JUDGMENT OF THE COURT (Third Chamber)

9 September 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 application – New elements or findings – Concept – Circumstances which already existed before a procedure relating to a previous application for international protection was definitively concluded – Principle of res judicata – Fault on the part 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

other party:

Bundesamt für Fremdenwesen und Asyl,

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,

having regard to the written procedure,

after considering the observations submitted on behalf 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,

gives 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).

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

Legal context

European Union law

Directive 2005/85/EC

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 by Directive 2013/32 with effect from 21 July 2015. Article 34(2) of Directive 2005/85 provided:

'Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:

…

(b) require submission of the new information by the applicant concerned within a time limit after he/she obtained such information;

…'

Directive 2013/32

4 Recitals 3, 18 and 36 of Directive 2013/32 state:

'(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 …, thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution.

…

(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(36) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.'

5 Article 5 of that directive provides:

'Member States may introduce or retain more favourable standards on procedures for granting and withdrawing international protection, in so far as those standards are compatible with this Directive.'

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

‘1. When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line 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)], to reject the application.

Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for international protection in particular when it is ascertained that:

(a) he or she has failed to respond to requests to provide information essential to his or her application in terms of Article 4 of [Directive 2011/95] or has not appeared for a personal interview as provided for in Articles 14 to 17 of this Directive, unless the applicant demonstrates within a reasonable time that his or her failure was due to circumstances beyond his or her control;

(b) he or she has absconded or left without authorisation the place where he or she lived or was held, without contacting the competent authority within a reasonable time, or he or she has not within a reasonable time complied with reporting duties or other obligations to communicate, unless the applicant demonstrates that this was due to circumstances beyond his or her control.

For the purposes of implementing these provisions, Member States may lay down time limits or guidelines.

2. Member States shall ensure that an applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his or her case be reopened or to make a new application which shall not be subject to the procedure referred to in Articles 40 and 41.

Member States may provide for a time limit of at least nine months after which the applicant’s case can no longer be reopened or 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 reopened only once.

Member States shall ensure that such a person is not removed contrary to the principle of *non-refoulement*.

Member States may allow the determining authority to resume the examination at the stage where it was discontinued.’

7 Under Article 33(2) of that directive:

‘Member States may consider an application for international protection as inadmissible only if:

…

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [Directive 2011/95] have arisen or have been presented by the applicant; or

…’

8 Article 40(1) to (5) of Directive 2013/32, entitled ‘Subsequent application’, provides:

‘1. Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the

examination of the previous application or in the framework of the examination of the decision under review or appeal, in so far as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [Directive 2011/95].

3. If the preliminary examination referred to in paragraph 2 concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of [Directive 2011/95], the application shall be further examined in conformity with Chapter II. Member States may also provide for other reasons for a subsequent application to be further examined.

4. Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.

5. When a subsequent application is not further examined pursuant to this Article, it shall be considered inadmissible, in accordance with Article 33(2)(d).'

9 Under Article 42(2) of Directive 2013/32:

'Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6).

Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.'

Austrian law

10 Paragraph 68(1) of the Allgemeines Verwaltungsverfahrensgesetz (General Law on administrative procedure, BGBl. 51/1991; 'the AVG') provides:

'Applications by interested parties who, except in the cases referred to in Paragraphs 69 and 71, seek the modification of a decision which is not, or is no longer, subject to appeal shall be rejected on the ground of *res judicata*, unless the administrative authority has grounds for making an order in accordance with subparagraphs 2 to 4 of this Paragraph.'

