ECLI:EU:C:2023:902

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

23 November 2023 (*)

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for grantingrefugee status or subsidiaryprotection status – Father of minor refugeechildrenborn in Belgium – Fathernot a ‘family member’ within the meaning of Article 2(j) of thatdirective – Application for the grant of international protection, as a derivedright, submitted by thatfather – Rejection – No obligation on Member States to recognise the right of the personconcerned to obtainthatprotectionif he doesnotindividuallyqualify for it – Article 23(2) of thatdirective – Inapplicability)

In Case C-374/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (Council of State, Belgium), made by decision of 18 May 2022, receivedat the Court on 8 June 2022, in the proceedings

**XXX**

v

**Commissairegénéralauxréfugiés et auxapatrides,**

THE COURT (Second Chamber),

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

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

havingregard to the written procedure,

after considering the observationssubmitted on behalf of:

– XXX, by S. Janssens, avocate,

– the Belgian Government, by M. Jacobs, C. Pochet and M. Van Regemorter, actingas Agents,

– the European Commission, by A. Azéma and J. Hottiaux, actingas Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 April 2023,

gives the following

**Judgment**

1 Thisrequest for a preliminary ruling concerns the interpretation of Article 2(j) and Article 23 of Directive 2011/95/EU of the EuropeanParliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or statelesspersonsasbeneficiaries of international protection, for a uniform status for refugees or for personseligible for subsidiaryprotection, and for the content of the protectiongranted (OJ 2011 L 337, p. 9).

2 The requesthasbeen made in proceedingsbetween XXX, a Guinean national, residing in Belgium, and the Commissairegénéralauxréfugiés et auxapatrides (Commissioner-General for Refugees and StatelessPersons, Belgium), concerning the latter'sdecision to reject the application for international protectionlodged by XXX in thatMember State.

**Legal context**

3 Recitals 18, 19 and 38 of Directive 2011/95 state:

'(18) The "best interests of the child" should be a primaryconsideration of Member States whenimplementingthis Directive, in line with the 1989 United Nations Convention on the Rights of the Child [, adopted by the General Assembly of the United Nations on 20 November 1989 (*United Nations Treaty Series*, Vol. 1577, p. 3), and enteredinto force on 2 September 1990]. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor'swell-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

(19) Itisnecessary to broaden the notion of family members, takinginto account the differentparticularcircumstances of dependency and the special attention to be paid to the best interests of the child.

…

(38) Whendeciding on entitlements to the benefits included in this Directive, Member States should take due account of the best interests of the child, aswellas of the particularcircumstances of the dependency on the beneficiary of international protection of close relativeswho are alreadypresent in the Member State and who are not family members of thatbeneficiary. In exceptionalcircumstances, where the close relative of the beneficiary of international protectionis a married minor butnotaccompanied by his or herspouse, the best interests of the minor may be seen to lie with his or heroriginal family.'

4 Article 2 of thatdirective, headed ‘Definitions’, provides:

‘For the purposes of this Directive the following definitionsshallapply:

…

(j) “family members” means, in so far as the family alreadyexisted in the country of origin, the following members of the family of the beneficiary of international protectionwho are present in the sameMember State in relation to the application for international protection:

– the spouse of the beneficiary of international protection or his or herunmarried partner in a stablerelationship, where the law or practice of the Member State concernedtreatsunmarriedcouples in a way comparable to marriedcouples under itslawrelating to third-country nationals,

– the minor children of the couplesreferred to in the first indent or of the beneficiary of international protection, on conditionthatthey are unmarried and regardless of whethertheywereborn in or out of wedlock or adoptedasdefined under national law,

– the father, mother or anotheradultresponsible for the beneficiary of international protectionwhether by law or by the practice of the Member State concerned, whenthatbeneficiaryis a minor and unmarried’.

5 Article 3 of thatdirective, entitled ‘More favourable standards’, provides:

‘Member States may introduce or retain more favourable standards for determiningwhoqualifiesas a refugee or as a personeligible for subsidiaryprotection, and for determining the content of international protection, in so far asthose standards are compatible with this Directive.’

6 Article 23 of Directive 2011/95, entitled ‘Maintaining family unity’, provides:

‘1. Member States shallensurethat family unity can be maintained.

