ECLI:EU:C:2019:219

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

19 March 2019(*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Common procedures for granting and withdrawing international protection — Directive 2013/32/EU — Article 33(2)(a) — Rejection by the authorities of a Member State of an application for asylum as being inadmissible because of the prior granting of subsidiary protection in another Member State — Article 52 — Scope ratione temporis of that directive — Articles 4 and 18 of the Charter of Fundamental Rights of the European Union — Systemic flaws in the asylum procedure in that other Member State — Systematic rejection of applications for asylum — Substantial risk of suffering inhuman or degrading treatment — Living conditions of those granted subsidiary protection in that other State)

In Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decisions of 23 March 2017, received at the Court on 23 May 2017 (C-297/17) and on 30 May 2017 (C-318/17 and C-319/17), and by decision of 1 June 2017, received at the Court on 20 July 2017 (C-438/17), in the proceedings

Bashar Ibrahim (C-297/17),

Mahmud Ibrahim,

Fadwa Ibrahim,

Bushra Ibrahim,

Mohammad Ibrahim,

Ahmad Ibrahim (C-318/17),

Nisreen Sharqawi,

Yazan Fattayrji,

Hosam Fattayrji (C-319/17)

v

Bundesrepublik Deutschland,

and

Bundesrepublik Deutschland

v

Taus Magamadov (C-438/17),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Prechal, M. Vilaras, E. Regan, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, L. Bay Larsen and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, head of unit,

having regard to the written procedure and further to the hearing on 8 May 2018,

after considering the observations submitted on behalf of:

– Mr Bashar Ibrahim, Mr Mahmud Ibrahim, Mrs Fadwa Ibrahim, Mr Bushra Ibrahim and the minor children Mohammad Ibrahim and Ahmad Ibrahim, and Mrs Sharqawi and her minor children Yazan Fattayrji and Hosam Fattayrji, by D. Kösterke-Zerbe, Rechtsanwältin,

– Mr Magamadov, by I. Stern, Rechtsanwältin,

– the German Government, by T. Henze and R. Kanitz, 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. Koós, and M. Tátrai, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 33(2)(a) and of the first paragraph of Article 52 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'), and of Articles 4 and 18 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in four sets of proceedings, where in three instances the opposing parties are Mr Bashar Ibrahim (Case C-297/17), Mr Mahmud Ibrahim, Mrs Fadwa Ibrahim, Mr Bushra Ibrahim and the minor children Mohammad and Ahmad Ibrahim (Case C-318/17), and Mrs Nisreen Sharqawi and her minor children Yazan and Hosam Fattayrji (Case C-319/17), on the one hand, and the Bundesrepublik Deutschland (Federal Republic of Germany), on the other, and in the fourth instance (Case C-438/17) the opposing parties are the Federal Republic of Germany and Mr Taus Magamadov, concerning decisions adopted by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) ('the Federal Office') refusing the parties concerned a right of asylum.

Legal context

International law

3 Under the heading 'Prohibition of torture', Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

European Union law

The Charter

4 Article 1 of the Charter, headed 'Human dignity', provides:

'Human dignity is inviolable. It must be respected and protected.'

5 Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment', states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

6 Article 18 of the Charter, headed 'Right to asylum', provides:

'The right to asylum shall be guaranteed with due respect for the rules of [the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)] and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties").'

7 The first paragraph of Article 47 of the Charter, headed 'Right to an effective remedy and to a fair trial', states:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

8 Article 51(1) of the Charter, that article being headed ‘Field of application’, provides:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

9 Article 52(3) of the Charter, that article being headed ‘Scope and interpretation of rights and principles’, provides:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The Qualification Directive

10 Article 2 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; ‘the Qualification Directive’) provides:

‘For the purposes of this Directive the following definitions shall apply:

(a) “international protection” means refugee status and subsidiary protection status …

...

(d) “refugee” means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) “refugee status” means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) “subsidiary protection status” means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) “application for international protection” 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 this Directive, that can be applied for separately;

…’

11 Chapter II of the Qualification Directive lays down the conditions governing the assessment of applications for international protection.

12 That Chapter II contains Article 4 of the Qualification Directive, that article being headed ‘Assessment of facts and circumstances’, where Article 4(3) provides:

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

...’

13 Chapter III of the Qualification Directive lays down the conditions governing qualification for refugee status. In that context, Articles 9 and 10 of that directive, headed respectively ‘Acts of persecution’ and ‘Reasons for persecution’, set out the factors that must be taken into account in order to assess whether the applicant has been or could be the victim of persecution.

14 Chapter IV of the Qualification Directive, titled ‘Refugee status’, contains Article 13 of that directive, headed ‘Granting of refugee status’, which provides:

‘Member States shall grant refugee status to a third-country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.’

15 Chapters V and VI of the Qualification Directive define, respectively, qualification for subsidiary protection and subsidiary protection status.

