Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 13 July 2023 [1]

Case C-646/21

K,
L
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling from the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands))

(Reference for a preliminary ruling – Common policy on asylum and subsidiary protection – Subsequent applications for international protection – Directive 2011/95/EU – Article 10(1)(d) – Reasons for persecution – Membership of a particular social group – Third-country nationals who have spent a considerable part of the phase of their life when individuals form their identity in a Member State – European values, norms and conduct – Gender equality – Women and girls transgressing rules of social conduct in country of origin – Best interests of the child)

I. Introduction

1. The present Opinion concerns the applications for international protection of K and L, two teenage girls from Iraq [2] who lived in the Netherlands for five years whilst their family's initial applications for international protection were being examined. During that time, they were part of a society that values gender equality and they adopted the values, norms and conduct of their peers. In their subsequent applications for international protection, [3] which the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) has rejected as manifestly unfounded, [4] the appellants claim that, if they return to Iraq, they will be unable to conform to values, norms and conduct that do not afford women and girls the freedoms that they enjoyed in the Netherlands, the expression of which would expose them to the risk of persecution. The questions referred for a preliminary ruling ask whether persons in the appellants' circumstances may be entitled to international protection because they are members

[1] Original language: English.

[2] In the present Opinion, I refer to them as 'the appellants'.

[3] Applications of 4 April 2019. Article 2(q) 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 (OJ 2013 L 180, p. 60) defines a subsequent application as a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1) of that directive.

[4] Decisions of 21 December 2020, appealed on 28 December 2020 and heard by the referring court on 17 June 2021.

of a particular social group within the meaning of Article 10(1)(d) of Directive 2011/95/EU,[5] and how a child's best interests may be taken into account in the assessment of applications for international protection.

II. Legal framework

A. European Union law

2. Article 10 of Directive 2011/95, entitled 'Reasons for persecution', provides:

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

– members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

(e) the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

[5] 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).

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.'

B. Netherlands policy circulars

3. According to the annex to the order for reference, by paragraph C7.2.8[6] of the Vreemdelingencirculaire 2000 (C) (Circular on Foreign Nationals of 2000 (C); 'the Circular on Foreign Nationals of 2000 (C)'):

'The principal rule is that merely a Western lifestyle developed in the Netherlands cannot lead to refugee status or subsidiary protection. An adaptation to the customs of Afghanistan is required. Two exceptions are possible:

– If a woman makes a plausible case that the Western conduct is a manifestation of religious or political conviction.

– If a woman makes a plausible case that she has personal characteristics, which are very difficult or virtually impossible to change, and that, due to those characteristics, she fears persecution or risks inhuman treatment in Afghanistan.'

4. Paragraph B8.10 of Vreemdelingencirculaire 2000 (B) (Circular on Foreign Nationals of 2000 (B)), entitled 'Westernised school-going girls', provides:

'The IND [(Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service, Netherlands; "the IND"))] grants a residence permit for a fixed period of time … to westernised girls, if the girl has made a plausible case that on return to Afghanistan she will be subject to disproportionate psychosocial pressure.

The IND assesses whether or not there is disproportionate psychosocial pressure based on circumstances that must include the following:

a. the degree of westernisation of the girl;

b. individual humanitarian circumstances, which must include the medical circumstances (of the girl or a family member) and the death in the Netherlands of a family member of the girl; and

c. the possibility of participation in Afghan society, which includes an assessment of family composition and the presence of powerful actors (tribal leaders, war lords) to protect the girl.

Regarding point a, the IND assesses the degree of westernisation on the basis of the following circumstances:

– the girl is at least 10 years old;

[6] While that paragraph is part of the section entitled 'Country-specific guidance' relating to Afghanistan, the present reference concerns applicants from Iraq.

– she has stayed in the Netherlands for at least 8 years, from the date of the first application for asylum for a fixed period until the date of application for an ordinary residence permit for a fixed period as described in the present paragraph; and

– she has attended school in the Netherlands.

If the girl does not satisfy one or more of those circumstances, then she faces a higher burden of proof in order to make a plausible case that she should be granted an ordinary residence permit for a fixed period of time under this policy. …'

III. The facts of the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

5. On 29 September 2015, the appellants, together with their father, mother and aunt, left Iraq. On 7 November 2015, they lodged applications for international protection with the Netherlands authorities. At that time, the appellants were 10 and 12 years of age. On 31 July 2018, the Raad van State (Council of State, Netherlands) definitively dismissed their applications. On 4 April 2019, the appellants lodged subsequent applications for international protection, which were rejected as manifestly unfounded on 21 December 2020. On 28 December 2020, the appellants appealed those decisions to the referring court, which heard those appeals on 17 June 2021. By the date of that hearing, the appellants were 15 and 17 years old and had been continuously resident in the Netherlands for five years and seven and a half months.

6. The appellants argue that, due to their long stay in the Netherlands in the phase of their lives when individuals form their identity, they have adopted the values, norms and conduct of their Dutch peers. In the Netherlands, they have become aware of the freedom that they have, as girls, to make their own life choices. They indicate that they wish to continue to determine for themselves, just as they have done in the Netherlands, whether to associate with boys, to participate in sport, to study, to marry and, if so, to whom, and to work outside the home. They also want to decide on political and religious views for themselves and to be able to express those views in public. As they would be incapable of renouncing those values, norms and conduct upon their return to Iraq, they seek international protection.

7. The referring court considers that the values, norms and conduct to which the appellants refer consist essentially in a belief in gender equality.[7] That court must decide whether the appellants may be considered members of a particular social group within the meaning of Article 10(1)(d) of Directive 2011/95, whether, when and how a decision-maker should take into account the child's best interests in an application for international protection, and whether account should be taken of the harm that the appellants claim they have suffered due to the stress of living with prolonged uncertainty as to their residence in the Netherlands as well as the threat of a forced return to their country of origin.

[7] Order for reference, paragraph 23.

8. The referring court therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 10(1)(d) of [Directive 2011/95] be interpreted as meaning that Western norms, values and actual conduct which third-country nationals adopt while staying in the territory of the Member State and participating fully in society for a significant part of the phase of their lives in which they form their identity are to be regarded as a common background that cannot be changed or characteristics that are so fundamental to identity that a person should not be forced to renounce them?

(2) If the answer to the first question is in the affirmative, are third-country nationals who, irrespective of the reasons, have adopted comparable Western norms and values through actual residence in the Member State during the phase of their lives in which they form their identity to be regarded as "[members of] a particular social group" within the meaning of Article 10(1)(d) of [Directive 2011/95]? Is the question of whether there is a "particular social group … that … has a distinct identity in the relevant country" to be assessed from the perspective of the Member State or must this, read in conjunction with Article 10(2) of [Directive 2011/95], be interpreted as meaning that decisive weight is given to the ability of the foreign national to demonstrate that he or she is regarded in the country of origin as belonging to a particular social group or, at any rate, that this is attributed to him or her? Is the requirement that westernisation can lead to refugee status only if it stems from religious or political motives compatible with Article 10 of [Directive 2011/95], read in conjunction with the prohibition on refoulement and the right to asylum?

