ECLI:EU:C:2020:579

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

16 July 2020 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Asylum policy — Common procedures for granting and withdrawing international protection — Directive 2013/32/EU — Articles 14 and 34 — Obligation to give applicants for international protection the opportunity of a personal interview before the adoption of a decision declaring the application to be inadmissible — Failure to comply with that obligation in the procedure at first instance — Consequences)

In Case C-517/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 27 June 2017, received at the Court on 28 August 2017, in the proceedings

Milkiyas Addis

v

Bundesrepublik Deutschland,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: G. Hogan,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2020,

after considering the observations submitted on behalf of:

– Mr Addis, by K. Müller, Rechtsanwältin,

– Bundesrepublik Deutschland, by M. Henning and A. Horlamus, acting as Agents,

– the German Government, initially by J. Möller, T. Henze and R. Kanitz, and subsequently by J. Möller and R. Kanitz, acting as Agents,

– the Belgian Government, by M. Jacobs, C. Van Lul, C. Pochet and F. Bernard, acting as Agents,

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

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

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

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the European Commission, by C. Ladenburger and M. Condou-Durande, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(1) of 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) and Article 14(1) 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; 'the Procedures Directive').

2 The request has been made in proceedings between Mr Milkiyas Addis and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the lawfulness of a decision of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany; 'the Office') refusing to grant Mr Addis the right to asylum.

Legal context

EU law

Directive 2005/85

3 According to Article 1 of Directive 2005/85, the purpose of that directive was to establish minimum standards concerning procedures for granting and withdrawing refugee status.

4 Article 12 of that directive, headed 'Personal interview', provided:

‘1. Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

…

2. The personal interview may be omitted where:

(a) the determining authority is able to take a positive decision on the basis of evidence available; or

(b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application …; or

(c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded in cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.

3. The personal interview may also be omitted where it is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, Member States may require a medical or psychological certificate.

Where the Member State does not provide the applicant with the opportunity for a personal interview pursuant to this paragraph, or where applicable, to the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

4. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.

5. The absence of a personal interview pursuant to paragraph 2(b) and (c) or paragraph 3 shall not adversely affect the decision of the determining authority.

6. Irrespective of Article 20(1), Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless he/she had good reasons for the failure to appear.’

5 Article 25 of that directive, headed ‘Inadmissible applications’, provided in paragraph 2:

‘Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

…’

The Procedures Directive

6 The Procedures Directive recast Directive 2005/85.

7 Recitals 16, 18, 22, 29 and 32 of the Procedures Directive read as follows:

‘(16) It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

…

(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.

…

(22) It is also in the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance. …

…

(29) Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. …

…

(32) With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. …’

8 As set out in Article 1 of the Procedures Directive, the purpose of that directive is to establish common procedures for granting and withdrawing international protection pursuant to 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).

9 Article 2 of the Procedures Directive provides:

‘For the purposes of this Directive:

…

(b) “application for international protection” or “application” means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive [2011/95], that can be applied for separately;

…

(f) “determining authority” means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection and competent to take decisions at first instance in such cases;

…’

10 Article 4 of the Procedures Directive, headed ‘Responsible authorities’, provides:

‘1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.

…

3. Member States shall ensure that the personnel of the determining authority referred to in paragraph 1 are properly trained. … Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants’ ability to be interviewed, such as indications that the applicant may have been tortured in the past.

…’

11 Chapter II of the Procedures Directive, headed ‘Basic principles and guarantees’, contains Articles 6 to 30 of that directive.

12 Article 12 of that directive, headed ‘Guarantees for applicants’, states:

‘1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

…

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. …

…’

13 Article 14 of that directive, headed ‘Personal interview’, provides:

‘1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. This subparagraph shall be without prejudice to Article 42(2)(b).

Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it impossible in practice for the determining authority to conduct timely interviews on the substance of each application, Member States may provide that the

personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that other authority shall receive in advance the relevant training …

…

2. The personal interview on the substance of the application may be omitted where:

(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or

(b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature.