16 Chapter VII of the Qualification Directive, containing Articles 20 to 35 of that directive, defines the content of international protection.

The Dublin II and Dublin III Regulations

17 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'), repealed and replaced 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; 'the Dublin II Regulation').

18 Whereas the Dublin II Regulation, in accordance with Article 1 thereof, read together with Article 2(c) thereof, laid down solely the criteria and mechanisms for determining the Member State responsible for examining an application for asylum, under the Convention relating to the status of refugees, signed in Geneva on 28 July 1951 ('the Geneva Convention'), the Dublin III Regulation, as is apparent from Article 1 thereof, is now intended to lay down such criteria and mechanisms with respect to the applications for international protection which, according to the definition in Article 2(b) of the Dublin III Regulation, which refers to the definition set out in Article 2(h) of the Qualification Directive, are applications seeking refugee status or subsidiary protection status.

19 Article 18(1)(d) of the Dublin III Regulation provides that the Member State responsible under that regulation is obliged to take back a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

20 Article 49 of the Dublin III Regulation, headed 'Entry into force and applicability', provides:

'This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply to applications for international protection lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back applicants, irrespective of the date on which the application was made. The Member State responsible for the examination of an application for international protection submitted before that date shall be determined in accordance with the criteria set out in [the Dublin II Regulation].

...'

Directive 2005/85 and the Procedures Directive

21 The Procedures Directive recast 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).

22 According to Article 1 of Directive 2005/85, the purpose of that directive was to establish minimum standards on procedures for granting and withdrawing refugee status. Article 2(b) of that directive defined an 'application for asylum' as meaning an application made by a third-country national or stateless person which could be understood as a request for international protection from a Member State under the Geneva Convention.

23 Article 25 of Directive 2005/85 provided:

‘1. In addition to cases in which an application is not examined in accordance with [the Dublin II Regulation], Member States are not required to examine whether the applicant qualifies as a refugee … where an application is considered inadmissible pursuant to this Article.

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

(a) another Member State has granted refugee status;

...’

24 According to Article 1 of the Procedures Directive, the purpose of that directive is to establish common procedures for granting and withdrawing international protection pursuant to the Qualification Directive.

25 Article 2(b) of the Procedures Directive defines an ‘application for international protection’ as being a request for protection from a Member State made by a third-country national or a stateless person 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 the Qualification Directive, that can be applied for separately.

26 Article 10(2) of the Procedures Directive provides:

‘When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.’

27 Article 33 of the Procedures Directive, headed ‘Inadmissible applications’, provides:

‘1. In addition to cases in which an application is not examined in accordance with [the Dublin III Regulation], Member States are not required to examine whether the applicant qualifies as a refugee in accordance with [the Qualification Directive] where an application is considered inadmissible pursuant to this Article.

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

(a) another Member State has granted international protection;

...

(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 [the Qualification Directive] have arisen or have been presented by the applicant …

...’

28 Article 40(2) to (4) of the Procedures Directive, that article being headed ‘Subsequent application’, provide:

‘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 [the Qualification Directive].

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 [the Qualification Directive], 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.’

29 Article 51(1) of the Procedures Directive provides:

‘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.’

30 The first paragraph of Article 52 of the Procedures Directive states:

‘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].’

31 The first subparagraph of Article 53 of the Procedures Directive provides that Directive 2005/85 is repealed for the Member States bound by the Procedures 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 that directive set out in Annex II, Part B.

32 The first subparagraph of Article 54 of the Procedures Directive provides that that directive is to ‘enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*’, that date being 29 June 2013.

German law

33 Paragraph 29 of the Asylgesetz (Asylum Act; ‘the AsylG’), as amended with effect from 6 August 2016 by the Integrationsgesetz of 31 July 2016 (Integration Act, BGBl. 2016 I, p. 1939, ‘the Integrationsgesetz’), is headed ‘Inadmissible applications’ and provides:

‘(1) An application for asylum is inadmissible if:

1. another State is responsible for examining the application for asylum

(a) according to [the Dublin III Regulation], or

(b) based on other European Union law or another international agreement

...

2. another Member State of the European Union has already granted to the foreign national the international protection referred to in Paragraph 1(1), point 2,

...'

34 Paragraph 77(1) of the AsylG provides:

'In disputes falling within the scope of this law, the court shall rely on the situation of fact and of law obtaining at the time of the last hearing; if a judgment is given without a hearing, the relevant point in time shall be that at which the judgment is given. ...'

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

Joined Cases C-297/17, C-318/17 and C-319/17

35 The applicants in the main proceedings are applicants for asylum who are stateless Palestinians that resided in Syria.

36 Mr Bashar Ibrahim, the applicant in the main proceedings in Case C-297/17, is the son of Mr Mahmud Ibrahim and Mrs Ibrahim and the brother of three other children of Mr Mahmud Ibrahim and Mrs Ibrahim, who together with their parents are the applicants in the main proceedings in Case C-318/17. Mrs Nisreen Sharqawi and her infant children are the applicants in the main proceedings in Case C-319/17.