(3) Is a national legal practice whereby a decision-maker, when assessing an application for international protection, weighs up the best interests of the child without first concretely determining (in each procedure) the best interests of the child compatible with EU law and, in particular, with Article 24(2) of the Charter of Fundamental Rights of the European Union ("the Charter"), read in conjunction with Article 51(1) of the Charter? Is the answer to this question different if the Member State has to assess a request for the grant of residence on ordinary grounds and the best interests of the child must be taken into account in deciding on that request?

(4) Having regard to Article 24(2) of the Charter, in which manner and at what stage of the assessment of an application for international protection must the best interests of the child, and, more specifically, the harm suffered by a minor as a result of his or her long residence in a Member State, be taken into account and weighed up? Is it relevant in that regard whether that actual residence was lawful? Is it relevant, when weighing up the best interests of the child in the above assessment, whether the Member State took a decision on the application for international protection within the time limits laid down in EU law, whether a previously imposed obligation to return was not complied with and whether the Member State did not effect removal after a return decision had been issued, as a result of which the minor's actual residence in the Member State was able to continue?

(5) Is a national legal practice whereby a distinction is made between initial and subsequent applications for international protection, in the sense that ordinary grounds are disregarded in the case of subsequent applications for international protection, compatible with EU law, having regard to Article 7 of the Charter, read in conjunction with Article 24(2) thereof?'

9. The appellants, the Czech, Greek, French, Hungarian and Netherlands Governments and the European Commission filed written observations. Those parties and the Spanish Government responded to written and oral questions from the Court at the hearing on 18 April 2023.

IV. Analysis

A. The first and second questions

10. I will consider the first and second questions together since they both seek the interpretation of Article 10(1)(d) of Directive 2011/95.

11. The referring court essentially asks if third-country nationals who have lived in a Member State for a significant part of the phase of their lives in which they form their identity may be considered members of a particular social group within the meaning of the first indent of Article 10(1)(d) because they have 'a common background that cannot be changed' or characteristics that are 'so fundamental to identity … that a person should not be forced to renounce' them. Does that provision require that adherence to certain values can justify the grant of international protection only where it has a religious or political foundation? How should the referring court assess whether the condition in the second indent of Article 10(1)(d) – whether the group has a distinct identity in the relevant country because the surrounding society perceives it as being different – is satisfied?

1. Summary of the observations received

12. The Netherlands Government points out that, according to the IND's guidelines, which are based on a judgment of the Raad van State (Council of State),[8] women with a Western lifestyle are not members of a particular social group. They may nevertheless obtain international protection if: (i) that lifestyle is based on religious or political beliefs which are fundamental to their identity or moral integrity; or (ii) it is plausible that they will be persecuted by actors in their country of origin due to characteristics that are virtually impossible to change; or (iii) they will be at risk of inhuman treatment within the meaning of Article 15(b) of Directive 2011/95 in their country of origin. The concept of political beliefs being fundamental to identity or moral integrity, mentioned under the first condition above, is interpreted broadly to include the persecution of women who do not conform to social customs, religious rules or cultural norms that discriminate on the basis of gender.[9]

13. The Czech, Greek, Hungarian and Netherlands Governments share the view that the appellants' arguments are based on a preference for a certain lifestyle. That cannot lead to the grant of international protection under national rules transposing Directive 2011/95. Having adapted to life in a Member State during a long stay on its territory, upon their return to their country of origin the appellants could be expected to re-adapt to life by conforming to the norms and customs of their country of origin in the same way as other residents. The desire for a certain lifestyle is not a belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. The appellants share no identifiable innate characteristic or common background because the putative category of women and girls who have acquired a Western

[8] Werkinstructie 2019/1 Het beoordelen van asielaanvragen van verwesterde vrouwen (Work instruction 2019/1 The assessment of asylum applications of westernised women).

[9] Paragraph C2.3.2. of the Circular on Foreign Nationals of 2000 (C).

lifestyle is too broad, heterogeneous and abstract to constitute a clearly delineated social group for the purpose of Article 10(1)(d) of Directive 2011/95. Nor have the appellants made any attempt to substantiate why or how they would face persecution upon return to their country of origin.

14. The Spanish and French Governments and the Commission disagree. They consider that girls may be members of a particular social group based, inter alia, on gender and age, which constitute innate characteristics.

15. In its oral submissions, the Spanish Government submitted that the order for reference indicates that the appellants have not merely acquired aspirations to better themselves financially or culturally; they are more accurately described as women or girls who have adopted a way of life that recognises and allows them to enjoy their fundamental rights. They therefore satisfy the first condition of Article 10(1)(d) of Directive 2011/95. Whether the second condition of that provision – whereby the group has a distinct identity in the relevant country – is also met depends on the circumstances that pertain in their country of origin.

16. The French Government submits that the fact that someone has spent a long time in a Member State means that they have a shared common background that cannot be changed, or a shared belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. By continuing to adhere to the values, norms and conduct prevailing in that Member State, the surrounding society in their country of origin will perceive individuals sharing those characteristics as members of a distinct group. By way of example, resistance to forced marriage may expose the appellants to persecution from which the authorities will not protect them.

17. The Commission submits that the conviction that men and women have equal rights may be regarded as a shared and fundamental belief. The existence of laws in the country of origin that discriminate against girls and women and seek to punish them disproportionately when they transgress certain norms and customs indicates that such persons are at risk of being considered a distinct group in that country.

2. Preliminary observation

18. The referring court points out that the present case does not concern 'westernised women' as such.[10] The order for reference, however, includes references to 'Western lifestyle' and 'westernised conduct', which may reflect the use of those terms in the Circular on Foreign Nationals of 2000 (C). The parties that filed observations were predominantly of the view that the concepts 'westernised' and 'Western' were too vague to be applied in the context of applications for international protection. I agree with those observations. 'The East' and 'the West' are vast, diverse regions with a multitude of religious traditions, moral codes and values. In the absence of precise definitions, which were not canvassed before the Court, terms such as 'Western lifestyle' and 'westernised women' are largely meaningless. More perniciously, the application of the terms 'Eastern' and 'Western' in the context of moral codes and values perpetrates a false dichotomy that constitutes part of a divisive dialogue. The present Opinion therefore avoids the use of those terms.

[10] Order for reference, paragraph 25.