Where a personal interview is not conducted pursuant to point (b) or, where applicable, with the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

3. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for international protection.

4. The absence of a personal interview pursuant to paragraph 2(b) shall not adversely affect the decision of the determining authority.

5. Irrespective of Article 28(1), Member States, when deciding on an application for international protection, may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear.'

14 Article 15 of that directive, headed 'Requirements for a personal interview', provides:

'1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

(b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;

(e) ensure that interviews with minors are conducted in a child-appropriate manner.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.'

15 Chapter III of the Procedures Directive, headed 'Procedures at first instance', contains Articles 31 to 43 of that directive.

16 Article 33 of that directive, headed 'Inadmissible applications', provides in paragraph 2:

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

(a) another Member State has granted international protection;

…'

17 Article 34 of that directive, headed 'Special rules on an admissibility interview', provides:

'1. Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 33 in their particular circumstances before the determining authority decides on the admissibility of an application for international protection. To that end, Member States shall conduct a personal interview on the admissibility of the application. Member States may make an exception only in accordance with Article 42 in the case of a subsequent application.

…

2. Member States may provide that the personnel of authorities other than the determining authority conduct the personal interview on the admissibility of the application for international protection. In such cases, Member States shall ensure that such personnel receive in advance the necessary basic training, in particular with respect to international human rights law, the Union asylum *acquis* and interview techniques.'

18 Chapter V of the Procedures Directive, headed 'Appeals procedures', contains, as its sole provision, Article 46 of that directive, headed 'The right to an effective remedy', which provides:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, …

…'

19 Article 51(1) of the Procedures Directive states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 30, Article 31(1), (2) and (6) to (9), Articles 32 to 46, Articles 49 and 50 and Annex I by 20 July 2015 at the latest. They shall forthwith communicate the text of those measures to the Commission.'

20 As set out in the first paragraph of Article 52 of that directive:

'Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged and to procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date. Applications lodged before 20 July 2015 and procedures for the withdrawal of refugee status started before that date shall be governed by the laws, regulations and administrative provisions adopted pursuant to Directive [2005/85].'

21 The first paragraph of Article 53 of the Procedures Directive provides:

'Directive [2005/85] is repealed for the Member States bound by this Directive with effect from 21 July 2015, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex II, Part B.'

22 In accordance with the first paragraph of Article 54 of the Procedures Directive, that directive entered into force on the 20th day following that of its publication in the *Official Journal of the European Union*, which took place on 29 June 2013.

German law

23 Paragraph 24 of the Asylgesetz (Law on Asylum), in the version applicable at the material time ('the AsylG'), provides in subparagraph 1:

'The [Office] shall establish the facts of the case and compile the necessary evidence. … It shall interview the foreign national in person. The interview may be dispensed with if the [Office] intends to recognise the foreign national's entitlement to asylum or if the foreign national … has entered federal territory from a safe third country …'

24 Paragraph 29 of the AsylG, headed 'Inadmissible applications', provides in subparagraph 1:

'An application for asylum shall be inadmissible if

…

2. another EU Member State has already granted the foreign national international protection …

…’

25 The first sentence of Paragraph 77(1) of the AsylG states:

‘In disputes governed by this law, the court shall base its decision on the factual and legal situation at the time of the last hearing; if the decision is made without a hearing, it shall be based on the situation at the time the decision is taken.’

26 Paragraph 46 of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure; ‘the VwVfG’) provides:

‘Application for annulment of an administrative act which is not void … cannot be made solely on the ground that the act was adopted in infringement of provisions governing procedure, form or territorial jurisdiction where it is evident that the infringement has not influenced the substance of the decision.’

27 Paragraph 86(1) of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts) states:

‘The court shall investigate the facts of its own motion; it shall involve the parties in its investigation. It shall not be bound by the parties’ arguments or requests for evidence.’

