objective is therefore to prevent applicants, once their application has been lodged in a first Member State, from leaving that State before a ruling is given on that application, and moving to a second Member State with which they lodge another application for international protection.

34. In the situation at issue in the main proceedings, the applicant's family members have not lodged concurrent applications for international protection in several Member States because they already enjoy refugee status in one of those States.[20] That situation is more a question of an infringement of the provisions laid down in Article 33 of Directive 2011/95, which limits the freedom of movement of beneficiaries of international protection to the territory of the granting Member State, since the family members have moved and established their residence in another Member State, in the present case, Germany, without a residence permit being issued to them for that purpose.

[19] In the present case, although the applicant's family members lodged their application for international protection in 2012 in Poland, the child, by contrast, lodged the application at issue in 2016 in Germany.

[20] See, to that effect, 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 and the case-law cited). That is also the objective of Directive 2013/32 as is apparent from recital 13 which states that 'the approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States', and of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96), in accordance with recital 12 thereof.

35. In the light of all those factors, I therefore think that it is impossible to apply, by analogy, Article 20(3) of Regulation No 604/2013 to a situation such as that presented by the referring court, in view of the significant differences between the two situations.

36. Therefore, I propose that the Court rule that Article 20(3) of Regulation No 604/2013 cannot be applied by analogy to the situation in which a child lodges his or her application for international protection in the Member State in whose territory he or she was born and where he or she resides with his or her family members, although the latter enjoy international protection in another Member State.

37. In the light of the reply which I suggest should be given to the first question, there is no need to reply to the second and third questions referred.

2. Application by analogy of the ground for inadmissibility referred to in Article 33(2)(a) of Directive 2013/32 (fourth question referred)

38. By its fourth question referred for a preliminary ruling, the referring court is asking the Court, in essence, whether, on the basis of an application by analogy of Article 33(2)(a) of Directive 2013/32, a Member State may consider an application for international protection lodged by a child to be inadmissible on the ground that such protection has been granted to his or her family members by another Member State.

39. For the reasons which I shall now explain, I also think that the Court cannot make such an application by analogy.

40. First, it is apparent from Article 33(2)(a) of Directive 2013/32 that Member States may consider an application for international protection to be inadmissible if 'another Member State has granted international protection'. The scope of that rule is specified in recital 43 of that directive in the following terms:

'(43) Member States should examine all applications on the substance, i.e. assess whether the *applicant in question* qualifies for international protection in accordance with [Directive 2011/95], … In particular, Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted *the applicant* refugee status …' [21]

41. Those words clearly show that the provisions laid down in Article 33(2)(a) of Directive 2013/32 are designed to apply to the situation in which the applicant for international protection is already the beneficiary of such protection in another Member State. It is in the light of the fact that the applicant and the beneficiary of that international protection are the same person that, in the context of the Common European Asylum System, that article constitutes an expression of the principle of mutual trust. [22] Such a case clearly cannot be equated with a situation, such as that at issue in the main proceedings, in which the applicant and the beneficiary of international protection are different persons.

[21] Emphasis added. See also judgment of 22 February 2022, *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)* (C-483/20, EU:C:2022:103) in which the Court held that 'it is apparent from the wording itself of Article 33(2)(a) of Directive 2013/32 that Member States are not obliged to verify whether the applicant fulfils the conditions to claim international protection under Directive 2011/95 where such protection is already provided in another Member State' (paragraph 24).

[22] See, in that regard, judgment of 22 February 2022, *Commissaire général aux réfugiés et aux apatrides (Family unity – Protection already granted)* (C-483/20, EU:C:2022:103, paragraphs 29 and 37 and the case-law cited).

42. Second, Article 33(2) of Directive 2013/32 lists the grounds of inadmissibility of an application for international protection. The Court has repeatedly held that that list must be considered exhaustive in regard both to the wording of that article and the use of the word 'only' preceding the list of those grounds and to its purpose, which consists specifically 'in relaxing the obligation of the Member State responsible for examining an application for international protection by defining the cases in which such an application is considered to be inadmissible'.[23] In those circumstances, Article 33(2) of Directive 2013/32 cannot be applied by analogy to a situation which is not comparable, since that would be tantamount to adding a ground of inadmissibility other than those expressly listed by the EU legislature in that article, which would be contrary to the intention it has clearly expressed.

