Preliminary Edition

JUDGMENT OF THE COURT (Third Chamber)

September 9, 2021 (*)

(Reference for a preliminary ruling — Border controls, asylum and immigration — Asylum policy — Common procedures for granting and withdrawing international protection — Directive 2013/32/EU — Article 40 — Subsequent request — New elements or findings — Concept — Circumstances that existed before the final termination of proceedings relating to a previous application for international protection – Res judicata – Act of the applicant’

In case C-18/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 18 December 2019, received at the Court on 16 January 2020, in the proceedings

XY

in the presence of:

Bundesamt für Fremdenwesen und Asyl,

points

THE COURT (Third Chamber),

composed of: A. Prechal, President of the Chamber, N. Wahl, F. Biltgen, L. S. Rossi (Rapporteur) and J. Passer, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

given the documents,

having regard to the comments of:

– the Austrian Government, by A. Posch, J. Schmoll and C. Drexel, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and A. Pagáčová, acting as Agents,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the French Government, by E. de Moustier and D. Dubois, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and M.M. Tátrai, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the European Commission, by M. Condou-Durande, H. Leupold and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 40 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, with corrigendum in OJ 2015, L 29, p. 18).

2 The request has been made in proceedings between XY and the Bundesamt für Fremdenwesen und Asyl (Austria Federal Aliens and Asylum Service; 'the Bundesamt') concerning the rejection by the Bundesamt of an application for international protection lodged by XY .

Applicable Provisions

Union law

Directive 2005/85

3 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) was repealed with effect from 21 July 2015 by Directive 2013/32. Article 34(2) of Directive 2005/85 provided:

'Member States may lay down rules on the prior examination pursuant to Article 32 in their national law. Those rules may include:

[...]

b) require the submission of the new data by the asylum seeker concerned within a specified period of time after having obtained them;

[...]”

Directive 2013/32

4 Recitals 3, 18 and 36 of Directive 2013/32 are worded as follows:

'(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards the establishment of a Common European Asylum System based on the full and non-restrictive application of the Geneva Convention relating to the status of refugees of July 28, 1951, as amended by the New York Protocol of January 31, 1967 [...], thus reaffirming the principle of non-refoulement and ensuring that no one is returned to the country of persecution.

[...]

(18) It is in the interest of both Member States and applicants for international protection that a decision on applications for international protection be taken as soon as possible, without prejudice to the carrying out of a due and full examination.

[...]

(36) If an applicant makes a subsequent application without providing any new evidence or arguments, it would be disproportionate to require Member States to carry out a new full examination procedure. In those cases, Member States should be able to reject an application as inadmissible on the basis of the principle of res judicata."

5 Article 5 of that directive provides:

"Member States may introduce or maintain more favorable standards for procedures for granting or withdrawing international protection, in so far as they are compatible with this Directive."

6 Article 28(1) and (2) of that directive provides:

„1. Where there are reasonable grounds to believe that the applicant has implicitly withdrawn or implicitly waived such application, Member States shall ensure that the determining authority decides either to terminate the examination of the application or, provided that it on the basis of an adequate examination of the substance in accordance with Article 4 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)], reject the request.

In particular, Member States may presume that the applicant has implicitly withdrawn or implicitly waived his application for international protection where it has been established that:

a) he has failed to reply to requests to provide information essential to his request as referred to in Article 4 of [Directive 2011/95] or has failed to appear for a personal interview as referred to in Articles 14 to 17 of this Directive, unless it proves within a reasonable time that this was due to circumstances beyond its control;

(b) he has disappeared, or it has been established that he has left the place where he was staying or being held without authorization without contacting the competent authority within a reasonable time, or has not paid within a reasonable time to his notification obligation or to other notification obligations, unless he demonstrates that this was due to circumstances beyond his control.

Member States may set deadlines or issue guidelines for the implementation of these provisions.

2. Member States shall ensure that an applicant who reappears to the competent authority after a decision to terminate his application as referred to in paragraph 1 of this Article has been taken has the right to request that his/her application be re-examined is taken or to make a new request which is not subject to the procedure referred to in Articles 40 and 41.