37 The parties concerned left Syria in 2012 in order to travel to Bulgaria where, by decisions of 26 February and 7 May 2013, they were granted subsidiary protection. In November 2013 they travelled onwards through Romania, Hungary and Austria and entered Germany, where, on 29 November 2013, they lodged new applications for asylum.

38 On 22 January 2014 the Federal Office sent take back requests with respect to the persons concerned to the Bulgarian refugee authority, which rejected those requests by letters of 28 January and 10 February 2014. According to the latter authority, the subsidiary protection previously granted in Bulgaria to the applicants in the main proceedings means that, in this case, the take back rules laid down by the Dublin III Regulation are inapplicable. Moreover, the competent Bulgarian authority was said to be the local border police.

39 By decisions of 27 February and 19 March 2014, the Federal Office refused to grant a right to asylum to the persons concerned, without examining the substance of their applications, on the ground that they came from a safe third country. The Federal Office ordered that they should be removed to Bulgaria.

40 By judgments of 20 May and 22 July 2014, the Verwaltungsgericht Trier (Administrative Court, Trier, Germany) dismissed the actions brought against those decisions.

41 By judgments of 18 February 2016, the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rheinland-Pfalz, Germany) annulled the decisions ordering the removal to Bulgaria of the persons concerned, but dismissed the actions brought before it for the remainder. According to that court, the refusal to grant asylum in Germany to the persons concerned was correct, since those persons had arrived in Germany from a safe third country, namely Austria. The decisions ordering the removal to Bulgaria were however unlawful in that it had not been established that the Republic of Bulgaria remained willing to take back the applicants.

42 The applicants in the main proceedings brought an appeal against those judgments partially dismissing their actions before the Bundesverwaltungsgericht (Federal Administrative Court, Germany). The applicants claim, in particular, that, in accordance with the second sentence of the second paragraph of Article 49 of the Dublin III Regulation, their situation continues to fall within the scope of the Dublin II Regulation and that the latter regulation remains applicable, even after the granting of subsidiary protection. Under the provisions of the Dublin II Regulation, the initial responsibility of the Republic of Bulgaria was, according to the applicants, transferred to the Federal Republic of Germany in the course of the procedure laid down by that regulation.

43 The Federal Republic of Germany considers that the asylum applications at issue in the main proceedings are now inadmissible under Paragraph 29(1), point 2, of the AsylG, the content of which corresponds to that of Article 33(2)(a) of the Procedures Directive.

44 The Bundesverwaltungsgericht (Federal Administrative Court) holds that the Federal Office could not refuse to examine the asylum applications submitted to it on the ground that the applicants came from a safe third country. Since national law must be interpreted so as to conform to 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 decisions at issue can be considered to be rejection decisions based on the inadmissibility of the asylum applications, pursuant to Paragraph 29(1), point 2, of the AsylG.

45 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer to the Court of Justice the following questions in each of Cases C-297/17, C-318/17 and C-319/17, for a preliminary ruling:

‘(1) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] preclude the application of national legislation which, in transposition of the power conferred in Article 33(2)(a) of [the Procedures Directive], which is more extensive than that conferred in the directive that preceded it, provides that an application for international protection is inadmissible if the applicant has been granted subsidiary protection in another Member State, in so far as the national legislation, in the absence of any national transitional provisions, is also applicable even to applications lodged before 20 July 2015?

In particular, does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] allow the Member States, in particular, to transpose the extended power conferred in Article 33(2)(a) of [the Procedures Directive] retroactively, with the result that even applications which were lodged before that extended power was transposed into national law but which were not yet the subject of a final decision at the time of transposition are inadmissible?

(2) Does Article 33 of [the Procedures Directive] confer on the Member States a right to choose whether to reject an application for asylum as inadmissible either on the basis that responsibility lies with another Member State (the Dublin Regulation) or on the basis of Article 33(2)(a) of [the Procedures Directive]?

(3) If the answer to Question 2 is in the affirmative, does EU law prevent a Member State from transposing the power conferred by Article 33(2)(a) of [the Procedures Directive] so as to reject an application for international protection as being inadmissible on the ground that subsidiary protection has been granted in another Member State, where:

(a) the applicant seeks to have the subsidiary protection granted to him in another Member State enhanced (by recognition of refugee status) and the asylum procedure in the other Member State was (and continues to be) vitiated by systemic flaws, or

(b) the form which the international protection takes, that is to say the living conditions of those benefiting from subsidiary protection, in the other Member State which has already granted the applicant subsidiary protection,

– is contrary to Article 4 of the [Charter] and to Article 3 of the ECHR, or

– does not satisfy the requirements of Article 20 et seq. of [the Qualification Directive] but does not in and of itself infringe Article 4 of the Charter or Article 3 of the ECHR?