The main proceedings and the question referred for a preliminary ruling

28 The applicant in the main proceedings, who claims to be an Eritrean national, entered Germany in September 2011 and applied for refugee status there. Owing to mutilation of his fingers, it was not, at first, possible to identify him using the Eurodac database.

29 Although the applicant in the main proceedings stated, in an interview held on 1 December 2011, that he had not previously been to another Member State, an analysis of his fingerprints taken in June 2012 revealed that he had already submitted an application for asylum in Italy in 2009. The Italian competent authorities, which had been asked to take back the applicant in the main proceedings, responded on 8 January 2013 that he had obtained refugee status in Italy, with the result that, since the asylum procedure was concluded, he could be taken back only under the readmission agreement and not under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1). On 26 February 2013, the Italian authorities informed the Bundespolizeipräsidium (Federal Police Headquarters, Germany) that authorisation had been given for the applicant in the main proceedings to return to Italy.

30 By a decision of 18 February 2013, the Office, first, declared that, because he had entered Germany from a safe third country, namely Italy, the applicant in the main proceedings did not have the right to asylum in Germany and, second, ordered his deportation to Italy.

31 By judgment of 15 April 2013, the Verwaltungsgericht Minden (Administrative Court, Minden, Germany) dismissed the action brought against that decision.

32 By judgment of 19 May 2016, the Oberverwaltungsgericht Münster (Higher Administrative Court, Münster, Germany), before which the applicant in the main proceedings had brought an appeal, annulled the decision ordering his deportation to Italy, but dismissed the appeal as to the remainder. That court stated that the applicant in the main proceedings was rightly refused the right of asylum in Germany since he had arrived from a 'safe third country', in this instance Italy, where he was not at risk of suffering inhuman or degrading treatment within the meaning of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. However, that court took the view that the decision ordering deportation to Italy was unlawful, since it had not been established that the Italian Republic remained prepared to take back the applicant in the main proceedings after the expiry on 5 February 2015 of the residence permit and travel document issued to him by the Italian authorities.

33 The applicant in the main proceedings has brought an appeal against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court, Germany). He claims, inter alia, that the Office was not entitled to dispense with conducting a personal interview with him before it adopted the decision of 18 February 2013. In addition, since he had obtained refugee status in another Member State and there was no decision declaring that his application was inadmissible under Article 25(2)(a) of Directive 2005/85, his application for international protection could not be refused on the ground that he had entered Germany from a safe third country.

34 The Federal Republic of Germany considers that the asylum application submitted by the applicant in the main proceedings is, in any event, now inadmissible pursuant to Paragraph 29(1)(2) of the AsylG, the content of which corresponds, so far as concerns the situation where an applicant's refugee status has already been recognised in another Member State, to Article 25(2)(a) of Directive 2005/85 and Article 33(2)(a) of the Procedures Directive which replaced it. There was no failure to comply with the obligation to conduct an interview with the applicant in the main proceedings since, under Article 12(4) of Directive 2005/85, the absence of a personal interview in the situations referred to in that provision does not prevent the competent authority from taking a decision on an asylum application.

35 The Bundesverwaltungsgericht (Federal Administrative Court) states that it was not open to the Office to refuse to examine the asylum application submitted to it on the ground that the applicant in the main proceedings came from a safe third country. Since national law must be interpreted in conformity with EU law, a safe third country can be only a State which is not a Member State of the European Union. What has to be determined, therefore, is whether the decision at issue in the main proceedings may be regarded as a decision refusing the asylum application based on its inadmissibility, pursuant to Paragraph 29(1)(2) of the AsylG.

36 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) considers that it is necessary to determine the consequences that a failure to comply with the obligation laid down in Article 12(1) of Directive 2005/85 to give an applicant for international protection the opportunity of a personal interview will have on the validity of such a decision declaring the application to be inadmissible when the applicant has the opportunity to set out, in an appeal procedure, all of the considerations militating against the decision refusing the application and those considerations cannot lead to the substance of that decision being amended on legal grounds. That court points out, inter alia, that the Office took the decision at issue in the main proceedings without first giving the applicant the opportunity to be heard on the facts made known by the Italian authorities or the fact that the Office intended to refuse his asylum application.