Member States may set a time limit of at least nine months after which an application may no longer be considered or after which the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41. Member States may provide that the applicant's case may be re-examined only once.

Member States shall ensure that such a person is not removed in violation of the principle of non-refoulement.

Member States may allow the determining authority to resume examination of the application at the stage where it was terminated."

7 Article 33(2) of that directive provides:

'Member States may consider an application for international protection inadmissible only where:

[...]

d) the application is a subsequent application and no new elements or findings have been raised or submitted by the applicant in relation to the examination of his or her eligibility for recognition as a beneficiary of international protection in accordance with [Directive 2011/95]; or

[...]”

8 Article 40 of Directive 2013/32 is entitled 'Following requests' and provides in paragraphs 1 to 5:

„1. If a person who has applied for international protection in a Member State has made further statements there or has made a subsequent application, that Member State shall examine those further statements or the elements of the subsequent application in the context of the examination of the previous application or in the in the context of the review of the decision against which an appeal or objection has been lodged, insofar as the competent authorities can take into account all the elements underlying the further statements or the subsequent request in this regard.

2. In order to take a decision on the admissibility of an application for international protection under Article 33(2)(d), a subsequent application for international protection shall first be subject to a preliminary examination to determine whether new elements or findings have been raised or submitted by the applicant in relation to the examination of his or her eligibility for recognition as a beneficiary of international protection under [Directive 2011/95].

3. If it is concluded from the preliminary examination referred to in paragraph 2 that new elements or findings have arisen or have been submitted by the applicant that significantly increase the applicant's eligibility for recognition as beneficiaries of international protection under [Directive 2011/95], the request is further processed in accordance with Chapter II. Member States may also provide other reasons for further processing a subsequent request.

4. Member States may provide for further processing of the application only if the applicant concerned was unable to assert the situations described in paragraphs 2 and 3 of this Article under the previous procedure through no fault of his own, in particular by virtue of his law to exercise an effective remedy under Article 46.

5. Where a subsequent request is not further examined in accordance with this Article, it shall be deemed inadmissible in accordance with Article 33(2)(d).'

9 Article 42(2) of that directive provides:

'Member States may lay down rules on the preliminary examination pursuant to Article 40 in their domestic law. Those rules may include:

(a) require the applicant concerned to state facts and provide evidence that justify a new procedure;

(b) allow the preliminary examination on the basis of written explanations only without a personal interview, with the exception of the cases referred to in Article 40(6).

These rules should not make it impossible for [the] applicant to access a new procedure, nor should they lead to an actual denial or severe restriction of such access.”

Austrian law

10 Paragraph 68(1) of the Allgemeine Verwaltungsverfahrensgesetz (General Administrative Law Act, BGBl. 51/1991; 'the GDPR') provides:

Requests from interested parties which, except in the cases referred to in §§ 69 and 71, seek to amend a decision against which there is no (any longer) appeal, shall, if the administrative authority considers that there are no grounds for taking a decision in accordance with paragraphs 2 to 4 of this article, on the grounds of res judicata."

11 § 69 GDPR reads:

'(1) An application by an interested party for the reopening of proceedings closed by decision shall be granted if that decision is no longer open to appeal and:

[...]

2. where new facts or evidence are presented which the interested party could not assert in the previous proceedings through no fault of their own and which, taken in isolation or in conjunction with the other results of the proceedings, would probably have resulted in a decision with a substantive other enacting; or

[...]

(2) The request for reopening shall be submitted within two weeks to the administrative authority that adopted the decision. The period begins to run from the time when the applicant becomes aware of the grounds for reopening; if, however, that time falls after the oral communication of the decision but before the copy of the decision is handed over, the period does not start to run until that handover. After a period of three years after the adoption of the decision, the request for reopening can no longer be submitted. It is up to the applicant to demonstrate the circumstances from which it appears that the statutory term has been observed.

[...]"

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

12 XY, Iraqi citizen and Shia Muslim, submitted an application for international protection to the Bundesamt on July 18, 2015. This request was rejected by decision of 29 January 2018. After XY's last legal appeal against that decision was dismissed by order of 25 September 2018 of the Verfassungsgerichtshof (Constitutional Court, Austria), that decision has become final.