(4) If Question 3(b) is to be answered in the affirmative, is this also the case where, although the persons qualifying for subsidiary protection do not receive any subsistence benefits or those which they do receive are markedly inferior to those available in other Member States, they are in that regard not treated any differently from nationals of that Member State?

(5) If Question 2 is answered in the negative:

(a) Is the Dublin III Regulation applicable in a procedure for the grant of international protection if the asylum application was lodged before 1 January 2014 but the take back request was not sent until after 1 January 2014 and the applicant had previously (in February 2013) been granted subsidiary protection in the requested Member State?

(b) Do the Dublin Regulations support the inference of an — implicit — transfer of responsibility to the Member State which has requested that an applicant be taken back, where the requested responsible Member State has rejected a take back request made, within the prescribed time limit, under the Dublin provisions and has instead referred to an international readmission agreement?'

Case C-438/17

46 Mr Magamadov, an applicant for asylum who is of Russian nationality but declares himself to be Chechen, arrived in 2007 in Poland where, by a decision of 13 October 2008, he was granted subsidiary protection. In June 2012, with his wife and his child, he entered Germany, where, on 19 June 2012, he lodged an application for asylum.

47 On 13 February 2013 the Federal Office sent a take back request with respect to Mr Magamadov and his family to the Polish authorities, who, on 18 February 2013, stated that they were willing to take them back.

48 By a decision of 13 March 2013, the Federal Office held, without any examination of their substance, that the asylum applications submitted by the applicant and his family were inadmissible, on the ground that the Republic of Poland was responsible for the examination of those applications, and ordered the transfer of the persons concerned to Poland. When that transfer did not

occur within the period prescribed because of medical problems suffered by Mr Magamadov's wife, the Federal Office, by a decision of 24 September 2013, withdrew its decision of 13 March 2013 on the ground that the Federal Republic of Germany had become the Member State responsible, because the prescribed period had expired. By a decision of 23 June 2014, the Federal Office refused to grant Mr Magamadov international protection and a right of asylum, on the ground that he had arrived in Germany from a safe third country, namely Poland, and ordered his removal to Poland.

49 By a judgment of 19 May 2015, the Verwaltungsgericht Potsdam (Administrative Court, Potsdam, Germany) dismissed the action brought against that decision.

50 By judgment of 21 April 2016, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany) annulled the decision of the Federal Office of 23 June 2014. That court held that the rule to the effect that a right to asylum should not be granted to a foreign national coming from a safe country was not applicable in the main proceedings, because of the derogation laid down in Paragraph 26a(1), third sentence, point 2, of the AsylG, which states that the safe third-country rule is not relevant where, as in this case, the Federal Republic of Germany has become responsible under EU law for the examination of the application of the person concerned for protection. As the asylum application at issue in the case in the main proceedings was lodged before 20 July 2015, Directive 2005/85 is applicable in this case. That directive permits a Member State to reject an application for asylum, without any examination of its substance, only where another Member State has recognised the refugee status of the person concerned.

51 The Federal Republic of Germany brought an appeal on a point of law against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court). The Federal Republic of Germany claims inter alia that the application for asylum at issue in the main proceedings is now inadmissible, under Paragraph 29(1), point 2, of the AsylG, as amended by the Integrationsgesetz, since Mr Magamadov was granted international protection in Poland. Mr Magamadov considers that his application for asylum, lodged on 19 June 2012, is not inadmissible since the Republic of Poland did not grant him refugee status, but merely subsidiary protection.

52 The Bundesverwaltungsgericht (Federal Administrative Court) holds that the Federal Office could not refuse to examine the asylum application submitted to it on the ground that the applicant came from a safe third country. Since national law must be interpreted so as to conform to 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 can be considered to be a rejection decision based on the inadmissibility of the asylum applications, pursuant to Paragraph 29(1), point 2, of the AsylG.

53 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] preclude the application of national legislation which, in transposition of the power conferred in Article 33(2)(a) of [the Procedures Directive], which is more extensive than that conferred in the directive that preceded it, provides that an application for international protection is inadmissible if the applicant has been granted subsidiary protection in another Member State, in so far as the national legislation, in the absence of any national transitional provisions, is applicable even to applications lodged before 20 July 2015? Is that in any event the case if, in accordance with

Article 49 of [the Dublin III Regulation], the asylum application still falls entirely within the scope of [the Dublin II Regulation]?

(2) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] allow the Member States, in particular, to transpose the extended power conferred in Article 33(2)(a) of [the Procedures Directive] retroactively, with the result that even applications that were lodged before the entry into force of [the Procedures Directive] and before that extended power was transposed into national law, but that were not yet the subject of a final decision at the time of transposition, are inadmissible?'

Procedure before the Court

54 By decision of the President of the Court of 9 June 2017, Cases C-297/17, C-318/17 and C-319/17 were joined for the purposes of the written procedure, the oral procedure and the judgment, since the questions referred for a preliminary ruling in those three cases were identical. Further, by decision of the Court of 30 January 2018 those cases and Case C-438/17 were joined for the purposes of the oral procedure and of the judgment.