37 The Bundesverwaltungsgericht (Federal Administrative Court) states that the procedure adopted by the Office failed to comply with the obligation, laid down in Article 12 of Directive

2005/85, to conduct a personal interview with the applicant in the main proceedings since none of the exceptions provided for in that article are applicable in the present case. The same is true if Articles 14 and 34(1) of the Procedures Directive are applied. It is therefore necessary to determine whether the exceptions laid down in Article 12(2) and (3) of Directive 2005/85 and Article 14(2) of the Procedures Directive are exhaustive or whether, taking account of the Member States' procedural autonomy, EU law permits the Member States to provide for other exceptions.

38 In that respect, the Bundesverwaltungsgericht (Federal Administrative Court) states that, under Paragraph 46 of the VwVfG, the absence of a personal interview constitutes only a minor irregularity where it is evident that the fact that a personal interview was not conducted had no bearing on the substance of the decision at issue. That is true in the present case given that a decision declaring an application to be inadmissible under Paragraph 29(1)(2) of the AsylG is a decision which is adopted in the exercise of circumscribed powers, and in the context of which the Office and the administrative courts are required to investigate of their own motion the case in question and to verify all of the conditions for the application of the legal provision, including those which are unwritten. Accordingly, and in view of the comprehensive judicial review carried out by the administrative courts and the fact that those courts themselves grant applicants the right to be heard, the absence of a personal interview in the administrative procedure is compensated for by the hearing held in the subsequent judicial proceedings.

39 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the first sentence of Article 14(1) of [the Procedures Directive] or the rule in the first sentence of Article 12(1) of [Directive 2005/85] that preceded it preclude the application of a national provision under which the failure to conduct a personal interview with the applicant in the case where the determining authority rejects an asylum application as inadmissible, in implementation of the power under Article 33(2)(a) of [the Procedures Directive] or the rule in Article 25(2)(a) of [Directive 2005/85] that preceded it, does not result in that decision being annulled by reason of that failure if the applicant has an opportunity in the judicial proceedings to set out all the circumstances militating against a decision of inadmissibility and, even having regard to those submissions, no other decision can be taken in the case?'

Procedure before the Court

40 The referring court asked the Court to determine the present case pursuant to an expedited procedure in accordance with Article 105(1) of the Court's Rules of Procedure. In support of its request, it submitted, in essence, that it should be assumed that there are thousands of procedures currently pending before the Office and the German administrative courts which, at least in part, raise the same questions as the present reference for a preliminary ruling and which cannot, on account of the reference made, be definitively determined.

41 It follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, decide after hearing the Judge-Rapporteur and the Advocate General that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

42 In the present case, on 13 September 2017, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to reject the referring court's request referred to in

paragraph 40 above. That decision was based on the fact that the reason relied on by the referring court, on which that court also relied in the cases which gave rise to the judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219), was not such as to demonstrate that the conditions laid down in Article 105(1) of the Rules of Procedure were met in the present case (see, to that effect, orders of the President of the Court of 14 July 2017, *Ibrahim and Others*, C-297/17, C-318/17 and C-319/17, not published, EU:C:2017:561, paragraphs 17 to 21, and of 19 September 2017, *Magamadov*, C-438/17, not published, EU:C:2017:723, paragraphs 15 to 19).

43 By decision of the President of the Court of 26 September 2017, the present case was joined with Cases C-540/17 and C-541/17, *Hamed and Omar*, for the purposes of the written and oral procedure and of the judgment. That joinder was lifted by decision of the President of the Court of 14 May 2019 on the ground that the questions which had justified the cases being joined were withdrawn by the referring court following delivery of the judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219), pending which the present case and Cases C-540/17 and C-541/17, *Hamed and Omar*, had been stayed.