2. Member States shallensurethat family members of the beneficiary of international protectionwho do notindividuallyqualify for suchprotection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far asiscompatible with the personal legal status of the family member.

3. Paragraphs 1 and 2 are notapplicablewhere the family memberis or would be excluded from international protectionpursuant to Chapters III and V.

4. Notwithstandingparagraphs 1 and 2, Member States mayrefuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.

5. Member States may decide thatthisArticlealsoapplies to other close relativeswholivedtogetheras part of the family at the time of leaving the country of origin, and whowerewholly or mainlydependent on the beneficiary of international protectionatthat time.’

7 The benefits listed in Articles 24 to 35 of Directive 2011/95 relate to the right of residence, travel documents, access to employment, access to education and procedures for recognition of qualifications, social welfare, healthcare, unaccompaniedminors, access to accommodation,

freedom of movementwithin the Member State, access to integration facilities and, lastly, repatriation.

**The dispute in the mainproceedings and the questionsreferred for a preliminary ruling**

8 XXX, a Guinean national, arrived in Belgium in 2007. He lodged a first application for international protection, whichwasrejected, and then made twofurtherapplications, in 2010 and 2011, which the competentBelgian authority refused to consider.

9 On 29 January 2019, he lodged a fourthapplication for international protection. In support of thatapplication, he statedthat he was the father of twochildren, born in Belgium in 2016 and 2018 and whohadbeengrantedrefugee status there, ashadtheirmother.

10 Sincethatfourthapplicationwasrejectedasinadmissible, XXX brought an action before the Conseilducontentieuxdesétrangers (Council for asylum and immigrationproceedings, Belgium), whichdismissedit by decision of 17 April 2020.

11 The referring court, hearing an appeal on a point of lawagainstthatdecision, raises the questionwhether, asclaimed by XXX, Article 23 of Directive 2011/95 applies to his situation, sinceitis clear from Article 2(j) of thatdirectivethat the family members of the beneficiary of international protection, who are covered by thatdirective, are such ‘in so far as the family alreadyexisted in the country of origin’ and it follows from the explanationsprovided by XXX thathis family didnotexist in the country of origin, butdid so in Belgium. Thatis the subjectmatter of the first and second questionsreferred for a preliminary ruling.

12 In the event thatArticle 23 of Directive 2011/95 isapplicable, the referring court notes that the applicant in the mainproceedingssubmitsthatsinceArticle 23 of thatdirectivehasnotbeenvalidlytransposedintoBelgianlaw, thatarticlewouldhavedirecteffect, meaningthat the Kingdom of Belgiumis under an obligation to granthim international protection. Although the referring court hasdoubtsconcerning the merits of thatclaim, sinceArticle 23 refersonly to the grant of the benefits referred to in Articles 24 to 35 of thatdirective and thatgrantis the maximum likely to result from anydirecteffect of Article 23, that court considersthat, asitiscalledupon to rule at last instance in the present case, itisrequired to make a reference to the Court in thatregard. Thoseconsiderations lead the referring court to refer the third and fourthquestions for a preliminary ruling. The referring court states, moreover, thatitconsidersit appropriate to refer to the Court a fifthquestion, the wording of whichwassuggested to it by the applicant in the mainproceedings.

13 Although the referring court againhasdoubtsconcerning the merits of the applicant’sargument – according to which the best interests of the child and respect for family life necessitate that, under Article 23 of thatdirective, international protection be granted to the father of childrenwho are recognisedasrefugees in Belgium and whohavebeenbornthere, evenif he doesnotqualify for suchprotection – since the stakes in questionappear to be capable of beingmet by the grant of a residence permitenabling the father to live lawfully in Belgium, the referring court alsoconsidersitselfbound to make a reference to the Court in thatregard, giventhatitis ruling at last instance. In thosecircumstances, the referring court decided to refer the sixthquestion to the Court of Justice for a preliminary ruling, the wording of whichhadalsobeensuggested to it by the applicant in the mainproceedings.

14 In thosecircumstances the Conseil d’État (Council of State, Belgium) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 2(j) and Article 23 of [Directive 2011/95] to be interpretedasapplying to the father of twochildrenwhowereborn in Belgium and whohavebeenrecognisedasrefugeesthere, whereasArticle 2(j) of Directive 2011/95 specifiesthat the family members of the beneficiary of international protectionwho are covered by [thatdirective] are such “in so far as the family alreadyexisted in the country of origin”?