43. Moreover, it would result in depriving a child, such as the applicant, of effective access to the procedures for granting international protection, which would clearly be contrary to his or her fundamental rights, and in particular to Article 18 and Article 24(2) of the Charter,[24] on which Directive 2013/32 is based. The right to asylum is an individual right. By declaring the application for international protection lodged by that child inadmissible on the ground that his or her family members have been granted international protection in another Member State, the competent national authorities face the prospect that the application lodged by that child may never be examined. A decision of inadmissibility has serious implications the extent of which should be strictly limited. I would draw attention to the fact that, in *Bundesrepublik Deutschland* (C-504/21), still pending before the Court, the German authorities refused the request to take charge of the family members of a beneficiary of international protection, made by the Greek authorities in accordance with Article 9 and Article 17(2) of Regulation No 604/2013, on the ground that their applications for international protection had been declared inadmissible on the basis of Article 33(2) of Directive 2013/32.

44. Third, I cannot agree with the idea, expressed by one of the parties at the hearing, that if her application is deemed inadmissible and she is transferred to the host State, the child may nevertheless enjoy the economic and social rights benefits referred to in Articles 23 to 35 of Directive 2011/95, as a family member of beneficiaries of international protection.

45. On the one hand, enjoyment of those rights and benefits is not the same as recognition of refugee status or of the status conferred by subsidiary protection, which is the right of any person who individually satisfies the conditions for granting it laid down in Chapters II and III of Directive 2011/95, inter alia because he or she is or risks being exposed to threats of persecution or serious harm in his or her country of origin. Moreover, that is why, in Article 23(2) of that directive, the EU legislature expressly reserves the grant of those rights and benefits only to the family members who, individually, do not satisfy the necessary conditions for obtaining international protection.[25] It is reasonable to think that in the case in the main proceedings the

[23] See, to that effect, judgments of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218, paragraphs 29 and 30 and the case-law cited), and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 149 and 182 and the case-law cited).

[24] Article 24(2) of the Charter provides that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

[25] See, to that effect, judgment of 9 November 2021, *Bundesrepublik Deutschland (Retention of family unity)* (C-91/20, EU:C:2021:898, paragraph 51).

child may qualify for that protection, as an extension of that granted to the members of her family.[26] There is therefore no reason why that child, if she were transferred to the host State, should only have the benefits referred to in Articles 24 to 35 of that directive.

46. On the other hand, as the Court held in the judgment of 9 November 2021, *Bundesrepublik Deutschland (Retention of family unity)*,[27] 'it follows from a combined reading of Article 2(j) of Directive 2011/95, which defines the concept of "family members" for the purposes of that directive, and from Article 23(2) thereof that the obligation on the Member States to provide for access to those advantages does not extend to the children of a beneficiary of international protection who were born in the host Member State to a family based in that Member State'.[28] In a situation such as the one at issue, in which the child is not covered by the concept of 'family members', within the meaning of Article 2(j) of that directive, the host State is under no obligation to grant him or her the rights and benefits referred to in Articles 24 to 35 of that directive.

47. In view of those factors, I therefore take the view that a Member State cannot, on the basis of an application by analogy of Article 33(2)(a) of Directive 2013/32, consider the application for international protection lodged by a child to be inadmissible on the ground that international protection has been granted to his or her family members by another Member State.

C. Examination of other possible procedures

48. In order to provide a useful answer to the referring court, I propose that the Court examine other procedures: first, that suggested by the Commission in its observations, namely the application by analogy of Article 9 of Regulation No 604/2013, then, second, that which seems to me the simplest and most respectful of the interests of the child, based on an application of the general principles on which that regulation is based, namely, Article 3(2) and Article 6(1) of the regulation.