Consideration of the question referred

44 As a preliminary observation, it is apparent from the request for a preliminary ruling that, pursuant to the first sentence of Paragraph 77(1) of the AsylG, the referring court is to base its decision in the main proceedings on the factual and legal situation at the time of the last hearing before that court or, where no hearing is held, on the date of its decision. It is therefore apparent that the referring court will apply provisions of national law which transpose the Procedures Directive, in particular those relating to, first, the personal interview with the applicant and, second, the ground of inadmissibility in Article 33(2)(a) of that directive. Such an immediate application, including of that latter provision, to applications lodged before 20 July 2015 on which no final decision has yet been made is permitted under the first paragraph of Article 52 of the Procedures Directive where, as in the main proceedings, the applicant has already been granted refugee status, and not merely subsidiary protection, in another Member State (see, to that effect, judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 74, and order of 13 November 2019, *Hamed and Omar*, C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 30).

45 In those circumstances, the question referred must be understood as seeking to ascertain, in essence, whether Article 14(1) of the Procedures Directive is to be interpreted as precluding national legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before the adoption of a decision on the basis of Article 33(2)(a) of that directive declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority if the applicant has the opportunity to set out, in the appeal procedure, all of his or her arguments against the decision and those arguments are not capable of altering that decision.

46 In order to answer that question, it must be noted, first, that the Procedures Directive sets out unequivocally the obligation to give an applicant for international protection the opportunity of a personal interview before a decision is taken on his or her application.

47 Article 14(1) of the Procedures Directive states, as Article 12(1) of Directive 2005/85 did, that before a decision is taken by the determining authority, the applicant is to be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. That obligation, which forms

part of the basic principles and guarantees set out in Chapter II of each of those directives, applies to decisions on the admissibility of the application as well as to decisions on the substance.

48 The fact that that obligation also applies to decisions on admissibility is moreover now expressly confirmed in Article 34 of the Procedures Directive, headed ‘Special rules on an admissibility interview’, which provides in paragraph 1 that, before the determining authority decides on the admissibility of an application for international protection, Member States are to allow applicants to present their views with regard to the application of the grounds referred to in Article 33 of that directive in their particular circumstances and that, to that end, Member States are to conduct a personal interview on the admissibility of the application.

49 Where the determining authority is inclined to find that an application for international protection is inadmissible on the ground referred to in Article 33(2)(a) of the Procedures Directive, the personal interview on the admissibility of the application is intended to give the applicant the opportunity not only to state whether international protection has in fact already been granted to him or her in another Member State, but in particular to present all of the factors which differentiate his or her specific situation in order to enable the determining authority to rule out the possibility that the applicant, if transferred to that other Member State, would be exposed to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

50 In that regard, it should be noted that, according to the Court’s case-law, Article 33(2)(a) of the Procedures Directive precludes a Member State from exercising the option granted by that provision to reject an application for international protection as being inadmissible on the ground that the applicant has already been granted international protection by another Member State where the living conditions that that applicant could be expected to encounter as the beneficiary of international protection in that other Member State would expose him or her to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 101, and order of 13 November 2019, *Hamed and Omar*, C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 43).

51 In that context, the Court has previously stated that the particularly high level of severity required by Article 4 of the Charter will be attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding him or herself, irrespective of his or her wishes and his or her personal choices, in a situation of extreme material poverty that does not allow him or her to meet his or her most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his or her physical or mental health or puts him or her in a state of degradation incompatible with human dignity (judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 90, and order of 13 November 2019, *Hamed and Omar*, C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 39).