13 XY has based both his application for international protection and the legal remedies he has used against the decision of 29 January 2018 rejecting that application on the fact that he feared for his life in the event of a return to Iraq because he refused to to fight for Shia militias and that country was still at war.

14 On December 4, 2018, XY filed a further application for international protection.

15 In support of that request, he argued that, during the proceedings relating to his previous request, he had failed to state the real reason for his application for international protection, namely his homosexuality. He expressed fear for his life in Iraq because of his sexual orientation, which is banned in his country and "by his religion." He has indicated that it was only after his arrival in Austria and thanks to the support of an association with which he had been in contact from June 2018 that he realized that he could reveal his homosexuality without danger to his person.

16 By decision of 28 January 2019, the Bundesamt dismissed XY's following request as inadmissible, on the ground that, pursuant to 68(1) of the GDPR, that request was intended to challenge a previous refusal decision which had the force of res judicata. It also ordered his return to Iraq, with an entry ban to Austrian territory for a maximum of two years.

17 XY appealed against that decision to the Bundesverwaltungsgericht (Federal Administrative Court, Austria). By judgment of 18 March 2019, that court allowed the action only in so far as it concerned the entry ban into Austrian territory and dismissed it for the rest.

18 The Bundesverwaltungsgericht considered that, since XY had failed to mention his homosexuality when examining the first application for international protection, that fact could not be taken into account because of the res judicata of the decision rejecting that first application.

19 XY brought an appeal in *Revision* before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), challenging the inadmissibility of his subsequent application. In his view, he relied on a new fact which should have enabled him to establish the admissibility of that request. It is not the fact that he is homosexual, but the fact that since his stay in Austria he has the opportunity to express that homosexuality.

20 The referring court observes that, since there are no specific provisions in Austrian law in this regard, the admissibility of a subsequent application for international protection must be assessed in the light of the general provisions governing the administrative procedure, in particular in order to ensure that the authority res judicata of a decision on a previous request is respected.

21 Pursuant to § 68(1) of the GDPR, requests for amendment of a decision against which there is no (any longer) appeal must, in principle, be rejected on the grounds of res judicata.

22 The referring court states in that regard that, according to the national case-law concerning repeated applications for international protection, only circumstances which become apparent only after the adoption of the final decision terminating the previous proceedings and which substantially alter the applicant's situation , justify the opening of a new procedure.

23 By contrast, as is apparent from Paragraph 69(1)(2) of the GDPR, any subsequent request based on a situation which arose before the adoption of this decision can only lead to the reopening of the previous procedure, and then only if the applicant has not pointed out this situation through no fault of his own in the previous procedure.

24 In that context, the referring court asks, first, whether the concept referred to in Article 40(2) and (3) of Directive 2013/32 is ‘new elements or findings raised or submitted by the applicant’. , must be understood as referring only to new elements or findings or to also cover elements or findings relied on by the applicant that existed before the definitive termination of a previous proceeding.

25 He clarifies that Austrian administrative law has opted for the first interpretation. Therefore, under Austrian law, an applicant for international protection can obtain, on the basis of elements or findings that existed before the termination of the procedure relating to the previous application, the reopening of the previous procedure only, provided that he is outside those elements or findings. could not assert his fault under that previous procedure.

26 The referring court considers that, in view of the impreciseness of the wording of Article 40 of Directive 2013/32, the second of the interpretations mentioned in paragraph 24 of the present judgment, on which XY relies in the present case, could be chosen. In that case, the referring court asks, in the second place, whether, in the absence of national provisions transposing Article 40 of Directive 2013/32 which specifically regulate the handling of subsequent applications, the reopening of the previous procedure is sufficient, inter alia, to implement to Article 40(3) of this Directive, which provides that if the preliminary examination referred to in Article 40(2) and (3)

27 In the third place, that court – which considers that new elements or findings not raised in the proceedings relating to a previous application and which already existed before the decision definitively terminated those proceedings can be relied upon in support of a further request, and furthermore that the reopening of that procedure does not ensure the correct implementation of Article 40 of Directive 2013/32 – that that

provision, if interpreted in such a way, would mean that § 68 of the GDPR should be disapplied.Paragraph 68 provides that respect for res judicata precludes an applicant for international protection from relying, in the context of a new application for protection, on 'new' elements or findings that already existed when the final decision was made rejecting his first application for protection.