1. An application by analogy of the criterion of responsibility set out in Article 9 of Regulation No 604/2013

49. Article 9 of Regulation No 604/2013 establishes a criterion for determining the Member State responsible for examining an application for international protection, as may be seen in Chapter III, of which it forms part. That criterion is entitled 'Family members who are beneficiaries of international protection'. It is based on family considerations which also form the basis for the criteria set out in Article 8 ('Minors'), in Article 10 ('Family members who are applicants for international protection'), in Article 11 ('Family procedure') and in paragraph 2 of Article 17 ('Discretionary clauses') of that regulation.

[26] This may concern recognition as the principal issue or as a secondary issue, in accordance with the principles established by the Court in the judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 72) and confirmed by the Court in the judgment of 9 November 2021, *Bundesrepublik Deutschland (Retention of family unity)* (C-91/20, EU:C:2021:898, paragraph 41).

[27] C-91/20, EU:C:2021:898.

[28] Paragraph 37 of that judgment.

50. Article 9 of the regulation provides that where a Member State has allowed a family member of the applicant to reside as a beneficiary of international protection, that Member State is responsible for examining the application for international protection of the other family members, provided that the persons concerned have expressed their desire in writing. [29]

51. An examination of the *travaux préparatoires* of Regulation No 343/2003 indicates that that criterion pursues several objectives. It is designed, first, to ensure family reunification by bringing together the applicant and his or her family members in the Member State in which the latter have been authorised to reside as beneficiaries of international protection. Second, it aims to ensure that the procedure for examining the application is conducted rapidly, on the understanding that the Member State in which at least one family member has already obtained refugee status and is permitted to reside is the best placed to assess the validity of the applicant's fears of persecution in his or her country of origin.

52. The application of the criterion set out in Article 9 of Regulation No 604/2013 requires several conditions to be met. First, that Member State is responsible for examining the application for protection only if at least one of the applicant's family members *has been allowed to reside* in the territory of the State considered responsible for examining the application for protection as a beneficiary of international protection. Second, that Member State is responsible for examining the application for protection only provided that the applicant and his or her family members allowed to reside in the territory of the same Member State express their *consent* in writing with regard to them being brought together.

53. In accordance with Article 1(1)(a) of Regulation (EC) No 1560/2003, [30] the take charge request made to the requested State on the basis of the criterion of responsibility set out in Article 9 of Regulation No 604/2013 must therefore not only include written confirmation of the 'legal residence' of the family members in the territory of that State, the residence permits issued to them and extracts from registers, but also contain evidence that the persons are related, if available, and evidence of the consent of the persons concerned.

54. Those two conditions preclude, in my view, an application by analogy of Article 9 of Regulation No 604/2013 to a situation such as that at issue in the main proceedings.

55. As regards the condition that the family member must be 'allowed to reside as a beneficiary of international protection' in the territory of the requested State, I note that it is different from the condition laid down in Article 8(1) and (2) of that regulation, under which that family member must be 'legally present' on that territory. [31] However, it seems to me that, in the light of the aim pursued by the EU legislature, namely family reunification, that condition means that that family member of the applicant not only receives in that territory the residence permit issued to him or her owing to his or her status as a beneficiary of international protection, [32] but also actually resides in the same territory. It cannot be arranged for an applicant and a family member to be brought together, in particular when that applicant is a child, if the family member does not actually reside in the territory of the requested State or if he or she is not authorised to stay there owing to the danger he or she represents for national security or public order, or to the withdrawal or

[29] The EU legislature states that that provision applies regardless of whether the family was previously formed in the country of origin, therefore differing from the definition of 'family members' set out in Article 2(g) of the regulation.

[30] Commission Regulation of 2 September 2003 laying down detailed rules for the application of Regulation No 343/2003 (OJ 2003 L 222, p. 3), as last amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ 2014 L 39, p. 1). That regulation was adopted pursuant to Article 17(3) of Regulation No 343/2003, now Article 21(3) of Regulation No 604/2013.

[31] That difference in wording is common to all the language versions.

[32] See Article 24 of Directive 2011/95.

expiry of his or her residence permit.[33] In such situations, that family reunification would be prevented and the procedure for taking charge of and transferring that applicant would be likely to lead to the start of a new procedure for determining the Member State responsible for examining the application.