52 Thus, where the authorities of a Member State have available to them evidence produced by the applicant in order to establish the existence of such a risk in the Member State that has previously granted international protection, those authorities are required to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights that is guaranteed by EU law, whether there are deficiencies which may be systematic or generalised, or which may affect certain groups of people (see, by analogy, judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 88, and order of 13 November 2019, *Hamed and Omar*,

C-540/17 and C-541/17, not published, EU:C:2019:964, paragraph 38). Furthermore, it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances which are unique to him or her and which would mean that being sent back to the Member State which previously granted international protection would expose him or her, because of his or her particularly vulnerability, to a risk of treatment that is contrary to Article 4 of the Charter (see, by analogy, judgment of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, paragraph 95).

53 It follows that the assessment of that risk must be made after the applicant is given the opportunity to set out all of the circumstances, particularly personal circumstances, capable of confirming that such a risk exists.

54 The personal interview on the admissibility of the application, provided for in Article 14(1) and Article 34(1) of the Procedures Directive, is therefore of fundamental importance in order to ensure that Article 33(2)(a) of that directive is in fact applied in full compliance with Article 4 of the Charter. The personal interview enables the determining authority to assess the applicant's specific situation and degree of vulnerability and satisfy itself that the applicant has been invited to set out all of the considerations which are capable of demonstrating that being sent back to the Member State that previously granted international protection would expose him or her to a risk of treatment that is contrary to Article 4 of the Charter.

55 Second, it must be noted that Article 34(1) of the Procedures Directive states that Member States may make an exception to the rule requiring that a personal interview be conducted with the applicant on the admissibility of the application for international protection only in accordance with Article 42 of that directive in the case of a subsequent application. However, it is clear from the order for reference that that is not the situation in the main proceedings.

56 Accordingly, it is necessary to examine, third, whether the failure, in the procedure at first instance before the determining authority, to comply with the obligation laid down in Articles 14 and 34 of the Procedures Directive to give the applicant for international protection the opportunity of a personal interview must necessarily lead to the annulment of the decision refusing the application and the case being remitted to the determining authority.

57 Since the Procedures Directive does not expressly govern the legal consequences of a failure to comply with that obligation, those consequences, as pointed out by all of the parties who submitted observations, are governed by national law provided that the applicable provisions of national law are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and do not make it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order (principle of effectiveness) (see, by analogy, judgment of 10 September 2013, *G and R*, C-383/13 PPU, EU:C:2013:533, paragraph 35 and the case-law cited).

58 As regards the principle of equivalence, it should be noted that there is nothing before the Court that is capable of raising any doubts as to the compliance with that principle of legislation such as that at issue in the main proceedings.

59 As regards the principle of effectiveness and therefore the question of whether applying Paragraph 46 of the VwVfG to the context at issue in the main proceedings would make it impossible in practice or excessively difficult to exercise the rights conferred by the Procedures Directive, the fact that the EU legislature chose, in that directive, to prescribe, first, a clear and express obligation on the Member States to give the applicant for international protection the

opportunity of a personal interview before a decision is taken on the application and, second, an exhaustive list of exceptions to that obligation demonstrates the fundamental importance it attaches to the personal interview in the asylum procedure.

60 Furthermore, the fact that, pursuant to Article 14(1) and Article 34(1) of the Procedures Directive, the opportunity of a personal interview is to be given to the applicant in the procedure at first instance before the determining authority decides on the application is intended to ensure that, already at first instance, the applicant's need for international protection in the Member State concerned is correctly recognised, which is, as stated in recitals 18 and 22 of that directive, in the interests of both Member States and the applicant since it contributes, inter alia, to the objective of the expeditious processing of applications.

61 In that regard, it should be noted that the Procedures Directive distinguishes between the 'determining authority', on the one hand, which it defines in Article 2(f) as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases', and the 'court or tribunal', on the other hand, which is referred to in Article 46 and is responsible for appeals procedures. Furthermore, it follows from recitals 16 and 22, Article 4 and the general scheme of that directive that the examination of the application for international protection by an administrative or quasi-judicial body with specific resources and specialised staff in this area is a vital stage of the common procedures established by that directive (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 103 and 116).