3. Assessment

(a) Overview of legal framework and introduction

19. The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 [11] ('the Geneva Convention'), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967. [12] The Geneva Convention is the cornerstone of the international legal regime for the protection of refugees. [13] Whilst all the Member States are contracting parties to the Geneva Convention, the European Union is not.

20. Directive 2011/95 guides the competent authorities of the Member States by reference to common concepts, which must be interpreted in a manner consistent with the Geneva Convention. The preamble to that convention observes that the United Nations High Commissioner for Refugees ('the UNHCR') is responsible for supervising the application of international conventions guaranteeing the protection of refugees. Given the role the Geneva Convention confers on the UNHCR, the Court has held that UNHCR documents are particularly relevant to the interpretation of Directive 2011/95. [14] That directive is also to be interpreted in a manner consistent with the Charter. [15]

21. The international protection to which Directive 2011/95 refers 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 (refugee), or faces a real risk of suffering serious harm (person eligible for subsidiary protection) if returned to his or her country of origin. [16]

22. Article 10 of Directive 2011/95 sets out the reasons for persecution. [17] All of the elements listed in Article 10(1) of Directive 2011/95 are relevant to the assessment as to whether reasons for persecution exist; those categories are not mutually exclusive. [18] The use of the words 'in

[11] *United Nations Treaty Series*, vol. 189, 1954, p. 150, No 2545.

[12] That protocol removed the Geneva Convention's temporal and geographical restrictions so that it would apply universally, rather than covering only persons who had become refugees as a result of events that had occurred before 1 January 1951.

[13] See Article 78 TFEU relating to the development of a common policy on asylum, subsidiary protection and temporary protection in accordance with the Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugees. See also, inter alia, recitals 3, 4, 14 and 22 to 24 of Directive 2011/95.

[14] Judgment of 9 November 2021, *Bundesrepublik Deutschland (Maintaining family unity)* (C-91/20, EU:C:2021:898, paragraph 56 and the case-law cited).

[15] Recital 16 of Directive 2011/95 and judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraphs 47 and 48 and the case-law cited).

[16] See Articles 13 and 18 of Directive 2011/95, read in conjunction with the definitions of 'refugee' and 'person eligible for subsidiary protection' in Article 2(d) and (f) thereof respectively. Article 5 of that directive provides, inter alia, that that includes situations in which a well-founded fear of being persecuted, or a real risk of suffering serious harm, is based on events that occurred since the applicant left his or her country of origin. The order for reference does not seek an interpretation of that provision.

[17] See point 2 of the present Opinion.

[18] Although the second paragraph of Article 10(1)(d) refers to the fact that 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group', that does not prevent gender-related aspects from being considered within the context of the other reasons for persecution in Article 10 of Directive 2011/95.

particular' in the subsections of that provision indicates that the considerations set out therein are not exhaustive. Finally, it is settled case-law that every decision to grant or to refuse refugee or subsidiary protection status must be based upon an individual assessment. [19]

23. The UNHCR has observed that the term 'membership of a particular social group' in Article 1A(2) of the Geneva Convention is to be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and the development of international human rights norms. States have recognised women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purposes of that convention. Depending on the particular circumstances in a society, a woman may be able to establish a claim based on political opinion (if the State views her conduct as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction the State opposes) or membership of a particular social group. [20]

24. Two cumulative conditions must be satisfied for a 'particular social group' to exist for the purpose of Article 10(1)(d) of Directive 2011/95. First, members of that group must share an 'innate characteristic', or a 'common background that cannot be changed', or a characteristic or belief that is 'so fundamental to identity or conscience that a person should not be forced to renounce it'. Those elements relate to what may be described as the internal aspects of a group. Second, that group must have a distinct identity in the relevant country because the surrounding society perceives it as different. [21] That involves an element of social perception, or what might be described as the external aspects of a group. For present purposes, the 'relevant country' is the country of origin, here Iraq, and the 'surrounding society' is the society in that country of origin.

(b) Internal aspects of a group

25. It is clear from the text of the second paragraph of Article 10(1)(d) of Directive 2011/95 that gender [22] and gender-related aspects may be relevant to establishing the existence of a particular social group. In certain situations gender may be a sufficient criterion to define such a group. [23] According to the UNHCR, women are a clear example of a social subset, defined by innate characteristics, who are frequently treated differently than men. In some societies, women in general may constitute a particular social group because they face systemic discrimination in the enjoyment of their fundamental rights as compared to men. [24]

[19] Article 4 of Directive 2011/95. See also judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 48 and the case-law cited) and UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, paragraph 7.

[20] See UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, paragraphs 3 and 4.

[21] It is for the referring court to determine whether those cumulative conditions are satisfied by reference to a given factual situation. See judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 89 and the case-law cited).

[22] Directive 2011/95 does not define gender, a term which has been defined elsewhere as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' (see Article 3(c) of the Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention'), which entered into force on 1 August 2014 (*Council of Europe Treaty Series* – No 210)). On 9 May 2023, the European Parliament approved the European Union's accession to that convention (see also Opinion 1/19 (*Istanbul Convention*) of 6 October 2021, EU:C:2021:832).

[23] Opinion of Advocate General Richard de la Tour in *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)* (C-621/21, EU:C:2023:314, point 73).

[24] See UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, paragraphs 30 and 31; European Asylum Support Office ('EASO'), *EASO Guidance on membership of a particular social group*, 2020, p. 21; and Opinion of Advocate General Richard de la Tour in *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)* (C-621/21, EU:C:2023:314, point 71).

26. In the present case, the appellants do not argue that they are entitled to international protection solely because of their gender. They say that they cannot renounce the values, norms and conduct, founded on their belief in gender equality, that they adopted in the Netherlands. The question therefore arises whether such a belief may constitute either a shared characteristic or a shared belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. I first consider the meaning of the words 'characteristic' and 'belief' before examining the requirement that there must be a shared belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

(1) The meaning of 'characteristic' and 'belief'

27. In the context of the values, norms and conduct that the appellants claim to have adopted during their stay in the Netherlands, the referring court mentions that the adoption of values, norms and conduct may be a 'characteristic' that is so fundamental to identity that a person should not be forced to renounce it.

28. Directive 2011/95 does not define the terms 'innate characteristic' and 'a characteristic … that is so fundamental to identity or conscience that a person should not be forced to renounce it' used in Article 10(1)(d) thereof. Dictionary definitions of a 'characteristic' of a person include 'a feature or quality belonging typically to that person and serving to identify them'. 'Innate' means 'inborn' or 'determined by factors present in an individual from birth'. Examples of innate characteristics are a person's height, the colour of their eyes and their genetic inheritance. Directive 2011/95 provides a sole example of a 'common characteristic', namely sexual orientation. [25]

29. Those definitions lead me to conclude that the adoption of certain values, norms and conduct cannot be described as a 'characteristic'. [26] The word 'belief', meaning 'the acceptance or feeling that something is true', appears to be more apt in the appellants' circumstances.