55 In its requests for a preliminary ruling, the referring court requested that the case be determined under an expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice. Those requests were rejected by 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), and of 19 September 2017, *Magamadov* (C-438/17, not published, EU:C:2017:723).

Consideration of the questions referred

The first question in Cases C-297/17, C-318/17 and C-319/17 and the questions in Case C-438/17

56 By these questions, which can be examined together, the referring court seeks, in essence, to ascertain whether the first paragraph of Article 52 of the Procedures Directive must be interpreted as meaning that it permits a Member State to provide for the immediate application of the provision of national law that transposes Article 33(2)(a) of that directive to asylum applications on which no final decision has yet been made and which were lodged before 20 July 2015 and before the entry into force of that provision of national law. With respect to Case C-438/17, that court seeks, further, to ascertain whether the position is the same where an application for asylum was lodged before the entry into force of the Procedures Directive and where that application still falls, in accordance with Article 49 of the Dublin III Regulation, fully within the scope of the Dublin II Regulation.

57 Under Article 33(2)(a) of the Procedures Directive, the Member States may consider an application for international protection as being inadmissible where international protection has been granted by another Member State.

58 Since Article 33(2)(a) provides that a Member State may also reject such an application as being inadmissible in situations where the applicant has been granted only subsidiary protection in another Member State, that provision extends the option previously provided for in Article 25(2)(a) of Directive 2005/85, which permitted such rejection solely where the applicant had been granted refugee status in another Member State.

59 It follows from Article 51(1) of the Procedures Directive that the Member States were required bring into force the laws, regulations and administrative provisions necessary to comply with, inter alia, Article 33 of that directive by 20 July 2015 at the latest. Further, in accordance the first paragraph of Article 53 of the Procedures Directive, Directive 2005/85 was repealed with effect from 21 July 2015.

60 The first paragraph of Article 52 of the Procedures Directive contains transitional provisions.

61 Accordingly, the first sentence of the first paragraph of Article 52 of that directive provides that Member States are to 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'.

62 The second sentence of the first paragraph of Article 52 of the Procedures Directive states that applications lodged 'before 20 July 2015' and procedures for the withdrawal of refugee status started before that date are to be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85.

63 It is apparent from an examination of the *travaux préparatoires* of the Procedures Directive, in particular a comparison of Position (EU) No 7/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, adopted by the Council on 6 June 2013 (OJ 2013 C 179 E, p. 27), with the Commission Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009) 554 final), that the words 'or an earlier date' in the first sentence of the first paragraph of Article 52 of the Procedures Directive were added in the course of the legislative process (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 71).

64 Consequently, notwithstanding the tension between the first and second sentences of the first paragraph of Article 52 of the Procedures Directive, it is apparent from those *travaux préparatoires* that the EU legislature intended to allow the Member States who wished to do so to apply their provisions implementing that directive, with immediate effect, to applications for international protection lodged before 20 July 2015 (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 72).

65 Further, there is nothing in those *travaux préparatoires* to indicate that the EU legislature had intended to restrict that option, which the first paragraph of Article 52 of the Procedures Directive grants to the Member States, solely to the provisions that are more favourable to the applicants for international protection than those previously adopted for the purposes of transposing Directive 2005/85.

66 The fact remains that, while the first paragraph of Article 52 of the Procedures Directive permitted the Member States to apply their provisions implementing that directive to applications for international protection lodged before 20 July 2015, it did not compel them to do so. Since that provision offers, by using the wording 'started after 20 July 2015 or an earlier date', various possibilities with respect to temporal application, it is important, in order for the principles of legal certainty and equality before the law to be observed in the implementation of EU law and for applicants for international protection to be protected from arbitrariness, that each Member State bound by that directive examines applications for international protection lodged within the same

period on its territory in a predictable and uniform manner (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 73).

67 It is apparent from the orders for reference that the provision whereby the additional ground for inadmissibility laid down in Article 33(2)(a) of the Procedures Directive was transposed into German law, namely Paragraph 29(1), point 2, of the AsylG, entered into force with effect from 6 August 2016 and that, in the absence of national transitional provisions, the referring court must, pursuant to the first sentence of Paragraph 77(1) of the AsylG, base its decision, on the disputes in the main proceedings, on the situation in fact and in law obtaining at the time of the last hearing before that court or, if a judgment is given without a hearing, the date at which its judgment is given, and, therefore, on Paragraph 29 of the AsylG in the version in force on that date, unless the first paragraph of Article 52 of the Procedures Directive precludes the immediate application of that version to applications which were lodged before the entry into force of that directive but on which no final decision has been made.

68 In that regard, it must be stated, first, that a provision of national law such as the first sentence of Paragraph 77(1) of the AsylG ensures that applications for international protection, which have been lodged in the course of the same period in German territory and on which no final decision had been made at the time of the entry into force of Paragraph 29(1), point 2, of the AsylG, are examined in a predictable and uniform manner.