(2) Does the factrelied on by the [applicant in the mainproceedings] at the hearing, thathischildren are dependent on him and that, according to [him], the best interests of hischildrenrequirethat international protection be granted to him, mean, in the light of recitals 18, 19 and 38 of [Directive 2011/95], that the concept of family members of the beneficiary of international protection, covered by [thatdirective], isextended to a family thatdidnotexist in the country of origin?

(3) If the first twoquestionsreferred for a preliminary ruling are answered in the affirmative, can Article 23 of [Directive 2011/95], whichhasnotbeentransposedintoBelgianlaw to provide for the granting of a residence permit or international protection to the father of childrenwhowererecognisedasrefugees in Belgium and whowerebornthere, havedirecteffect?

(4) If so, doesArticle 23 of [Directive 2011/95] confer, in the absence of transposition, on the father of childrenrecognisedasrefugees in Belgium and bornthere the right to claim the benefits referred to in Articles 24 to 35 [of thatdirective], including a residence permitallowinghim to residelegally in Belgium with his family, or the right to obtain international protectionevenif the fatherdoesnotindividuallyqualify for suchprotection?

(5) Does the effectiveness of Article 23 of [Directive 2011/95], read in the light of Articles 7, 18 and 24 of the Charter of FundamentalRights of the European Union and recitals 18, 19 and 38 of [thatdirective], requireMember States thathavenotamendedtheir national laws so that family members [within the meaning of Article 2(j) of thatdirective or in respect of whomthere are particularcircumstances of dependency] of the beneficiary of such status may, ifthey do notindividuallyqualify for such status, claimcertain benefits, to grantthose family members the right to derivative refugee status so thattheymayclaimthose benefits in order to maintain family unity?

(6) Does Article 23 of [Directive 2011/95], read in the light of Articles 7, 18 and 24 of the Charter of FundamentalRights of the European Union and recitals 18, 19 and 38 of [thatdirective], requireMember States thathavenotamendedtheir national laws, so that the parents of a recognisedrefugee can claim the benefits listed in Articles 24 to 35 of [that] directive, to [allowthoseparents to] enjoy derivative international protection in order to giveprimaryconsideration to the best interests of the child and to ensure the effectiveness of thatchild’srefugee status?’

**Consideration of the questionsreferred**

15 As the Court hasconsistentlyheld, the procedure provided for in Article 267 TFEU is an instrument of cooperationbetween the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU lawwhichtheyneed in order to decide the disputesbeforethem. The justification for a reference for a preliminary ruling isnotthatitenablesadvisory opinions on general or hypotheticalquestions to be deliveredbutratherthatitisnecessary for the effectiveresolution of a dispute. Asisapparent from the actualwording of Article 267 TFEU, the questionreferred for a preliminary ruling must be ‘necessary’ to enable the referring court to ‘givejudgment’ in the case beforeit (judgment of

26 March 2020, *MiastoŁowicz and ProkuratorGeneralny*, C-558/18 and C-563/18, EU:C:2020:234, paragraphs 43 to 45 and the case-lawcited).

16 The Court hasthusrepeatedlyheldthatitis clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunalisnotempowered to bring a matterbefore the Court by way of a request for a preliminary ruling unless a case ispendingbeforeit in whichitiscalledupon to give a decisionwhichiscapable of taking account of the preliminary ruling (judgment of 26 March 2020, *MiastoŁowicz and ProkuratorGeneralny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 46 and the case-lawcited).

17 Itisapparent from the wording of the order for reference and from the documentsbefore the Court that, in the mainproceedings, the referring court isseised of an appeal relating to a decisionrefusing the applicant the international protectionwhich he hadsought. By contrast, itis in no way apparent from thatdecision or from the documentsbefore the Court thatthatapplicantactuallysought one or more of the benefits listed in Articles 24 to 35 of Directive 2011/95 to whichArticle 23(2) of thatdirectiverefers or that the decisionatissue in the mainproceedingsrelates to a refusal of such benefits.