62 Nevertheless, the Court has previously held that the requirement for a full and *ex nunc* examination of both facts and points of law in an appeal, laid down in Article 46(3) of the Procedures Directive, may also cover the grounds of inadmissibility referred to in Article 33(2) of that directive, where permitted under national law. In the event that the court or tribunal hearing the appeal intends to examine a ground of inadmissibility which has not been examined by the determining authority, it must conduct a hearing of the applicant in order to allow that individual to express, in person and in a language with which he or she is familiar, his or her view concerning the applicability of that ground to his or her particular circumstances (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 130).

63 It necessarily follows that it is also possible, in principle, for the court or tribunal hearing the appeal to conduct a hearing of the applicant with regard to the applicability in his or her particular circumstances of one of the grounds of inadmissibility laid down in Article 33(2) of the Procedures Directive where the decision refusing the application was based on that ground but the determining authority did not first give the applicant the opportunity to be heard on that point in a personal interview.

64 In that regard, however, it must be noted that the right conferred on the applicant by Articles 14 and 34 of the Procedures Directive to express, in a personal interview, his or her view concerning the applicability of such a ground of inadmissibility in his or her particular circumstances is accompanied by specific guarantees intended to ensure the effectiveness of that right.

65 Accordingly, under Article 15(2) and (3) of the Procedures Directive, the personal interview is to take place under conditions which ensure appropriate confidentiality and allow applicants to present the grounds for their applications in a comprehensive manner. As regards in particular the latter requirement, Article 15(3)(a) of that directive requires Member States to ensure that the person who conducts the interview is competent to take account of the personal and general

circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. Article 15(3)(b) of that directive requires Member States to provide, wherever possible, for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner. In addition, Article 15(3)(c) of that directive requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview, in order to give effect to the applicant's right, laid down in Article 12(1)(b) of the Procedures Directive, to receive the services of an interpreter for submitting his or her case whenever necessary. Article 15(3)(e) of that directive requires Member States to ensure that interviews with minors are conducted in a child-appropriate manner.

66 As the Advocate General noted, in essence, in points 106, 109 and 115 of his Opinion, the fact that the EU legislature did not simply specify in Articles 14 and 34 of the Procedures Directive that the applicant is to be given the opportunity of a personal interview, but also took the decision to impose on Member States specific, detailed rules relating to how that interview is to be conducted demonstrates the fundamental importance which it attaches not only to an interview being held, but also to the conditions under which that interview is to take place, which must be observed in order for a decision declaring that an application for asylum is inadmissible to be valid.

67 In addition, it follows from recitals 29 and 32 of that directive that the aim of those conditions is to ensure, inter alia, that all applicants receive, depending on their gender or particular circumstances, appropriate procedural guarantees. It is therefore in relation to the applicant's particular circumstances and on a case-by-case basis that it must be determined which of those conditions are applicable.

68 In those circumstances, it would be incompatible with the effectiveness of the Procedures Directive, in particular Articles 14, 15 and 34, if the court or tribunal hearing the appeal were able to uphold a decision, which the determining authority adopted without complying with the obligation to give the applicant for international protection the opportunity of a personal interview, without itself conducting a hearing of the applicant in accordance with the conditions and fundamental guarantees applicable in the case in question.

69 As the Advocate General stated, in essence, in point 103 of his Opinion, without such a hearing, the applicant's right to a personal interview under conditions which ensure appropriate confidentiality and allow him or her to present the grounds for his or her application in a comprehensive manner, including considerations which support the admissibility of the application, would not be guaranteed at any stage of the asylum procedure, which would negate a safeguard that the EU legislature considered to be fundamental in that procedure.