28 However, not applying § 68 GDPR to any new application for international protection would allow applicants to invoke 'new' elements or findings in support of their application without any time limit. § 69 GDPR, which limits this possibility to the case where the applicant could not assert those elements or findings during the previous procedure through no fault of his own, applies only to the reopening of that procedure and not to such a new application for international protection.

29 In this context, the referring court questions whether that provision, despite the fact that Austrian law does not provide for specific provisions transposing Article 40(4) of Directive 2013/32, does not allow an applicant to subsequent request may limit the submission of new elements or findings to the case where the applicant could not assert such elements or findings through no fault of his own in the proceedings relating to the previous request. In this regard, the referring court's doubts also relate to the fact that an affirmative answer to this question would mean that an untransposed provision of a directive has direct effect to the detriment of an individual,

30 In the light of those considerations, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are the wording in Article 40(2) and (3) of [Directive 2013/32] 'new elements or findings [which] have arisen or have been submitted by the applicant' be understood as meaning that they also extend to circumstances that already existed before the final termination of the previous asylum procedure?

2) If the first question is answered in the affirmative: In the event that new facts or evidence arise which the asylum seeker could not rely on through no fault of his own in the previous procedure, is it sufficient that he is given the opportunity to request the reopening? of a previous procedure that has been definitively terminated?

3) If the first question is answered in the affirmative: In the event that the asylum seeker has not already asserted the newly invoked reasons through his actions in the previous asylum procedure, may the authority refuse to review the substance of a subsequent application on the basis of a national rule which establishes a generally applicable principle of administrative procedural law, even though the Member State has not properly transposed the provisions of Article 40(2) and (3) of [Directive 2013/32] by not adopting specific national rules and, consequently, has not expressly made use of the possibility provided for in Article 40(4) of [Directive 2013/32] to provide for an exception to the substantive review of the following request?"

Answer to the questions referred for a preliminary ruling

First question

31 By its first question, the referring court asks, in essence, whether Article 40(2) and (3) of Directive 2013/32 must be interpreted as meaning that the concept of 'new elements or findings raised or submitted by the applicant" within the meaning of that provision, refers only to elements or findings which arose after the definitive termination of the proceedings relating to a previous application for international protection, or whether that concept also includes elements or findings which existed before the termination of those proceedings but which the applicant has not relied on.

32 In order to answer this question, it should be recalled that, according to the settled case-law of the Court, the uniform application of EU law and the principle of equal treatment require that the wording of a provision of EU law which is not expressly used for the purpose of determining its meaning and scope

refers to the law of the Member States, as a rule be interpreted autonomously and uniformly throughout the European Union, taking into account not only the literal wording of the provision, but also its context and the purpose of the legislation in question [judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921/19 PPU, EU:C:2021:478, paragraph 28 and the case-law cited].

33 It should therefore be noted, first, that Article 40(2) of Directive 2013/32 provides that, in order to make a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d) of that directive a subsequent application is first subject to a preliminary examination in order to determine whether new elements or findings have arisen or have been submitted by the applicant in relation to his eligibility under Directive 2011/95 recognition as a beneficiary of international protection (judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921/19 PPU, EU:C:2021:478, paragraph 36].

34 Only if there are actually such new elements or findings in relation to the first application for international protection, will the examination of the admissibility of the next application be continued in accordance with Article 40(3) of that directive in order to determine whether it new elements and findings significantly increase the chances of the applicant being eligible for recognition as a beneficiary of international protection [judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921/19, EU: C:2021:478, point 37].

35 Although the wording of Article 40 of Directive 2013/32 does not clarify the concept of 'new elements or findings' in support of a subsequent request (judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C -921/19, EU:C:2021:478, paragraph 29], Article 40(2) and (3) provides, therefore, that those new elements or findings on which such a request may be based 'must be addressed come' or 'must have been presented by the applicant'.