18 Ratherthanactuallyseeking a specific benefit from amongthoselisted in Articles 24 to 35 of Directive 2011/95, by applying to the national authority thatmaygrant or refusethat benefit to him and thenchallenginganyrefusalbefore the competent national courts, setting out the reasonswhy he considersthat he iseligible for the benefit or benefits concerned under Directive 2011/95 – and, in particular, under Article 23 thereof – the applicant in the mainproceedingschose to seek international protection by claimingthatsuch a benefit would be the only one capable of remedying an allegedfailure to transposeArticle 23 correctlyinto national law.

19 It must be heldthat – as in essence the Conseilducontentieuxdesétrangers (Council for asylum and immigrationproceedings) correctlyfound in itsdecision of 17 April 2020 challengedbefore the referring court – irrespective of whether the applicant in the mainproceedings, whose family didnotexist in the country of origin, could, where appropriate and notwithstanding the wording of Article 23(2) of Directive 2011/95, read in conjunction with Article 2(j) thereof, claim benefits under thatArticle 23 and whether or notthatprovisionhasbeencorrectlytransposedinto national law, the applicantcannot in any event obtain international protectionsince he doesnotindividuallysatisfy the conditions for grantingsuchprotection under EU law.

20 The Court of Justice hasheldthat Directive 2011/95 doesnotprovide for the extension, as a derivedright, of refugee status or subsidiaryprotection status to the family members of a person to whomthat status isgranted and who, individually, do notsatisfy the conditions for grantingthat status. It follows, in thatregard, from Article 23 thereofthatthatdirectivemerelyrequires the Member States to amendtheir national laws so thatthose family members are entitled, in accordance with national procedures and in so far asthatiscompatible with the personal legal status of those family members, to certain benefits which include, inter alia, a residence permit, access to employment or to education, which are intended to maintain family unity (judgments of 4 October 2018, *Ahmedbekova*, C-652/16, EU:C:2018:801, paragraph 68, and of 9 November 2021, *Bundesrepublik Deutschland (Maintaining family unity)*, C- 91/20, EU:C:2021:898, paragraph 36).

21 Admittedly, EU lawdoesnot preclude a Member State, under more favourable national provisions, suchasthosereferred to in Article 3 of Directive 2011/95, from granting, as a derivedright and for the purpose of maintaining family unity, refugee status to the ‘family members’ of a beneficiary of suchprotection, provided, however, thatthatiscompatible with thatdirective.

22 Thatremains, however, an option for the Member States, which, asisapparent from the request for a preliminary ruling and from the documentsbefore the Court, the Belgian legislature hasnotexercised in respect of the family members of a beneficiary of international protectionwho do notindividuallyqualify for suchprotection.

23 Moreover, itisapparent from paragraphs 12 and 13 abovethat the referring court itselfhasdoubtswhether a right to international protectionsuchasthatsought in the mainproceedings can be baseduponArticle 23 of Directive 2011/95, although, havingbeingcalledupon in the present case to givejudgmentat last instance, itnonethelessconsidereditselfbound to refer a question to the Court in thatregard.

24 In thosecircumstances, and in the light of the case-lawreferred to in paragraphs 15 and 16 above and the subjectmatter of the dispute in the mainproceedings, as set out in paragraphs 17 and 18 of the presentjudgment, itisnecessary to answer the questionsreferredonly in so far astheyseek to ascertainwhether a person in the situation of the applicant in the mainproceedingsisentitled to international protection, with the request for a preliminary ruling beinginadmissibleas to the remainder.

25 In the light of all the foregoing, and, in particular, the factorsreferred to in paragraphs 20 to 22 above, the answer to the questionsreferredisthatArticle 23 of Directive 2011/95 must be interpretedasnotrequiring the Member States to grant the parent of a childwhohasrefugee status in a Member State the right to international protection in thatMember State.

**Costs**

26 Sincetheseproceedings are, for the parties to the mainproceedings, a step in the action pendingbefore the referring court, the decision on costs is a matter for that court. Costs incurred in submittingobservations to the Court, otherthan the costs of those parties, are notrecoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Article 23 of Directive 2011/95/EU of the EuropeanParliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or statelesspersonsasbeneficiaries of international protection, for a uniform status for refugees or for personseligible for subsidiaryprotection, and for the content of the protectiongranted,**

**must be interpretedasnotrequiring the Member States to grant the parent of a childwhohasrefugee status in a Member State the right to international protection in thatMember State.**

[Signatures]

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* Language of the case: French.