56. I would also point out that, in a situation such as that at issue in the main proceedings, in which the family members no longer reside in the territory of the host State and are resisting a return to that State, fulfilment of that condition implies that the requesting State takes steps prior to submitting its take charge request and, in particular, that it checks the validity of the residence permit of those family members in the host State[34] and that it removes them to that State. Those steps are liable to bring delays which seem to me much longer than the time limits laid down in Article 21(1) of Regulation No 604/2013 for submitting a take charge request.

57. In accordance with that provision, the Member State with which the application has been lodged must submit its request that another Member State take charge of the applicant 'as quickly as possible and in any event within three months of the date on which the application was lodged'.[35] In a situation in which the family members resist returning to the territory of the host State, submission of that take charge request and the communication of the corresponding evidence would make it necessary to implement beforehand a return procedure in accordance with Directive 2008/115, maybe even a coercive return, against that family. It seems to me that that procedure – which must respect the rights of the persons concerned – is difficult to carry out within the time limits set by Regulation No 604/2013, however promptly the competent national authorities act. Given the time limits linked to the bringing of a legal action against a return decision and the risks involved in implementing such a decision, the requesting State, with which the child has lodged his or her application for international protection, would have to wait for the final outcome of that action (possibly) brought against the removal decisions ordered against his or her family members, before making a request for the requested State to take charge of the child. That would lead not only to a situation of legal uncertainty, but also an inevitable latency period during which the fate of the application of international protection brought by that child would be unclear.

58. Such a solution would disregard the best interests of the child, in the light of which all the procedures laid down by Regulation No 604/2013 must be interpreted and applied.[36] Recital 13 that regulation expressly states that 'in accordance with the 1989 United Nations Convention on the Rights of the Child and with the [Charter], the best interests of the child should be a primary consideration of Member States when applying this Regulation'.

59. Moreover, such a solution would not make it possible to determine rapidly the Member State responsible and would risk not guaranteeing either effective access to the procedures for granting international protection or the rapid processing of applications for that international protection, contrary to the objectives specified by Regulation No 604/2013 in recital 5 thereof.

[33] See Article 21(3) and Article 24(1) of Directive 2011/95.

[34] In accordance with Article 24 of Directive 2011/95, a residence permit issued to beneficiaries of refugee status is valid for a period of three years and renewable, and that granted to beneficiaries of subsidiary protection is valid for a period of at least one year and renewable for a period of at least two years. In the case in the main proceedings, the residence permits of the applicant's family members expired on 4 May 2015, according to the information communicated by Poland.

[35] Failing that, under Article 21(1), third subparagraph, of Regulation No 604/2013, responsibility for examining the application for international protection lies with the Member State in which the application was lodged.

[36] See Article 6(1) of that regulation.

60. As regards, now, the condition relating to the written consent of the persons concerned, that refers to a clear positive act on the part of the applicant and his or her family members by which they express their wish to be reunited. The aim of that condition is to avoid situations in which those persons do not wish to be reunited for reasons of their own. That condition is also contained in Article 10 to Article 16(1) and Article 17(2) of Regulation No 604/2013. It is evident that that condition was not intended to apply to a situation such as that presented by the referring court, in which the applicant and her family members are united and live together under the same roof, in the same Member State. Once again, that condition would only make sense if the family members were sent to the granting State. However, in such circumstances, that condition would be used for a purpose other than that laid down by the EU legislature because it would not be aimed at ensuring the family reunification of the family members, dispersed in EU territory, but rather at preserving family unity.

61. Although, during the proceedings, some parties have proposed that the Court rule out application of that condition, such a solution does not seem to me to be desirable because the requirement of written consent is a condition expressly laid down by the EU legislature in Article 9 of Regulation No 604/2013.

62. I think, in fact, that the significant number of disputes concerning the application of that regulation to situations in which the interests of the child are at issue requires great care to be taken in interpreting its provisions. Regulation No 604/2013 is an instrument of a mainly procedural nature made available to the Member States in order that they may determine, on the basis of an exhaustive list of criteria and in compliance with the fundamental rights of the parties concerned, which of them is responsible for examining an application for international protection.