69 Second, as follows from the considerations set out in paragraphs 64 and 65 of the present judgment, the first paragraph of Article 52 of the Procedures Directive does not preclude a provision of national law that transposes the additional ground for inadmissibility provided for by Article 33(2)(a) of that directive from being, in accordance with national law, applicable *ratione temporis* to asylum applications which were lodged before 20 July 2015 and before the entry into force of that transposing provision, but on which no final decision has been made.

70 Third, while the first paragraph of Article 52 of the Procedures Directive also does not preclude, in principle, the immediate application of the provisions of that directive to applications which were lodged before its entry into force, it is however clear that an immediate application of the additional ground for inadmissibility provided for in Article 33(2)(a) of that directive cannot extend to a situation such as that at issue in Case C-438/17, where both the application for asylum submitted in Germany and the take back request were lodged before 1 January 2014, so that that application, in accordance with Article 49 of the Dublin III Regulation, remains fully within the scope of the Dublin II Regulation.

71 That is because the Procedures Directive, which was adopted on the same day as the Dublin III Regulation, provides, in the same way as the latter, for an extension of its scope to applications for international protection, as compared with Directive 2005/85 which preceded it and which governed solely asylum procedure. This is the wider legislative framework surrounding the introduction of the additional ground for inadmissibility provided for in Article 33(2)(a) of the Procedures Directive, which permits Member States also to reject an application for asylum as being inadmissible where the applicant has been granted by another Member State not a right to asylum, but solely subsidiary protection.

72 Further, whereas Article 25(1) of Directive 2005/85 refers to the Dublin II Regulation, Article 33(1) of the Procedures Directive refers to the Dublin III Regulation.

73 It follows therefore from the structure of the Dublin III Regulation and from that of the Procedures Directive, and from the wording of Article 33(1) of that directive, that the additional

ground for inadmissibility provided for in Article 33(2)(a) of that directive is not intended to be applicable to an application for asylum which still falls entirely within the scope of the Dublin II Regulation.

74 In the light of the foregoing, the answer to the first question in Cases C-297/17, C-318/17 and C-319/17 and to the questions referred in Case C-438/17 is that the first paragraph of Article 52 of the Procedures Directive must be interpreted as meaning that it permits a Member State to provide for the immediate application of the provision of national law transposing Article 33(2)(a) of that directive to applications for asylum on which no final decision has yet been made, which were lodged before 20 July 2015 and before the entry into force of that provision of national law. However, the first paragraph of Article 52 of that directive, read in the light of, inter alia, Article 33 thereof, precludes such an immediate application in a situation where both the application for asylum and the take back request were lodged before the entry into force of the Procedures Directive and, in accordance with Article 49 of the Dublin III Regulation, still fall fully within the scope of the Dublin II Regulation.

The second question in Cases C-297/17, C-318/17 and C-319/17

75 It is apparent from the order for reference that, by that question, the referring court seeks to ascertain whether Article 33 of the Procedures Directive must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must first have resorted to the take charge or take back procedures provided for by the Dublin II or Dublin III Regulations.

76 Article 33(1) of the Procedures Directive provides that, in addition to cases in which an application is not examined in accordance with the Dublin III Regulation, Member States are not required to examine whether an applicant qualifies for international protection in accordance with the Qualification Directive where an application is considered inadmissible pursuant to Article 33 of that directive. Article 33(2) of that directive sets out an exhaustive list of the situations in which the Member States may consider an application for international protection to be inadmissible.

77 It is apparent from the wording of Article 33(1) of the Procedures Directive, particularly from the use of the phrase ‘in addition to cases in which an application is not examined in accordance with [the Dublin III Regulation]’, and from the objective of procedural economy pursued by that provision, that, in the situations listed in Article 33(2) of that directive, that provision permits the Member States to reject an application for international protection as being inadmissible without those States being obliged to have recourse, as the first resort, to the take charge or take back procedures provided for by the Dublin III Regulation.

78 Further, with respect to applications for international protection, such as those at issue in Cases C-297/17, C-318/17 and C-319/17, which fall in part within the scope of the Dublin III Regulation, a Member State cannot properly make a request of another Member State that it take charge of or take back, within the procedures set out by that regulation, a third-country national who has submitted an application for international protection in the former Member State after having been granted subsidiary protection by the latter Member State.

79 In such a situation, the EU legislature took the view that the rejection of such an application for international protection had to be made by means of a decision of inadmissibility, pursuant to Article 33(2)(a) of the Procedures Directive, rather than by means of a decision to transfer the person concerned and not to examine the application, under Article 26 of the Dublin III Regulation (see order of 5 April 2017, *Ahmed*, C-36/17, EU:C:2017:273, paragraphs 39 and 41).