36 Those provisions therefore make it clear that a subsequent application may be based on elements or findings which are new because they occurred after the adoption of a decision on the previous application, and on elements or findings which are new because they were first introduced by submitted to the applicant.

37 It is therefore apparent from that wording that an element or finding must be regarded as new within the meaning of Article 40(2) and (3) of Directive 2013/32 where the decision on the previous application has been adopted without that element or finding has been notified to the authority responsible for determining the applicant's status. This provision does not distinguish according to whether the elements or findings relied on in support of a subsequent application occurred before or after the adoption of that decision.

38 Second, that interpretation of Article 40(2) and (3) of Directive 2013/32 is confirmed by the context of that provision.

39 Indeed, as the Advocate General points out, in essence, in point 44 of his Opinion, Article 40(4) of Directive 2013/32 allows Member States to provide that the application be further examined only if the applicant concerned was unable through no fault of his own to assert the elements and findings referred to in Article 40(2) and (3) under the previous procedure. It follows that if the Member States do not make use of the option offered to them in Article 40(4), the examination of the application continues because the application is deemed admissible, even if the applicant merely submits in support of his subsequent application elements or findings that he could also have presented during the investigation of the previous request,

40 Third, that interpretation of Article 40(2) and (3) of Directive 2013/32 is also confirmed by the purpose of that provision.

41 It must be recalled that it is apparent from recital 36 of Directive 2013/32 that the purpose of the procedure for reviewing the admissibility of a subsequent application is to enable the Member States to

make any subsequent application without introducing new elements or findings. inadmissible in order to respect the principle of the res judicata of a previous decision (judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921/19, EU: C:2021:478, point 49].

42 It follows that the examination of whether a subsequent application is based on new elements or findings relating to the examination of the eligibility of the applicant for recognition as a beneficiary of international protection under Directive 2011/95 must be limited to the review of the existence of elements or findings in support of that request which were not examined in the context of the decision taken on the previous request and on which that decision – which has the power of res judicata – could not be based (judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921/19, EU:C:2021:478, paragraph 50].

43 Any other interpretation of Article 40(2) and (3) of Directive 2013/32, according to which the authority responsible for determining the applicant's status must declare any subsequent application inadmissible on the sole ground that it is based on elements or findings that the applicant could have submitted in support of his previous application would go beyond what is necessary to ensure respect for the principle of res judicata and would prejudice a proper and full investigation of the applicant's situation.

44 In the light of the foregoing, the answer to the first question is that Article 40(2) and (3) of Directive 2013/32 must be interpreted as meaning that the concept of 'new elements or findings which have arisen or by the applicant submitted" within the meaning of that provision, includes the elements or findings that arose after the definitive termination of the procedure related to the previous application for international protection, as well as the elements or findings that existed before the termination of the procedure but which the applicant has not invoked.

second question

45 By its second question, the referring court asks, in essence, whether Article 40(3) of Directive 2013/32 must be interpreted as meaning that a subsequent application for international protection may be examined in the context of the reopening of the procedure relating to had on the previous request, or whether a new procedure should be opened.

46 In answer to this question, it should be borne in mind that Article 40(2) and (3) of Directive 2013/32 provides for subsequent applications to be dealt with in two stages. The admissibility of these applications is examined in the context of the first, preliminary phase, while in the second phase those applications are examined on the merits [judgment of 10 June 2021, State Secretary for Justice and Security (New elements or findings), C-921 /19, EU:C:2021:478, paragraph 34].

47 Although Article 40(2) to (4) and Article 42(2) of Directive 2013/32 lay down certain procedural rules for the first stage of processing subsequent applications, namely their admissibility, that directive does not provide for in any specific procedural framework for dealing with those requests on the merits. Article 40(3) of that directive merely requires that the examination of the merits of subsequent admissible applications be continued in accordance with Chapter II of that directive, which lays down the fundamental principles and safeguards to be applied by the Member States in the procedure they must be respected.

48 In those circumstances, the Member States are free to adopt procedural provisions governing the handling of subsequent applications, provided that the conditions of admissibility laid down in Directive 2013/32, in particular those of Article 33(2)(d), read in conjunction with Article 40 thereof, and that the substance of the matter is treated in accordance with those fundamental principles and safeguards.