30. In the light of the position the Netherlands Government contends for, it is pertinent next to inquire whether the shared belief the first indent of Article 10(1)(d) of Directive 2011/95 mentions must be interpreted as an implicit reference to a religious or political belief. The Commission points out that the use of the word 'Glaubensüberzeugung' in the German language version may create some doubt as to whether the belief in question must be of a religious nature.

31. Article 10(1)(b) of Directive 2011/95, which addresses persecution on grounds of religion, refers to 'theistic, non-theistic and atheistic beliefs'. For example, the German, English, French and Dutch versions of that article of Directive 2011/95 use the terms 'religiöse Überzeugung', 'religious belief', 'croyances religieuses' and 'godsdienstige overtuiging'. By contrast, the word used in point (d) of that article is 'Glaubensüberzeugung', 'belief', 'croyance' and 'geloof' in those respective language versions.

[25] See also judgment of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720, paragraph 46).

[26] It may be relevant to add that the first indent of Article 10(1)(d) of Directive 2011/95 states that a group may also be a particular social group where its members share a common background that cannot be changed. I am not persuaded that that consideration is relevant in the present case. It is certainly arguable that persons such as the appellants, who have spent a considerable part of the phase of their lives in which they form their identity in a Member State, share a common background that cannot be changed. However, in the present case, no argument appears to be advanced that the appellants may have a well-founded fear of persecution because they share such a common background.

32. Article 10(1)(e) of Directive 2011/95, which relates to political persecution, refers to the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 thereof and to their policies or methods.

33. Article 10(1)(b) of Directive 2011/95 thus refers to theistic, non-theistic and atheistic religious beliefs; Article 10(1)(e) refers to political opinions, thoughts or beliefs; and Article 10(1)(d) refers to beliefs that are so fundamental to identity or conscience that a person should not be forced to renounce them. [27] On that basis it appears there are no textual or contextual indications to support the idea that the basis of a belief within the meaning of Article 10(1)(d) must be religious or political in nature. [28] A contrary interpretation fails, moreover, to recognise that a range of views on fundamental issues may exist within a specific religion and that a person may change their views on those issues without converting to a different religion. [29]

(2) Is the belief in question a shared belief that is so fundamental to identity or conscience that a person should not be forced to renounce it?

34. A belief in gender equality shapes a range of choices related to education and choice of career, the extent and nature of activities in the public sphere, the possibility of achieving economic independence by working outside the home, decisions on whether to live alone or with a family and the free choice of a partner. Those matters are fundamental to an individual's identity. [30]

35. Article 2 and Article 3(3) TEU enshrine gender equality as one of the European Union's core values and aims and the case-law of the Court recognises it as a fundamental principle of EU law. Article 8 TFEU states that the European Union aims to eliminate inequalities and to promote equality between men and women in all of its activities. Article 19 TFEU enables the European Union to introduce legislation to combat gender-based discrimination. Article 157 TFEU establishes the principle of equal pay for work of equal value and furnishes a legal basis to enact gender equality law in the field of employment. Article 157(4) TFEU recognises positive action as a means of achieving gender equality.

[27] This is without prejudice to the possibility that a belief within the meaning of Article 10(1)(d) of Directive 2011/95 may be grounded upon or influenced by political or religious factors and that those factors play a role in the perception of a group by society in the country of origin.

[28] See also recitals 29 and 30 of Directive 2011/95, which clearly distinguish between the reasons for persecution listed in Article 10(1) thereof.

[29] In other words, religious edicts and dogmas of faith do not rule out the existence of a range of divergent religious beliefs among the faithful. For example, Catholics may believe that women should be permitted to become ordained priests despite the fact that Canon Law 1024 prohibits it.

[30] Erik Erikson was one of the first psychologists to describe the concept of identity in the context of personality development. He considered that identity enables a person to move with purpose and direction in life, and with a sense of inner sameness and continuity over time and place. Identity is psychosocial in nature, formed by the intersection of individual biological and psychological capacities in combination with the opportunities and various support offered by a person's social context. Identity normally becomes a central issue during adolescence, when the individual addresses questions about appearance, vocational choice, career aspirations, education, relationships, sexuality, political and social views, personality and interests. Key identity concerns often demand further reflection and revision later in life. The branch of psychology that is concerned with identity and the self has developed and refined Erikson's theories. See, for example, Branje, S., de Moor, E.L., Spitzer, J., Becht, A.I., 'Dynamics of Identity Development in Adolescence: A Decade in Review', *Journal of Research on Adolescence*, 2021, Vol. 1(4), pp. 908 to 927.

36. Since the adoption of the first directives in this area in the 1970s, the European Union has developed extensive legislation on gender equality, primarily in the field of employment, including matters such as equal pay, social security, employment, working conditions and harassment. [31] That legislation prohibits direct and indirect discrimination on grounds of gender and creates enforceable rights for individuals in the Member States' legal orders. [32]

37. The values, norms and conduct that the appellants claim to have adopted during their stay in the Netherlands also reflect a number of fundamental rights now enshrined in the Charter: Article 21(1) includes the right not to be discriminated against on the basis of sex; Article 23 recognises the right to equality between men and women in all areas, including employment, work and pay; [33] Article 9 refers to the right to marry freely; Article 11 provides for freedom of expression; Article 14 enshrines the right to education and access to vocational and continuing training; and Article 15 provides for the right to engage in work and to choose a profession. [34] The Member States are also parties to the Convention on the Elimination of All Forms of Discrimination against Women, which aims to advance the equal recognition, enjoyment and exercise of all human rights of women in the political, economic, social, cultural, civil and domestic fields. [35]

38. I do not doubt that many people who have spent their lives in the Netherlands will have been influenced by the value of gender equality so much so that it constitutes an indelible part of their identity.

39. In the light of the foregoing, I consider that girls and women who have adopted values, norms and conduct that reflect a belief in gender equality cannot be expected to renounce that belief any more than a person can be expected to renounce his or her religious or political beliefs or deny his or her sexual orientation. It follows that Member States cannot expect girls and women to adapt their behaviour by acting discretely in order to stay safe, all the more so because, by their nature, aspects of identity shaped by a belief in gender equality often manifest themselves in public. [36] The Court has already held that, in the context of homosexuals, Article 10(1)(d) of Directive 2011/95 does not lay down limits on the attitude that the members of a particular social group may adopt with respect to their identity or to their behaviour. [37]

[31] See, by way of example, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1), and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

[32] As early as 1976, the Court held that the principle of equal pay between men and women provided by EU law has direct effect, so that an individual may rely upon it against his or her employer (judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56).