80 In those circumstances, the answer to the second question in Cases C-297/17, C-318/17 and C-319/17 is that, in a situation such as that at issue in those cases, Article 33 of the Procedures Directive must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must, or must be able, to have recourse, as the first resort, to the take charge or take back procedures provided for by the Dublin III Regulation.

The third and fourth questions in Cases C-297/17, C-318/17 and C-319/17

81 By those questions, which can be examined together, the referring court seeks to ascertain, first, whether Article 33(2)(a) of the Procedures Directive must be interpreted as precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has already been granted subsidiary protection by another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter, or do not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of Article 4 of the Charter. The referring court is uncertain whether, in some cases, the position is the same where those granted such protection do not receive, in that other Member State, any subsistence allowance, or where such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State.

82 Second, the referring court seeks to ascertain whether Article 33(2)(a) of the Procedures Directive must be interpreted as precluding a Member State from exercising that option where the asylum procedure in the other Member State was and continues to be vitiated by systemic flaws.

83 As regards, first, the situation referred to in paragraph 81 of the present judgment, it must be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected, and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 of the Charter, which enshrine one of the fundamental values of the European Union and its Member States (judgment of today's date, *Jawo*, C-163/17, paragraph 80 and the case-law cited).

84 The principle of mutual trust between the Member States is in EU law, of fundamental importance, given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of today's date, *Jawo*, C-163/17, paragraph 81 and the case-law cited).

85 Accordingly, in the context of the Common European Asylum System, it must be presumed that the treatment of applicants for international protection in each Member State complies with the requirements of the Charter, the Geneva Convention and the ECHR (judgment of today's date, *Jawo*, C-163/17, paragraph 82 and the case-law cited). That applies, in particular, to the application of Article 33(2)(a) of the Procedures Directive, which constitutes, in the context of the Common

European Asylum System established by that directive, an expression of the principle of mutual trust.

86 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, so that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights (judgment of today's date, *Jawo*, C-163/17, paragraph 83 and the case-law cited).

87 Against that background, it must be stated that, having regard to the general and absolute nature of the prohibition laid down in Article 4 of the Charter, which is closely linked to respect for human dignity and which prohibits, without any possibility of derogation, inhuman or degrading treatment in whatever form, it is immaterial, for the purposes of the application of Article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 88).

88 Accordingly, where a court or tribunal hearing an action brought against a decision rejecting a new application for international protection as being inadmissible has available to it evidence produced by the applicant in order to establish the existence of such a risk in the Member State that has previously granted subsidiary protection, that court or tribunal is obliged 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 guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 90 and the case-law cited).

89 In that regard, it must be stated that, if the deficiencies mentioned in the preceding paragraph of the present judgment are to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 of the ECHR, and the meaning and scope of which is therefore, under Article 52(3) of the Charter, the same as those laid down by the ECHR, those deficiencies must attain a particularly high level of severity, which depends on all the circumstances of the case (judgment of today's date, *Jawo*, C-163/17, paragraph 91 and the case-law cited).

90 That particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (judgment of today's date, *Jawo*, C-163/17, paragraph 92 and the case-law cited).

91 That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment (judgment of today's date, *Jawo*, C-163/17, paragraph 93).

92 Given the concerns of the referring court on this point, it must be made clear that, having regard to the importance of the principle of mutual trust for the common European asylum system, infringements of the provisions of Chapter VII of the Qualification Directive which do not result in

a breach of Article 4 of the Charter do not prevent the Member States from exercising the option granted by Article 33(2)(a) of the Procedures Directive.

93 As regards the fact, also mentioned by the referring court, that those granted subsidiary protection do not receive, in the Member State which granted such protection to the applicant, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, that can lead to the finding that that applicant is exposed in that Member State to a real risk of suffering treatment that is in breach of Article 4 of the Charter only if the consequence is that the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that meets the criteria described in paragraphs 89 to 91 of the present judgment.

94 In any event, the mere fact that social protection and/or living conditions are more favourable in the Member State to which the new application for international protection has been made than in the Member State that has previously granted subsidiary protection cannot support the conclusion that the person concerned would be exposed, in the event of a transfer to the latter Member State, to a real risk of suffering treatment in breach of Article 4 of the Charter (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 97).

95 As regards, second, the situation referred to in paragraph 82 of the present judgment, it is apparent from the request for a preliminary ruling that the deficiencies in the asylum procedure identified by the referring court consist, according to that court, in the fact that the Member State which granted the subsidiary protection can be predicted to refuse, contrary to the Qualification Directive, to grant refugee status to applicants for international protection and that, contrary to Article 40(3) of the Procedures Directive, that Member State also does not examine subsequent applications, notwithstanding that there may be new evidence or findings that significantly increase the probability of the applicant satisfying the conditions required to claim refugee status.