49 It is for the referring court to assess whether the provisions of Austrian law applicable to the reopening of proceedings concluded by a decision on a previous request ensure compliance with those conditions and are in conformity with those fundamental principles and safeguards.

50 The Court may, however, provide that court with elements of assessment on the basis of the information contained in the file submitted to the Court.

51 As regards, in particular, the conditions of admissibility, it is apparent from the file that the reopening of an administrative procedure under Austrian law is governed by § 69 GDPR and that this article imposes three conditions on the reopening of that procedure. First, the new facts or evidence relied on in support of the following request, taken in isolation or in conjunction with the other results of the proceedings, are such that they are likely to have led to a decision the operative part of which would have had a different content than the previous decision. Second, such facts and evidence could not be relied upon in the proceedings relating to the previous request through no fault of the data subject,

52 As the Advocate General points out in point 68 of his Opinion, the first of those conditions essentially corresponds to the second condition of Article 40(3) of Directive 2013/32, according to which the new elements or findings are likely to ' significantly increase the applicant's eligibility for recognition as beneficiaries of international protection under Directive 2011/95', while the second condition of § 69 GDPR is in line with the requirements laid down by Article 40(4) of that directive to the Member States possibility to provide that 'the application shall be processed further only if the applicant concerned was unable to assert the situations described in paragraphs 2 and 3 [of Article 40] under the previous procedure through no fault of his own'.

53 The first two conditions of Paragraph 69 of the GDPR therefore appear to satisfy the two conditions for the admissibility of subsequent applications, referred to in paragraph 52 of the present judgment.

54 With regard to the third condition of Paragraph 69 of the GDPR, concerning the time limits laid down by Austrian law for the submission of a subsequent application, it must be noted that Article 40 of Directive 2013/32 does not provide for such time limits and does not expressly authorize the Member States to set such deadlines.

55 It follows from the context of the abovementioned Article 40 that the fact that it does not allow the Member States to set time-limits for submitting a subsequent application means that that article prohibits the fixing of such time-limits.

56 First, it should be noted in that regard that Directive 2013/32 does not provide for any time-limit for the applicant to exercise the rights conferred by it in the administrative procedure relating to an application for international protection.

57 Moreover, when the legislature intended to grant the Member States the power to lay down time-limits within which an applicant must act, it did so expressly, as is apparent from Article 28 of that directive.

58 Second, as the Advocate General points out in points 75 to 78 of his Opinion, it is apparent from the comparison of Directive 2013/32 with its predecessor Directive 2005/85, and in particular from Article 42 of Directive 2013/ 32 and Article 34 of Directive 2005/85 on the procedural rules for subsequent applications for international protection and asylum respectively, that the EU legislature did not wish to make the admissibility of subsequent applications for international protection conditional on the observance of a time-limit for submitting new elements or findings. Indeed, the wording of Article 42(2) of Directive 2013/32 does not correspond to that of Article 34(2)(b) of Directive 2005/85, that provided the possibility for Member States to require an applicant to submit new information within a specified period of time after obtaining such information. The abolition of this possibility in Directive 2013/32 implies that the Member States can no longer set such a time limit.

59 That interpretation is, moreover, confirmed by Article 5 of Directive 2013/32, according to which Member States may depart from the normative content of that directive for the procedures for granting or withdrawing international protection only in so far as they introduce more favorable standards for the applicant. or enforce it, excluding any possibility of applying less favorable rules. This applies in particular to the setting of time-limits to the detriment of the applicant.

60 Article 42(2) of Directive 2013/32, read in the light of Article 33(2)(d) and Article 40(2) and (3) of that directive, therefore prohibits Member States from submitting a subsequent request subject to the observance of expiry periods.

61 In the light of the foregoing, the answer to the second question is that Article 40(3) of Directive 2013/32 must be interpreted as meaning that the examination of the substance of a subsequent application for international protection may take place in the context of the reopening of the procedure relating to the first request, provided that the rules applicable to that reopening are in accordance with Chapter II of Directive 2013/32 and the submission of that request is not made subject to the observance of time-limits.