63. Like the other criteria listed in Chapter III of Regulation No 604/2013, the criterion laid down in Article 9 of that regulation does not seem to me to be applicable to a situation such as that at issue in which the applicant's family members, who are beneficiaries of international protection, no longer reside in the territory of the granting State and are resisting a return to that State.

64. I am therefore going to propose that the Court take another approach, based on the general principles on which Regulation No 604/2013 is based and, in particular, on the best interests of the child.

2. The implementation of the guarantees for minors set out in Article 6(1) of Regulation No 604/2013

65. At the outset, it should be pointed out that, in accordance with Article 3(2) of Regulation No 604/2013, 'where no Member State responsible can be designated on the basis of the criteria listed [in Chapter III of] this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it'. In a situation such as that at issue, none of the criteria set out in Chapter III of that regulation is applicable, so that it is indeed the first Member State with which the child lodged her application that is responsible for examining it. In accordance with recital 5 of that regulation, that makes it possible to guarantee that child effective access to the procedures for granting international protection, by not compromising the objective of the rapid processing of her application.

66. The application of that principle makes it possible here to grant the best interests of the child the primary consideration required by Article 24(2) of the Charter,[37] since that Member State is also the State in the territory of which the child was born and where she resides, together with her family members.

67. In accordance with Article 6(1) of Regulation No 604/2013, 'the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation'. In that context, the EU legislature requires, under Article 6(3) of that regulation, that Member States, in assessing the best interests of the child, cooperate with each other and 'in particular' take due account of family reunification possibilities, the minor's well-being and social development, safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking, and, lastly, of the views of the minor, in accordance with his or her age and maturity, including his or her background.[38]

68. The best interests of the child therefore require determination of the Member State which is best placed to rule on his or her application for international protection, taking account of all the circumstances of fact specific to each individual case.[39] The physical presence of that child in the territory of the Member State in which he or she was born and has lodged his or her application, the duration, regularity, conditions and reasons for his or her stay together with his or her family in the territory of that State are factors which the competent national authorities must take into account in order to assess the child's interests.

69. In that context, I think it is necessary to take into consideration the reasons why the family members left the host State. Admittedly, the situation of which the Court is seised is different from the situations it examined in the judgment of 19 March 2019, *Ibrahim and Others*,[40] in which there was a serious risk that the applicant for international protection would be treated, in the host State, in a manner incompatible with his fundamental rights owing to deficiencies which were either systemic or generalised, or which affected certain groups of people. However, it would be to ignore the guarantees which the EU legislature grants to minors and the provisions which it devotes expressly to the assessment of the child's best interests, not to take into account the reasons why the family members left the host State. By requiring, in Article 6(3) of Regulation No 604/2013, that Member States 'closely cooperate' and take due account of the child's well-being and social development, that EU legislature is requiring the competent national authorities to weigh up all the facts relating to the child's living conditions in the Member States concerned.

70. In that regard, I do not think that it is possible to infer from the choice made by the parents to leave the host State that they simply wished to circumvent or abuse the rules of the Common European Asylum System. To take the decision to leave that State, in which all the members of the family, including small children, enjoy international protection, after having been forced to leave the country of origin, and thus to take the risk of forgoing the security and benefits conferred by that status on the whole family, reflects either recklessness or necessity and a well thought out

37 That article provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. See also judgment of 9 November 2021, *Bundesrepublik Deutschland (Retention of family unity)* (C-91/20, EU:C:2021:898, paragraph 55 and the case-law cited).

38 See also recital 13 of Regulation No 604/2013.

39 See, in that context, judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 42 et seq. and the case-law cited), relating to the implementation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

40 C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219.

choice made by parents taking into account the best interests of their children. Thus, in the case in the main proceedings, the applicant's family members appear to have left Poland for Germany owing to intimidation they suffered in the host State by reason of their background. In *Ministre de l'immigration et de l'asile* (C-153/21), currently stayed, the parents also made the choice to leave Greece due, inter alia, to the living, reception and take charge conditions of their children which they considered deplorable. I therefore do not think that those movements can be reduced to or summed up as parents' 'tourism', to repeat words used in some procedural documents.