11 Paragraph 69 of the AVG provides:

'(1) An application by an interested party for the reopening of a procedure which has been concluded by means of a decision shall be granted where that decision cannot, or can no longer, be appealed against, and:

…

2. where new facts or evidence emerge which, through no fault of the person concerned, could not have been adduced in the previous procedure and which, considered in isolation or in conjunction with the other results of the proceedings, would likely have resulted in a decision with a different operative part; or

…

(2) An application for reopening must be submitted within two weeks to the administrative authority which took the decision. The time limit shall start to run from the moment when the applicant became aware of the grounds for reopening; however, where the applicant became aware of those grounds after oral communication of the decision but before service of the written version of the decision, the time limit shall start to run only from the time of such service. After a period of three years from the adoption of the decision, an application for reopening may no longer be submitted. It is for the applicant to provide evidence of circumstances demonstrating compliance with the statutory time limit.

…'

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

12 On 18 July 2015, XY, an Iraqi national of the Shiite Muslim faith, lodged an application for international protection with the Bundesamt, which was rejected by decision of 29 January 2018. Following the dismissal, by order of 25 September 2018 of the Verfassungsgerichtshof (Constitutional Court, Austria), of the final appeal brought by XY against that decision, the decision became final.

13 XY based both his application for international protection and his appeals against the decision of 29 January 2018 rejecting that application on the fact that he feared for his life if he returned to Iraq on the ground that he had refused to fight for Shiite militias and his country was still at war.

14 On 4 December 2018, XY made a subsequent application for international protection.

15 In support of that application, he submitted that, in the proceedings concerning his previous application, he had not provided the real reason for his application for international protection, that reason being his homosexuality. He claimed that he feared for his life in Iraq because of his sexual orientation, which is prohibited by his country and 'by his religion'. He stated that it was only after his arrival in Austria and thanks to support from an association with which he has been in contact since June 2018 that he became aware that he would not be personally exposed by revealing his homosexuality.

16 By decision of 28 January 2019, the Bundesamt rejected XY's subsequent application as inadmissible on the ground that, in accordance with Paragraph 68(1) of the AVG, that application sought to challenge a previous refusal decision which had the force of *res judicata*. It also ordered his return to Iraq and prohibited him from entering Austrian territory for a period of two years.

17 XY lodged an appeal against that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria). By judgment of 18 March 2019, that court upheld the appeal only in so far as it concerned the prohibition on entering Austrian territory and dismissed it as to the remainder.

18 According to the Bundesverwaltungsgericht (Federal Administrative Court), since XY failed to disclose his homosexuality during the examination of the first application for international protection, the force of *res judicata* accorded to the decision rejecting that first application precludes that factual element from being taken into account.

19 XY has brought an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) in which he challenges the inadmissibility of his subsequent application. In his view, he had relied on a new finding which should have made it possible to establish the admissibility of that application and which consists not in the fact that he is homosexual, but that, since he has been in Austria, he is now able to express that homosexuality.

20 The referring court notes that, since Austrian law does not contain any special provisions in that regard, the admissibility of a subsequent application for international protection must be assessed in the light of general provisions governing administrative procedure, inter alia in order to ensure compliance with the *res judicata* effect of a decision on a previous application.

21 Under Paragraph 68(1) of the AVG, applications seeking to amend a decision which is not, or is no longer, subject to appeal must, in principle, be rejected on the ground of *res judicata*.

22 The referring court states, in that regard, that, in the case of repeated applications for international protection, only circumstances which have arisen after the adoption of the final decision concluding the previous procedure and which change the applicant's situation significantly may, in accordance with the national case-law, justify a new procedure being initiated.

23 However, as is clear from point 2 of Paragraph 69(1) of the AVG, any subsequent application based on a situation which arose before the adoption of that decision may lead only to the reopening of the previous procedure and then only if the applicant's failure to rely on that situation during the previous procedure was through no fault of his or her own.

24 It is in that context that the referring court asks, in the first place, whether the concept of new elements or findings that have arisen or have been presented by the applicant, contained in Article 40(2) and (3) of Directive 2013/32, must be understood in the sense that it refers only to elements or findings which have newly arisen or whether it also includes the assertion by an applicant of elements or findings which already existed prior to the definitive conclusion of an earlier procedure.