[33] The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights.

[34] See, also, equivalent provisions of the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('ECHR'), to which all the Member States are signatories, in particular Article 14 (prohibition of discrimination), Article 12 (right to marry) and Article 10 (freedom of expression), as well as Article 2 of the Protocol to the ECHR (right to education).

[35] The United Nations General Assembly adopted that convention on 18 December 1979 and it entered into force on 3 September 1981 (*United Nations Treaty Series*, Vol. 1249, p. 13). The European Union is not a party.

[36] Judgment of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720, paragraphs 70 to 75). It may be observed that the assessment of the European Court of Human Rights ('ECtHR') in its judgment of 28 June 2011, *Sufi and Elmi v. The United Kingdom* (CE:ECHR:2011:0628JUD000831907, § 275), relates to the different matter of whether the applicants in that case were at a real risk of ill-treatment contrary to Article 3 ECHR and/or a violation of Article 2 ECHR. It is in that context that the ECtHR considered whether the applicants would be able to avoid those risks by 'playing the game'.

[37] Judgment of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720, paragraph 68).

40. The question that then arises is whether the appellants have accepted and absorbed a belief in gender equality so much so that it has become part of their identity. [38] Given the appellants' ages and the duration of their stay in the Netherlands, the referring court reasonably observes that they have spent a considerable part of the phase of their lives in which they form their identity in that Member State. [39] I do not doubt that the appellants' immersion in that Member State's culture was a profound experience that gave them possibilities and opened up perspectives of their future of which they might otherwise have been unaware. It is therefore plausible that, in contrast to their peers in Iraq who did not have that experience, they have adopted a way of life that reflects the recognition and enjoyment of their fundamental rights, in particular their belief in gender equality, to the extent that they have accepted and absorbed that belief to the point of it becoming a part of their character. The competent authorities, and ultimately the national courts, must assess the extent to which that is the case by reference to the appellants' individual circumstances, taking into account, where relevant, the consideration set out in Article 10(2) of Directive 2011/95. [40]

(c) External aspects of a group

41. Notwithstanding some ambiguity, it appears that the referring court essentially wishes to know how competent authorities and national courts should determine whether the requirement in the second indent of Article 10(1)(d) of Directive 2011/95 is met, namely whether a particular social group has a distinct identity in the relevant country because the surrounding society perceives it as different. That question raises issues regarding the burden of proof and the substantive assessment of the appellants' claims.

(1) Burden of proof

42. Article 4(3) of Directive 2011/95 provides that the assessment of an application for international protection must be carried out on an individual basis and take account of, inter alia: (a) all relevant facts as they relate to the country of origin, including its laws and regulations and the manner in which they are applied; (b) relevant statements and documentation presented by the applicant; and (c) the applicant's individual position and personal circumstances. By Article 4(1) of Directive 2011/95, Member States may consider that it is the applicant's duty to submit all of the elements needed to substantiate his or her application for international protection as soon as possible, including the reasons in support of that application. [41] Applicants must therefore articulate and substantiate the reasons why they fear persecution in their country of origin.

43. Does this requirement extend to a duty to substantiate that the particular social group to which the applicant claims to belong has a distinct identity in the relevant country because the surrounding society perceives it as being different, a position for which the Netherlands Government appears to contend? I think not. The statements the applicant must submit pursuant to Article 4(1) of Directive 2011/95 in order to substantiate an application for international protection are but the starting point for the competent authorities' assessment of

[38] See UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, paragraph 15. See, also, *EASO Guidance on membership of a particular social group*, 2020, p. 16.

[39] See footnote 30 to the present Opinion.

[40] See point 45 of the present Opinion.

[41] Article 4(2) of Directive 2011/95.

the facts and circumstances that gave rise to that application. That provision also requires the Member State to assess, in cooperation with the applicant, the relevant elements of his or her application. [42]

44. The Court has held that, in practical terms, the requirement that the Member State cooperate in the assessment has the consequence that if, for any reason whatsoever, the elements an applicant for international protection provides are incomplete, outdated or irrelevant, that Member State must assist the applicant in assembling all of the elements needed in order to substantiate that application. Member States may be better placed than applicants to access certain classes of document. [43] The burden of establishing that a particular social group has a distinct identity in a particular country thus appears to fall equally upon the applicant and the Member State and not exclusively upon the former. In that context, it is also relevant to recall that, under Article 4(5) of Directive 2011/95, aspects of the applicant's statements that are unsupported by documentary or other evidence do not require confirmation when, inter alia, those statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case.

45. Article 10(2) of Directive 2011/95 provides that, in the context of assessing if an applicant has a well-founded fear of persecution, it is immaterial whether he or she actually possesses the characteristic that attracts the persecution, provided the actor of persecution attributes that characteristic to the applicant. [44] The text of that provision makes it clear that it comes into play once it has been established that a particular social group exists. Contrary to what the referring court implies, the assessment of the perception of the actors of persecution does not replace, or render less important, the determination as to whether a group has a distinct identity in the country of origin. It only affects the extent to which it must be shown that the applicant is a member of that social group, since it may suffice for the purposes of the application for international protection to show that he or she is simply perceived to be as such. [45]

(2) Substantive assessment

46. The Court has acknowledged that the existence of criminal laws that specifically target homosexuals can support a finding that those persons form a separate group that the surrounding society perceives as different. By extension, the fact that society accepts certain conduct by men, when the same conduct by women is punished, is an indication that the surrounding society perceives women, or certain categories of women, as different. The competent authorities must therefore take the legal rules and the social and cultural mores in the applicant's country of origin into consideration. [46]

[42] Judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 52 and the case-law cited).

[43] See, to that effect, judgments of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraphs 65 and 66), and of 3 March 2022, *Secretary of State for the Home Department (Refugee status of a stateless person of Palestinian origin)* (C-349/20, EU:C:2022:151, paragraph 64 and the case-law cited). See, also, *EASO Practical Guide: Evidence Assessment*, 2015.

[44] See, to that effect, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 85).

[45] See, by analogy, judgment of 25 January 2018, *F* (C-473/16, EU:C:2018:36, paragraphs 31 and 32), and Opinion of Advocate General Mengozzi in *Fathi* (C-56/17, EU:C:2018:621, point 44 and the case-law cited).

[46] See Article 4(3)(a) of Directive 2011/95 and the Opinions of Advocate General Sharpston in *X and Others* (C-199/12 to C-201/12, EU:C:2013:474, point 35), and in *Shepherd* (C-472/13, EU:C:2014:2360, point 56). See, also, the Opinion of Advocate General Richard de la Tour in *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)* (C-621/21, EU:C:2023:314, points 72 and 73 and the case-law cited).