71. In circumstances such as those at issue, where the child has lodged her application for international protection in the Member State in the territory of which she was born and where, together with her family members, she has her habitual residence at the date on which she lodged that application – which it is for the competent national authorities to verify – I think that the interests of the child require the examination of her application to be the responsibility of that State. Any solution which consists in removing that child and her family members from the social environment in which they are integrated, on the ground that the latter enjoy international protection in another Member State, would be entirely contrary to the child's interests.

72. That criterion seems to me to be the simplest and the most respectful of the child's interests, since it ensures the effectiveness of her rights under Article 18 of the Charter, by guaranteeing her effective access to the procedure for examining her application and its rapid processing.

73. However, I am aware that that criterion should also involve the transfer of responsibility for the international protection granted to the child's family members, in order to guarantee the effectiveness of the right to asylum which they enjoy under that same article.

74. The effectiveness of that right implies guaranteeing not only the child's access to a procedure for examining her application for international protection, but also the enjoyment of her family members of the rights which their refugee status confers on them provided it is not withdrawn or terminated. As it stands, the granting State is unable to fulfil its obligations owing to the departure of the family members, since they left the territory of that State without a permit being issued for that purpose. Similarly, the Federal Republic of Germany is legally unable to substitute its own protection for that of the country of origin, since the family members are, moreover, unlawfully in its territory.

75. In addition, for the same reasons as those stated in points 44 to 46 of this Opinion, the family members are not eligible for the economic and social rights and benefits referred to in Articles 23 to 35 of Directive 2011/95, since they individually fulfil the criteria for granting international protection, which is evidenced by the refugee status which they already enjoy.

76. In those circumstances, it is appropriate to transfer responsibility for the international protection granted to the child's family members, in accordance with the European Agreement on Transfer of Responsibility for Refugees. In the present case, although the Polish authorities seem to have agreed to the transfer, pursuant to Article 4(1) of that agreement, it appears that nothing further has been done in that regard by the German authorities.[41] However, I note that, under Article 2 of that agreement, responsibility for refugees is to be considered to be transferred

[41] The Federal Republic of Germany and the Republic of Poland have ratified that agreement.

on the expiry of a period of two years of actual and continuous stay in the second State, with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the travel document.

77. In the light of all those considerations, I therefore propose that the Court rule that, in the situation in which a Member State is seised of an application for international protection of a child whose family members enjoy refugee status in another Member State, Article 3(2) and Article 6(1) of Regulation No 604/2013 are to be interpreted as meaning that the best interests of the child require the Member State seised of the application to be responsible for examining it where that child was born and, together with his or her family members, has his or her habitual residence in the territory of that State, at the date on which his or her application is lodged.

V. Conclusions

78. In the light of all the foregoing considerations, I propose that the Court of Justice answer the questions referred to it for a preliminary ruling by the Verwaltungsgericht Cottbus (Administrative Court, Cottbus, Germany) as follows:

(1) Article 20(3) of Regulation (EU) No 604/2013 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 is to be interpreted as meaning that it cannot be applied by analogy to the situation in which a child lodges his or her application for international protection in the Member State in whose territory he or she was born and where he or she resides with his or her family members, although the latter enjoy international protection in another Member State.

(2) A Member State cannot, on the basis of an application by analogy of 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, consider the application for international protection lodged by a child to be inadmissible on the ground that international protection has been granted to his or her family members by another Member State.

(3) In the situation in which a Member State is seised of an application for international protection of a child whose family members enjoy refugee status in another Member State, Article 3(2) and Article 6(1) of Regulation No 604/2013 are to be interpreted as meaning that the best interests of the child require the Member State seised of the application to be responsible for examining it where that child was born and, together with his or her family members, has his or her habitual residence in the territory of that State, at the date on which his or her application is lodged.