25 It states that Austrian administrative law adopts the first of those interpretations. Consequently, an applicant for international protection could, on the basis of elements or findings that existed before the procedure concerning the previous application was concluded, have the previous procedure reopened, under Austrian law, only on the condition that the fact that those elements or findings were not relied on during that previous procedure was through no fault of the applicant.

26 The referring court considers that, since the wording of Article 40 of Directive 2013/32 is vague, the second interpretation mentioned in paragraph 24 of this judgment, on which XY relies in this case, could be accepted. In that situation, the referring court asks, in the second place, whether, in the absence of national provisions transposing Article 40 of Directive 2013/32 and specifically regulating the processing of subsequent applications, the reopening of the previous procedure is sufficient to implement, in particular, Article 40(3) of that directive, which provides that, if the preliminary examination referred to in Article 40(2) and (3) of that directive concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95, the subsequent application must be further examined in conformity with Chapter II of Directive 2013/32.

27 In the third place, that court – which presupposes, first, that new elements or findings, which were not relied on during the procedure concerning a previous application and which already existed before the adoption of the final decision concluding that procedure, may be relied on in support of a subsequent application and, secondly, that the reopening of that procedure does not ensure the correct transposition of Article 40 of Directive 2013/32 – states that, as interpreted, that provision would require Paragraph 68 of the AVG to be disapplied. Paragraph 68 of the AVG provides that compliance with the principle of *res judicata* precludes an applicant for international protection, in a new application for protection, from relying on 'new' elements or findings which already existed at the time when the final decision rejecting his or her first application for protection was adopted.

28 However, the inapplicability of Paragraph 68 of the AVG to any new application for international protection would give applicants the option of relying on 'new' elements or findings in support of their application without any time limit. Paragraph 69 of the AVG, which limits that option solely to cases in which it is not the applicant's fault that those elements or findings were not raised during the previous procedure, applies only to the reopening of that procedure and not to a new application for international protection.

29 In that context, the referring court is unsure whether, despite the fact that Austrian law does not lay down specific provisions transposing Article 40(4) of Directive 2013/32, that provision may limit an applicant's ability to rely on new elements or findings in support of a subsequent application solely to cases in which the failure to rely on such elements or findings during the procedure concerning the previous application was through no fault of the applicant. In that regard, the referring court's doubts are also linked to the fact that, if that question is answered in the affirmative, this would mean that an

untransposed provision of a directive has direct effect to the detriment of an individual, such direct effect, however, being excluded by national case-law and that of the Court.

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

‘(1) Do the phrases “new elements or findings” that “have arisen or have been presented by the applicant” in Article 40(2) and 40(3) of [Directive 2013/32] also cover circumstances that already existed before the previous asylum procedure was definitively concluded? …

(2) [If the answer to Question 1 is in the affirmative,] in a case in which new facts or evidence come to light which could not have been relied on in the earlier procedure through no fault of the foreign national, is it sufficient that an asylum applicant is able to request the re-opening of a previous procedure which has been definitively concluded?

(3) [If the answer to Question 1 is in the affirmative,] if the applicant is at fault for not having relied in the previous asylum procedure upon the newly invoked grounds, is the authority allowed to deny substantive examination of a subsequent application on the basis of a national standard laying down a principle which is generally applicable in the administrative procedure, even though, in the absence of the adoption of special standards, the Member State has not correctly transposed Article 40(2) and 40(3) of the [Directive 2013/32] and, as a consequence, has also not made express use of the possibility granted by Article 40(4) of [that directive] to provide for an exception from substantive examination of the subsequent application?’

Consideration of the questions referred

The first question

31 By its first question, the national court wishes to ascertain, 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’ which ‘have arisen or have been presented by the applicant’, within the meaning of that provision, includes only elements or findings which arose after the procedure relating to a previous application for international protection was definitively concluded or whether that concept also includes elements or findings which already existed before that procedure was concluded, but which were not relied on by the applicant.