47. The recent country guidance on Iraq by the European Union Agency for Asylum ('the EUAA')[47] identifies groups of persons that the surrounding society perceives as being different. According to that country guidance, persons, in particular women, who transgress social mores may be perceived as amoral, are stigmatised and are at risk of serious harm.[48] Such transgressions reportedly include sexual relations outside marriage, being the victim of rape or other forms of sexual violence, refusing to marry a man the family has chosen,[49] marrying against the family's wishes, inappropriate appearance or dress and unacceptable contact or dating. Acceptable jobs for women are reported to be limited to home-related sectors and government departments. Society frowns upon women and girls who work in shops, cafes, entertainment, nursing or the transportation sector. Women's public activity, including their presence and activities on the internet, may lead to harassment. Women may be restricted from taking part in protests because their families are afraid of being perceived negatively. Sexual defamation may expose them to stigmatisation by society or to being considered as having violated family honour.[50]

48. From the foregoing it appears that girls and women who believe in gender equality may be perceived as transgressing social mores in Iraq due to manifestations of that belief, for example by statements or conduct associated with choices about matters such as education, career and work outside the home, the extent and nature of activities in the public sphere, decisions on whether to live alone or with a family, and the free choice of a partner. It is for the competent authorities and national courts to determine whether that is in fact the case for the appellants in their individual circumstances.

(d) Persecution

49. Some of the parties that filed observations submitted that the appellants had adduced no evidence to show that they would be subject to acts of persecution upon return to their state of origin. That is a different, albeit related,[51] issue from that of determining whether they are members of a particular social group within the meaning of Article 10(1)(d) of Directive 2011/95. The referring court does not seek guidance on the interpretation of the provisions of that directive that relate specifically to the assessment of a well-founded fear of persecution. Suffice it to point out that, under Article 8(2) of Directive 2011/95, in examining whether an applicant has a well-founded fear of persecution, Member States must have regard, inter alia, to the general circumstances prevailing in the relevant part of the country of origin. To that end, they must obtain precise and up-to-date information from relevant sources such as the UNHCR and the EUAA.

47 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ 2021 L 468, p.1) established the EUAA in order to replace and to assume the functions of EASO.

48 See EUAA, *Country Guidance: Iraq – Common analysis and guidance note*, 2022, in particular Sections 2.13 and 2.17. The UNHCR considers that, depending on their individual circumstances, persons perceived as contravening strict Islamic rules may be in need of international refugee protection on the basis of their religion or membership of a particular social group: UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, 2019, pp. 79 and 80.

49 Child marriage is a consistent phenomenon in Iraq, where the legal marriage age is 15 with parental permission, and 18 without (EUAA, *Country Guidance: Iraq – Common analysis and guidance note*, 2022, Section 2.16). According to the partnership organisation 'Girls not Brides', 28% of girls in Iraq are married before the age of 18 and 7% are married before the age of 15. On child marriage generally, see European Parliament resolution of 4 July 2018 entitled 'Towards an EU external strategy against early and forced marriages – next steps' (2017/2275(INI)).

50 See, for example, EASO Country of Origin Information Report entitled *Iraq: Key socio-economic indicators for Baghdad, Basra and Erbil*, 2020, in particular Section 1.4; EUAA, *Country Guidance: Iraq – Common analysis and guidance note*, 2022, in particular Sections 2.13 and 2.16.4; and the report on Iraq of 28 October 2020 by Humanists International, in particular the section entitled 'Discrimination against women and minorities'.

51 Opinion of Advocate General Richard de la Tour in *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)* (C-621/21, EU:C:2023:314, points 74 to 77 and the case-law cited).

50. Recent country guidance on Iraq indicates that girls and women who transgress social mores may be exposed to acts that are so severe as to amount to persecution. [52] It is therefore possible that, as a result of their being perceived as different in that respect, [53] the appellants, and/or their immediate family, could face retaliation constituting persecution within the meaning of Article 9 of Directive 2011/95. The likelihood and seriousness of those risks are again matters for the competent authorities and the national courts to assess in the light of the appellants' circumstances.

B. The third question

51. The third question is in two parts. First, the referring court asks, in essence, whether, in an application for international protection, EU law requires the decision-maker to determine and to take into account the child's best interests, as that concept is referenced in Article 24(2) of the Charter. Second, it wishes to know whether the answer to the first part would be different if the child's best interests must be taken into account in what it refers to as a 'grant of residence on ordinary grounds'.

52. It is a relevant consideration in this context that the proceedings pending before the referring court concern subsequent, rather than initial, applications for international protection. [54]

1. The first part

53. Article 2(k) of Directive 2011/95 defines a minor, in other words, a child, as 'a third-country national or stateless person below the age of 18 years'.

54. Article 24(2) and Article 51(1) of the Charter affirm the fundamental nature of the rights of the child and the requirement that the Member States respect those rights when they implement EU law. Directive 2011/95 therefore falls to be interpreted and applied in the light of Article 24(2) of the Charter. [55] That is reflected in recital 16 of Directive 2011/95, which states that that directive seeks to promote the application of, inter alia, Article 24 of the Charter, and recital 18 thereof, which states that the best interests of the child should be a primary consideration of the Member States when they implement the directive, in line with the 1989 United Nations Convention on the Rights of the Child. [56] In assessing the child's best interests, Member States should in particular take due account of the principle of family unity, his or her well-being and social development, safety and security considerations and his or her views by reference to age and level of maturity.

[52] See point 47 of the present Opinion.

[53] Article 9(3) of Directive 2011/95 requires a connection between the reasons mentioned in Article 10 of that directive and the acts of persecution as qualified in Article 9(1) thereof or the absence of protection against such acts.

[54] The Court has held that since Article 40(2) of Directive 2013/32 does not differentiate between an initial application for international protection and a subsequent application with regard to the nature of the elements or findings capable of demonstrating that an applicant qualifies for international protection by virtue of Directive 2011/95, in both cases the assessment of the facts and circumstances in support of those applications must be carried out in accordance with Article 4 of Directive 2011/95 (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 40).

[55] See, by analogy, judgments of 9 September 2021, *Bundesrepublik Deutschland (Family member)* (C-768/19, EU:C:2021:709, paragraph 38), and of 1 August 2022, *Bundesrepublik Deutschland (Family reunification with a minor refugee)* (C-273/20 and C-355/20, EU:C:2022:617, paragraphs 36 to 39 and the case-law cited).

[56] Signed on 20 November 1989 (*United Nations Treaty Series*, vol. 1577, p. 3). According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Article 24 of the Charter is based on that convention, which was ratified by all Member States, particularly on Articles 3, 9, 12 and 13 thereof. See, by analogy, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 64).