70 It is apparent from the Court's case-law that, in principle, an infringement of the rights of the defence results in annulment of the decision taken at the end of the administrative procedure at issue only if the outcome of the procedure might have been different had it not been for such an irregularity (see judgment of 10 September 2013, *G and R*, C-383/13 PPU, EU:C:2013:533, paragraph 38 and the case-law cited). That case-law cannot, however, be applied to an infringement of Articles 14, 15 and 34 of the Procedures Directive. First, those provisions set out, in binding terms, the obligation on the Member States to give the applicant the opportunity of a personal interview as well as specific, detailed rules on how that interview is to be conducted. Second, those rules seek to ensure that the applicant has been invited to provide, in cooperation with the authority responsible for the interview, all information that is relevant to the assessment of the admissibility and, as the case may be, the substance of the application for international protection, which gives

that interview, as stated in the preceding paragraph of this judgment, paramount importance in the procedure for examination of that application (see, by analogy, judgment of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, not published, EU:C:2020:385, paragraph 57 and the case-law cited).

71 It should be added, in the light of the referring court's queries in that regard, that the absence of a hearing cannot be compensated for by the opportunity that the applicant has in his or her appeal to set out in writing factors which call into question the validity of the decision declaring that his or her application for protection is inadmissible, or by the obligation, under national law, on the determining authority and on the court or tribunal hearing the appeal to investigate of its own motion all of the relevant facts. Furthermore, while the fact that a provision transposing into national law the grounds of inadmissibility laid down in Article 33(2) of the Procedures Directive leaves the determining authority discretion as to whether it is appropriate to apply a given ground in a particular case may require the case to be remitted to that authority, the fact that there is no such discretion under German law cannot justify exercise of the right to be heard in the form envisaged by the directive being denied to the applicant. As is apparent from paragraphs 59 to 69 above, if there is no personal interview before the determining authority at first instance, it is only if such an interview is conducted before the court or tribunal hearing the appeal against the decision adopted by that authority declaring the application inadmissible and that interview is conducted in accordance with all of the conditions prescribed by the Procedures Directive that it is possible to guarantee the effectiveness of the right to be heard at that subsequent stage of the procedure.

72 In the present case, it is apparent from the response given by the referring court to a request for clarification made by the Court that, in the event of a failure to comply with the obligation to give the applicant the opportunity of a personal interview in the procedure at first instance before the determining authority, German law does not automatically guarantee the applicant's right to a personal hearing in the appeal procedure. In addition, according to the referring court's response, while it is possible, by interpreting and applying national provisions in conformity with EU law, to guarantee any applicant a personal hearing, it cannot be guaranteed, owing to national rules governing judicial procedure, that all of the conditions under which the personal interview is to be conducted, pursuant to Article 15 of the Procedures Directive, will be complied with in a hearing held before the appeal court or tribunal.

73 Ultimately, it is for the referring court to determine whether, in the procedure at issue in the main proceedings, the opportunity was, or could still be, given to Mr Addis to be heard in full compliance with the conditions and fundamental guarantees applicable to the case in the main proceedings, in order to allow him to present, in person and in a language with which he is familiar, his view concerning the application to his personal situation of the ground referred to in Article 33(2)(a) of that directive. If the referring court considers that he cannot be guaranteed that opportunity in the appeal procedure, it must annul the decision refusing the application and remit the case to the determining authority.

74 It follows from all of the above considerations that Articles 14 and 34 of the Procedures Directive must be interpreted as precluding national legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before the adoption of a decision on the basis of Article 33(2)(a) of that directive declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority, unless that legislation allows the applicant, in the appeal procedure against that decision, to set out in person all of his or her arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Article 15 of that directive, and those arguments are not capable of altering that decision.

Costs

75 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 (Fifth Chamber) hereby rules:

Articles 14 and 34 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 precluding national legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before the adoption of a decision on the basis of Article 33(2)(a) of that directive declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority, unless that legislation allows the applicant, in the appeal procedure against that decision, to set out in person all of his or her arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Article 15 of that directive, and those arguments are not capable of altering that decision.

[Signatures]

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* Language of the case: German.