32 In order to answer that question, it must be borne in mind that, in accordance with the Court’s settled case-law, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard not only to its wording but also to the context of the provision and the objective pursued by the legislation in question (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 28 and the case-law cited).

33 Thus, it should be noted, in the first place, that Article 40(2) of Directive 2013/32 provides that, for the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d) of that directive, a subsequent application will be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue 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 36).

34 It is only if such new elements or findings exist as compared to the first application for international protection that the examination of the admissibility of the subsequent application continues, pursuant to Article 40(3) of that directive, in order to ascertain whether those new elements and findings add significantly to the likelihood of the applicant qualifying for that status (judgment of 10 June 2021,

Staatssecretaris van Justitie en Veiligheid (New elements or findings), C-921/19, EU:C:2021:478, paragraph 37).

35 Therefore, although the wording of Article 40 of Directive 2013/32 does not define the concept of 'new elements or findings' capable of substantiating a subsequent application (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 29), Article 40(2) and (3) provides, however, that those new elements or findings on which such an application may be based must have 'arisen' or have 'been presented by the applicant'.

36 Those provisions therefore clearly state that a subsequent application may be based both on elements and findings which are new in that they arose after a decision on the previous application was adopted, and on elements and findings which are new in that they have been presented for the first time by the applicant.

37 Thus, it is apparent from such 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 having been brought to the attention of the authority responsible for determining the applicant's status. That provision makes no distinction as to whether the elements or findings relied on in support of a subsequent application arose before or after that decision was adopted.

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

39 As the Advocate General essentially points out in point 44 of his Opinion, Article 40(4) of Directive 2013/32 allows Member States to provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the new elements or findings referred to in Article 40(2) and (3) in the previous procedure. It follows that, if Member States do not avail themselves of the option conferred on them by Article 40(4), the examination of the application is to continue, it being regarded as admissible, even if the applicant has presented in support of the subsequent application only elements or findings which he or she could have presented during the examination of the previous application and which, necessarily, already existed before the previous procedure was definitively concluded.

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

41 It should be recalled that the procedure for verifying the admissibility of a subsequent application seeks, as is apparent from recital 36 of Directive 2013/32, to allow Member States to dismiss as inadmissible any subsequent application made in the absence of any new element or finding in order to comply with the principle of *res judicata* which applies to an earlier decision (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 49).

42 It follows that the examination of whether a subsequent application is based on new elements or findings which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 should be confined to ascertaining whether, in support of that application, there are elements or findings which were not examined in the context of the decision taken on the previous application and on which that decision, having the force of *res judicata*, could not be based (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (New elements or findings)*, C-921/19, EU:C:2021:478, paragraph 50).

43 Any different interpretation of Article 40(2) and (3) of Directive 2013/32 that implies that the authority responsible for determining the applicant's status must regard as inadmissible any subsequent application on the sole ground that it is based on elements or findings which the applicant could have presented in support of his or her previous application would go beyond what is necessary to ensure compliance with the principle of *res judicata* and would undermine the adequate and complete examination of the applicant's situation.

44 In the light of the foregoing considerations, 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 have been presented by the applicant', within the meaning of that provision, includes elements or findings which arose after the procedure relating to a previous application for international protection was definitively concluded and elements or findings which already existed before the procedure was concluded, but which were not relied on by the applicant.

The second question

45 By its second question, the referring court seeks to ascertain, in essence, whether Article 40(3) of Directive 2013/32 must be interpreted as meaning that the examination of a subsequent application for international protection may be conducted in the context of the reopening of the procedure concerning the previous application or whether a new procedure must be initiated.