55. Article 4(3)(c) of Directive 2011/95 requires that an application for international protection must be assessed on an individual basis, taking into account the applicant's position and personal circumstances, including factors such as background, gender and age, so as to assess whether, on the basis of those personal circumstances, the acts to which that person has been or could be exposed amount to persecution or serious harm. Article 9(2)(f) thereof specifies that acts of persecution can, inter alia, take the form of acts of a child-specific nature. [57]

56. In the light of the foregoing considerations, and as the case-law of the Court indicates, [58] I am of the view that the child's best interests must be determined on an individual basis and taken into account in the assessment of applications for international protection, including subsequent applications.

57. The Netherlands Government submitted that the Netherlands competent authorities take the child's best interests into account sufficiently because they are reflected appropriately in all procedural aspects of the determination of an application for international protection relating to or involving children, for example by the use of child-appropriate interview procedures. [59]

58. Recourse to child-sensitive procedural safeguards is of great practical importance. Yet there is nothing in Article 24 of the Charter, in Articles 3, 9, 12 and 13 of the Convention on the Rights of the Child on which that provision of the Charter is based, in Directive 2011/95 or in the Court's case-law that indicates that the child's best interests ought not to be taken into account in the assessment of the substance of applications relating to children. Article 24(2) of the Charter itself states that the child's best interests 'must' be taken into account in 'all' actions relating to children. [60] According to the Court's case-law, it is only possible to determine a child's best interests by carrying out a general and in-depth assessment of that child's situation. [61] In that context, expert advice may be helpful or even necessary. The Commission rightly recalls that, under Article 10(3) of Directive 2013/32, Member States must ensure that decisions on applications for international protection are taken after an appropriate examination and that the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on, inter alia, child-related issues. [62]

59. I might add that where there has been a relevant and material change in the circumstances or health of a child between the date of the assessment of his or her initial application for international protection and any subsequent application, a fresh assessment of the child's best interests may be appropriate in order to determine the latter. [63]

[57] A number of other provisions of Directive 2011/95, as well as recital 38 thereof, also reflect the requirements of Article 24 of the Charter. Article 20(3) of Directive 2011/95 requires Member States to take into account the specific situation of vulnerable persons, such as minors. Article 20(5) thereof states that the best interests of the child shall be a primary consideration for Member States when they implement the provisions of Chapter VII of that directive that involve minors who have been granted international protection. The provisions of Chapter VII relate, for example, to access to education and healthcare (Article 27(1) and Article 30 of Directive 2011/95 respectively). The requirements in Article 20(3) and (5) do not, however, extend to the implementation of the provisions in Chapter II of Directive 2011/95, that is, those relating specifically to the assessment of applications for international protection.

[58] Judgment of 9 September 2021, *Bundesrepublik Deutschland (Family member)* (C-768/19, EU:C:2021:709, paragraph 38).

[59] In accordance with Article 15(3)(e) of Directive 2013/32.

[60] See, also, Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14), which explains that the child's best interests consist of a substantive right, an interpretative principle and a rule of procedure.

[61] See, by analogy, judgment of 14 January 2021, *Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)* (C-441/19, EU:C:2021:9, paragraph 46).

[62] See, in particular, Article 10(3)(d) of Directive 2013/32.

[63] See *EASO Practical guide on the best interests of the child in asylum procedures*, 2019, p. 13, which states that giving primary consideration to the child's best interests is a continuous process that requires assessment before any important administrative decision is made.

60. Decisions as to precisely when and how matters of this kind must be determined and taken into consideration are matters that fall within the Member States' exercise of their procedural autonomy, bearing in mind the need to respect the principles of equivalence and effectiveness. [64]

61. Assessing a child's best interests is therefore required in order to take a decision on a minor's application for international protection or one that concerns a minor or has significant consequences for her or him [65] and that complies with the requirements of Directive 2011/95, read in the light of Article 24(2) and Article 51(1) of the Charter. Such an appropriate assessment may take account of factors such as the child's chronological age, developmental age, gender, particular vulnerabilities, family situation, education and his or her state of physical and mental health. [66]

62. In that context, I agree with the observations of the Czech, Hungarian and Netherlands Governments that the child's best interests are but one consideration in the assessment of an application for international protection, albeit one of primary importance. It is important to recall that the objective of Directive 2011/95 is to identify persons who, forced by circumstances, genuinely and legitimately need international protection in the European Union. International protection is available only to refugees and to persons eligible for subsidiary protection as defined, respectively, in Article 2(d) and (f) thereof. Within that legal context, competent authorities must treat the child's best interests as a primary consideration, [67] and it would be contrary to the general scheme and objectives of Directive 2011/95 to grant refugee status and subsidiary protection status to third-country nationals in situations that have no connection to the rationale of international protection. [68]

63. By way of illustration of an application for international protection where the child's best interests are particularly important, I have in mind circumstances in which a child's specific mental or physical vulnerabilities indicate that acts that would not be regarded as acts of persecution if they affected another child, who does not suffer from those vulnerabilities, or an adult would have a more severe impact on that child, in the light of other relevant circumstances such as the availability of familial support in the country of origin, to the extent that they would amount to acts of persecution within the meaning of Article 9 of Directive 2011/95. The best interests of the child are also particularly relevant in the context of child-specific forms of persecution. [69]

64. Such a situation is clearly distinguishable from the circumstances that gave rise to the judgment in *M'Bodj*, [70] where the Court held that the lack of appropriate healthcare in an applicant's country of origin does not amount to inhuman or degrading treatment unless an

[64] See, by analogy, 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, paragraphs 34 and 35 and the case-law cited).

[65] See, by analogy, judgments of 11 March 2021, *État belge (Return of the parent of a minor)* (C-112/20, EU:C:2021:197, paragraphs 33 to 38), and of 17 November 2022, *Belgische Staat (Married refugee minor)* (C-230/21, EU:C:2022:887, paragraph 48 and the case-law cited).

[66] See, by analogy, judgment of 14 January 2021, *Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)* (C-441/19, EU:C:2021:9, paragraph 47).

[67] For example, if a decision-maker reasonably assumes that the parents' application for international protection will not be granted, then it may follow that it is in the child's best interest to return with the parents to their country of origin.

[68] See, by analogy, judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraph 44).

[69] See, by analogy, judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraphs 65 and 66) and, to a similar effect, UNCHR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 2009, paragraphs 15 to 17. See also the section of those guidelines dealing with child-specific forms of persecution.

[70] Judgment of 18 December 2014 (C-542/13, EU:C:2014:2452).

applicant suffering from a serious illness is intentionally deprived of healthcare, and that a Member State is precluded from introducing or retaining provisions granting subsidiary protection status to a third-country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is unavailable in his or her country of origin.