Third question

62 By its third question, the referring court asks, in essence, whether Article 40(4) of Directive 2013/32 must be interpreted as meaning that a Member State which has not adopted specific acts transposing that provision is unable to carry out a substantive review of a subsequent request may be refused under the generally applicable rules of national administrative law, where the new elements or findings relied on in support of that request already existed during the proceedings relating to the previous request and were not, through the applicant's own fault, submitted under that procedure.

63 The referring court asks this question in the event that, following the examination to be carried out by it in accordance with paragraph 49 of this judgment, it considers that the provisions of Austrian law applicable to the reopening of the procedure did not guarantee compliance with the conditions of admissibility on the previous application, for the purpose of examining a subsequent application, or did not comply with the fundamental principles and safeguards laid down in Chapter II of Directive 2013/32.

64 In such a case, XY's following request must be examined in the context of a new administrative procedure governed, in the absence of any measure transposing Article 40(4) of Directive 2013/32 into Austrian law. by § 68 GDPR. Unlike § 69 GDPR, which applies to the reopening of a previous administrative procedure, § 68 GDPR does not make the possibility of initiating a new procedure subject to the condition that the applicant in the procedure related to the previous request, was unable through no fault of his own to assert the elements and findings which he puts forward in support of his next request and which already existed during the previous proceedings.

65 In order to answer the third question, as the Advocate General points out in essence in point 93 of his Opinion, it should be noted that Article 40(4) of Directive 2013/32 is an optional provision allowing Member States to provide that the application be further examined only if the applicant concerned could not rely on the situations referred to in paragraphs 2 and 3 of Article 40 under the previous procedure through no fault of his own. Since Article 40(4) can only be effective if the Member States adopt specific implementing provisions, that provision is therefore not unconditional and therefore has no direct effect.

66 In any event, according to settled case-law, a provision of a directive cannot in itself create obligations for an individual and cannot therefore be relied upon as such before a national court (judgments of 26 February 1986, Marshall, 152/84, EU: C:1986:84, paragraph 48, and of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraph 65].

67 That would be the case if Article 40(4) of Directive 2013/32 were to be interpreted as meaning that, even in the absence of a national transposing measure, a subsequent application would be admissible only if, in the proceedings relating to the previous request, was unable, through no fault of his own, to assert the new elements or findings which he put forward in support of the next request and which already existed during that previous proceeding.

68 In the light of the foregoing, the answer to the third question is that Article 40(4) of Directive 2013/32 must be interpreted as meaning that a Member State which has not adopted specific acts transposing that provision may review the substance of a subsequent request. may not refuse under the generally applicable rules of national administrative law, where the new elements or findings relied on in support of that request

already existed during the proceedings relating to the previous request and were not, through the applicant's own fault, submitted under that procedure.

Cost

69 As far as the parties to the main proceedings are concerned, the procedure must be regarded as a single step in the proceedings, so that the costs of the proceedings are for the referring court to decide. The costs incurred by others, which have submitted observations to the Court, are not recoverable.

The Court (Third Chamber) hereby rules:

(1) Article 40(2) and (3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as meaning that the concept of 'new elements or findings raised or submitted by the applicant" within the meaning of that provision, includes the elements or findings that arose after the definitive termination of the proceedings relating to the previous application for international protection, and the elements or findings that existed before the termination of the proceedings but which the applicant has not invoked.

(2) Article 40(3) of Directive 2013/32 must be interpreted as meaning that the examination of the substance of a subsequent application for international protection may take place in the context of the reopening of the procedure relating to the first application, provided that the rules applicable to this reopening are in accordance with Chapter II of Directive 2013/32 and the submission of that request is not made subject to observance of time limits.

(3) Article 40(4) of Directive 2013/32 must be interpreted as meaning that a Member State which has not adopted specific acts transposing that provision may not refuse to review the substance of a subsequent application under the generally applicable rules of national administrative law, where the new elements or findings relied on in support of that request already existed during the proceedings relating to the previous request and were not submitted in those proceedings through the applicant's own fault.

signatures

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* Language of the case: German.