46 In order to answer that question, it should be recalled that Article 40(2) and (3) of Directive 2013/32 provides for the processing of subsequent applications in two stages. The purpose of the first stage, which is preliminary in nature, is to verify the admissibility of those applications, whereas the second stage relates to the examination of the substance of those applications (judgment of 10 June 2021, *Staatssecretaris van Justitie en Veiligheid (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 concerning the first stage of the processing of subsequent applications relating to the admissibility of such applications, that directive does not lay down any specific procedural framework with regard to the substantive processing of those applications. Article 40(3) of that directive merely requires that the substance of subsequent admissible applications be further examined in conformity with Chapter II of that directive, which lays down basic principles and guarantees which, within the procedural framework which they establish, the Member States must observe.

48 In those circumstances, the Member States remain free to lay down procedural provisions governing the processing of subsequent applications, provided that, first, the conditions of admissibility laid down in Directive 2013/32, in particular those referred to in Article 33(2)(d), read in conjunction with Article 40, are complied with and, secondly, the substantive processing is carried out in accordance with those basic principles and guarantees.

49 It is for the referring court to assess whether the provisions of Austrian law applicable to the reopening of a procedure that has been concluded by a decision on a previous application ensure compliance with those conditions and are in accordance with those basic principles and guarantees.

50 Nevertheless, the Court may provide that court with evidence for that assessment on the basis of the information contained in the file submitted to it.

51 In that regard, with respect to conditions of admissibility in particular, it is apparent from the documents before the Court that the reopening of an administrative procedure under Austrian law is governed by Paragraph 69 of the AVG and that that paragraph requires that three conditions be satisfied in order for such a procedure to be reopened. Thus, first, the new facts or evidence submitted in support of the subsequent application, considered in isolation or in conjunction with the other results of the proceedings, are such that they would likely have resulted in a decision with a different operative part from that of the earlier decision, secondly, those facts and evidence, through no fault of the person concerned, could not have been adduced in the proceedings concerning the previous application and, thirdly, the subsequent application is submitted within two weeks from the moment, essentially, when the applicant became aware of the grounds for reopening and, in any event, within three years of the adoption of the decision on the previous application.

52 As the Advocate General notes in point 68 of his Opinion, the first of those conditions corresponds, in essence, to the second condition laid down in Article 40(3) of Directive 2013/32, in accordance with which the new elements or findings 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95', whereas the second condition laid down in Paragraph 69 of the AVG corresponds to the possibility offered to Member States by

Article 40(4) of that directive to 'provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3' of Article 40.

53 The first two conditions laid down by Paragraph 69 of the AVG therefore appear to meet the two conditions for the admissibility of subsequent applications mentioned in paragraph 52 of this judgment.

54 As regards the third condition laid down by Paragraph 69 of the AVG, concerning the time limits for lodging a subsequent application under Austrian law, it must be noted that Article 40 of Directive 2013/32 does not provide for such time limits, nor does it expressly authorise the Member States to do so.

55 It follows from the context of Article 40 of Directive 2013/32 that the fact that it does not authorise Member States to set time limits for the lodging of a subsequent application implies that it prohibits the setting of such time limits.

56 In that regard, it should be noted, first, that Directive 2013/32 does not lay down any time limit for the exercise by the applicant of the rights which it confers on him or her in the administrative procedure concerning an application for international protection.

57 Moreover, where the legislature intended to confer on Member States the power to set time limits within which the applicant is required to act, it did so expressly, as is clear from Article 28 of that directive.

58 Secondly, as the Advocate General notes in points 75 to 78 of his Opinion, it follows from the comparison of Directive 2013/32 with Directive 2005/85, which it succeeded, and in particular Article 42 of Directive 2013/32 and Article 34 of Directive 2005/85, concerning the procedural rules which apply to 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 subject to compliance with a time limit for the presentation of new elements or findings. The wording of Article 42(2) of Directive 2013/32 does not correspond to that of Article 34(2)(b) of Directive 2005/85, which gave Member States the option to require submission of the new information by the applicant concerned within a time limit after he or she obtained such information. The removal of that option in Directive 2013/32 means that the Member States may no longer lay down such a time limit.