65. Once again, all of those matters are for the competent authorities, and ultimately the national courts, to assess in the context of individual applications for international protection.

2. The second part

66. From the manner in which the referring court has phrased the second part of the third question, I understand that it does not require a response if the answer to the first part is that EU law requires a decision-maker to determine and to take into account the child's best interests in ruling upon an application for international protection.

67. In any event, it is difficult to understand from the order for reference how there is any link, in fact or in logic, between what happens in proceedings relating to a 'request for the grant of residence on ordinary grounds', which, according to the Netherlands Government, are not governed by EU law,[71] and the applications for international protection under the national law transposing Directive 2011/95 in the case pending before the referring court. The French and Hungarian Governments and the Commission are of the view that the order for reference contains insufficient information, in particular in relation to what is meant by a 'request for the grant of residence on ordinary grounds', for the Court to provide a meaningful response to the second part of the third question. Moreover, by way of response to a question from the Court at the hearing, the appellants' representative confirmed that the present proceedings concern applications for international protection only, and not '[requests] for the grant of residence on ordinary grounds'. That confirms the Netherlands Government's submission that the second part of the third question is irrelevant to the resolution of the matters pending before the referring court. By reason of the foregoing, I advise the Court that the second part of the third question is inadmissible, and I propose not to consider it further.[72]

C. The fourth question

68. The fourth question relates specifically to harm that a minor might suffer as a result of a long stay in a Member State, and when, if at all, that must be taken into account in the substantive assessment of a subsequent application for international protection. The referring court speculates that it may be relevant to take into consideration whether the initial application was determined within the time limits laid down by EU law, whether the applicant's stay in the Member State was lawful and whether a previously imposed obligation to return had been complied with or enforced.

[71] In its observations on the fifth question, which also refers to the grant of residence on ordinary grounds, the Netherlands Government referred the Court to Article 3.6a of the Vreemdelingenbesluit 2000 (Decree on foreign nationals 2000) of 23 November 2000 (Stb. 2000, No 497).

[72] Judgment of 14 January 2021, *The International Protection Appeals Tribunal and Others* (C-322/19 and C-385/19, EU:C:2021:11, paragraphs 51 to 55 and the case-law cited).

69. According to the order for reference, the appellants say they have suffered developmental delay or developmental damage due to the stress of living with uncertainty about the outcome of their family's initial applications for international protection and the threat of a forced return to their country of origin, and supported those claims with documentary evidence. Apart from the appellants' representative, all of the parties that responded to the fourth question submit that the outcome of a subsequent application for international protection ought not to be determined by reference to that type of harm.

70. There is no doubt that living with prolonged uncertainty and threat leads to stress that may cause developmental delay or damage in children.[73] That is not, in itself, a factor that can either ground an entitlement to international protection under Directive 2011/95 or justify a more lenient approach towards the assessment of an application for that purpose, as the referring court appears to imply. The appellants' parents decided that it was in their children's best interests to exhaust the available legal remedies in the context of the family's initial application for international protection and to lodge subsequent applications on behalf of their children. There is nothing to indicate that processing those applications and the determination of those appeals took longer than could reasonably have been anticipated. The appellants' parents' decisions had the inevitable consequence of prolonging the family's stay in the Netherlands. The parents must be taken to have considered the consequences of their decisions for their children's well-being in the light of those circumstances. It may be assumed that they made their decisions in the belief that it was better for their children to stay in the Netherlands than to return to Iraq. That may not have been an ideal choice, but on the basis of the appellants' own case, it is difficult to accept that they suffered any greater harm than if their parents had decided to return to Iraq with them.

71. Finally, in taking decisions on applications for international protection relating to a minor, consideration must be given to his or her developmental age and the state of his or her physical and mental health at the time that assessment is carried out. The circumstances that may have had a detrimental effect on the child's development or health are, in that context, irrelevant.

D. The fifth question

72. By its fifth question, the national court wishes to know if a national legal practice whereby a distinction is made between initial and subsequent applications for international protection, in the sense that ordinary grounds are disregarded in the case of subsequent applications for international protection, is compatible with EU law, having regard to Article 7 of the Charter, read in conjunction with Article 24(2) thereof.

73. It is difficult to establish the link with EU law and the relevance of the present question in the proceedings pending before the referring court, which concerns subsequent applications for international protection and not requests for the grant of residence on ordinary grounds, which the Netherlands Government submits are not governed by EU law. I therefore advise the Court that the present question is inadmissible for the same reasons as those given in point 67 of the present Opinion.

[73] See, for example, Kalverboer, M.E., Zijlstra, A.E. and Knorth, E.J., 'The developmental consequences for asylum-seeking children living with the prospect for five years or more of enforced return to their home country', *European Journal of Migration and Law*, Vol. 11, Martinus Nijhoff Publishers, 2009, pp. 41-67.

V. Conclusion

74. In the light of the foregoing, I propose that the Court answer the questions referred by the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands) as follows:

(1) Article 10(1)(d) 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

must be interpreted as meaning that:

– third-country nationals who are girls and women share an innate characteristic on account of their biological sex and, as a result of having lived in a Member State for a considerable period during the phase of their life in which they form their identity, may share a belief in gender equality that is so fundamental to their identity that they should not be forced to renounce it;

– in order to determine whether a group has a distinct identity in a country of origin because the surrounding society perceives it as being different, Member States are required, pursuant to Article 4 of Directive 2011/95, to take into account all relevant facts as they relate to the country of origin at the time of taking a decision on an application for international protection, including that country of origin's laws and regulations and the manner in which they are applied, together with any relevant elements the applicant for international protection submits;

– a group consisting of women and girls who share a belief in gender equality has a distinct identity in the country of origin if, when they express that belief by way of statements or conduct, they are perceived by society in that country as transgressing social mores;

– it is unnecessary for a shared belief in gender equality to have a religious or political basis.

(2) Directive 2011/95, read in conjunction with Article 24(2) and Article 51(1) of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that:

– a national practice whereby a decision-maker, when carrying out the substantive assessment of an application for international protection or a subsequent application for international protection, does not take into account, as a primary consideration, the best interests of the child, or weighs up the best interests of the child without first determining, in each procedure, what the best interests of the child are, is incompatible with EU law;

– the methodology and procedure for determining the best interests of the child are matters for the Member States to establish, taking full account of the principle of effectiveness;

– harm that a minor has suffered as a result of his or her long stay in a Member State is irrelevant to a decision as to whether to grant a subsequent application for international protection when that long stay in a Member State is the result of decisions of the minor's

parents or guardians to exhaust the legal remedies available to challenge the rejection of the initial application and to lodge a subsequent application for international protection.