59 That interpretation is also confirmed by Article 5 of Directive 2013/32, under which Member States may derogate from the normative content of that directive as regards the procedures for granting and withdrawing international protection only in so far as they introduce or retain more favourable standards for the applicant, excluding any possibility of applying less favourable rules. That is the case in particular with regard 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 making the lodging of a subsequent application subject to compliance with time limits.

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 substantive examination of a subsequent application for international protection may be conducted in the context of the reopening of the procedure concerning the first application, provided that the rules applying to that reopening comply with Chapter II of Directive 2013/32 and that the lodging of that application is not subject to compliance with time limits.

The 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 permitting a Member State which has not adopted specific measures transposing that provision to refuse, in accordance with the general rules of national administrative procedure, to examine the substance of a subsequent application, where the new elements or findings relied on in

support of that application existed at the time of the procedure concerning the previous application and were not presented in the context of that procedure through the fault of the applicant.

63 It must be noted that the referring court asks that question in the event that it were to consider, following the examination which it is required to undertake in accordance with paragraph 49 of this judgment, that the provisions of Austrian law applicable to the reopening of the procedure concerning the previous application in order to examine a subsequent application do not ensure compliance with the conditions of admissibility of that application or are not in conformity with the basic principles and guarantees provided for in Chapter II of Directive 2013/32.

64 In such a case, XY's subsequent application would have to be examined in a new administrative procedure which, in the absence of any measure transposing Article 40(4) of Directive 2013/32 into Austrian law, would be governed by Paragraph 68 of the AVG. Unlike Paragraph 69 of the AVG, which applies to the reopening of a previous administrative procedure, Paragraph 68 of the AVG does not make the possibility of initiating a new procedure subject to the condition that the applicant was not at fault in failing to rely on elements and findings in the procedure concerning the previous application which he or she puts forward in support of the subsequent application, where they already existed at the time of that procedure.

65 In order to answer that third question, it should be noted, as has essentially been highlighted by the Advocate General in point 93 of his Opinion, that Article 40(4) of Directive 2013/32 is an optional provision in the sense that it allows Member States to provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in Article 40(2) and (3) in the previous procedure. Consequently, since the effects of Article 40(4) of Directive 2013/32 depend on the adoption, by the Member States, of specific implementing provisions, that provision is not unconditional and, therefore, does not have direct effect.

66 In any event, according to settled case-law, a provision of a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual 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 any national implementing measure, the admissibility of a subsequent application was subject to the condition that the applicant had failed to submit, in the procedure concerning the previous application, the new elements or findings presented in support of the subsequent application which already existed at the time of that procedure and that that omission was through no fault of the applicant.

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 not permitting a Member State which has not adopted specific measures transposing that provision to refuse, in accordance with the general rules of national administrative procedure, to examine the substance of a subsequent application, where the new elements or findings relied on in support of that application existed at the time of the procedure concerning the previous application and were not presented in the context of that procedure through the fault of the applicant.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, 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'**

which 'have arisen or have been presented by the applicant', within the meaning of that provision, includes elements or findings which arose after the procedure relating to a previous application for international protection was definitively concluded and elements or findings which already existed before the procedure was concluded, but which were not relied on by the applicant.

2. **Article 40(3) of Directive 2013/32 must be interpreted as meaning that the substantive examination of a subsequent application for international protection may be conducted in the context of the reopening of the procedure concerning the first application, provided that the rules applying to that reopening comply with Chapter II of Directive 2013/32 and that the lodging of that application is not subject to compliance with time limits.**

3. **Article 40(4) of Directive 2013/32 must be interpreted as not permitting a Member State which has not adopted specific measures transposing that provision to refuse, in accordance with the general rules of national administrative procedure, to examine the substance of a subsequent application, where the new elements or findings relied on in support of that application existed at the time of the procedure concerning the previous application and were not presented in the context of that procedure through the fault of the applicant.**

[Signatures]

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* Language of the case: German.