96 The referring court seeks to ascertain, in that regard, whether the combined provisions of Article 18 of the Charter and of Article 78 TFEU dictate that, in such a situation, a Member State must examine the further application for international protection notwithstanding a rule of domestic law that gives effect to Article 33(2)(a) of the Procedures Directive.

97 It must be borne in mind that both the Qualification Directive and the Procedures Directive were adopted on the basis of Article 78 TFEU and with the aim of attaining the objective laid down by that article and of assuring compliance with Article 18 of the Charter.

98 Under the Qualification Directive, in particular Article 13 thereof, the Member States are obliged to grant refugee status to any third-country national or stateless person who qualifies as a refugee, in accordance with Chapters II and III of that directive. In order to determine whether that is the case, the Member States must, in accordance with Article 4(3) of that directive, undertake an individual assessment of each application for international protection. Accordingly only where the Member States establish, following such an individual assessment, that an applicant for such protection does not satisfy the conditions laid down in Chapter III, but does satisfy those laid down in Chapter V, of that directive, can they grant to that applicant the status conferred by subsidiary protection instead of refugee status.

99 However, if the asylum procedure in a Member State were to lead to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive, the treatment

of applicants for asylum in that Member State could not be regarded as compliant with the obligations stemming from Article 18 of the Charter.

100 That said, the other Member States may reject a further application submitted to them by the person concerned as being inadmissible, pursuant to Article 33(2)(a) of the Procedures Directive, read with due regard to the principle of mutual trust. In such circumstances, it is for the Member State that granted subsidiary protection to resume the procedure for the obtaining of refugee status.

101 It follows from all the foregoing that the answer to the third and fourth questions in Cases C-297/17, C-318/17 and C-319/17 is as follows:

– Article 33(2)(a) of the Procedures Directive must be interpreted as meaning that it does not preclude a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter. The fact that the beneficiaries of such subsidiary protection do not receive, in that Member State, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, can lead to the finding that that applicant would be exposed in that Member State to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.

– Article 33(2)(a) of the Procedures Directive must be interpreted as not precluding a Member State from exercising that option, where the asylum procedure in the other Member State that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive.

The fifth question in Cases C-297/17, C-318/17 and C-319/17

102 In the light of the answer given to, in particular, the second question in Cases C-297/17, C-318/17 and C-319/17, there is no need to answer the fifth question referred in those cases.

Costs

103 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 (Grand Chamber) hereby rules:

1. **The first paragraph of Article 52 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 it permits a Member State to provide for the immediate application of the provision of national law transposing Article 33(2)(a) of that directive to applications for asylum on which no final decision has yet been made, which were lodged before 20 July 2015 and before the entry into force of that provision of national law. However, the first paragraph of Article 52 of that directive, read in the light of, inter alia,**

Article 33 thereof, precludes such an immediate application in a situation where both the application for asylum and the take back request were lodged before the entry into force of Directive 2013/32 and, in accordance with Article 49 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, still fall fully within the scope of 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**.**

2. **In a situation such as that at issue in Cases C-297/17, C-318/17 and C-319/17, Article 33 of Directive 2013/32 must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must, or must be able, to have recourse, as the first resort, to the take charge or take back procedures provided for by Regulation No 604/2013.**

3. **Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State would not expose him 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 fact that the beneficiaries of such subsidiary protection do not receive, in that Member State, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, can lead to the finding that that applicant would be exposed in that Member State to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.**

Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a Member State from exercising that option, where the asylum procedure in the other Member State that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III 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.

[Signatures]

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* Language of the case: German.

ECLI:EU:C:2019:219

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

19 March 2019(*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Common procedures for granting and withdrawing international protection — Directive 2013/32/EU — Article 33(2)(a) — Rejection by the authorities of a Member State of an application for asylum as being inadmissible because of the prior granting of subsidiary protection in another Member State — Article 52 — Scope ratione temporis of that directive — Articles 4 and 18 of the Charter of Fundamental Rights of the European Union — Systemic flaws in the asylum procedure in that other Member State — Systematic rejection of applications for asylum — Substantial risk of suffering inhuman or degrading treatment — Living conditions of those granted subsidiary protection in that other State)

In Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decisions of 23 March 2017, received at the Court on 23 May 2017 (C-297/17) and on 30 May 2017 (C-318/17 and C-319/17), and by decision of 1 June 2017, received at the Court on 20 July 2017 (C-438/17), in the proceedings

Bashar Ibrahim (C-297/17),

Mahmud Ibrahim,

Fadwa Ibrahim,

Bushra Ibrahim,

Mohammad Ibrahim,

Ahmad Ibrahim (C-318/17),

Nisreen Sharqawi,

Yazan Fattayrji,

Hosam Fattayrji (C-319/17)

v

Bundesrepublik Deutschland,

and

Bundesrepublik Deutschland

v

Taus Magamadov (C-438/17),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Prechal, M. Vilaras, E. Regan, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, L. Bay Larsen and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, head of unit,

having regard to the written procedure and further to the hearing on 8 May 2018,

after considering the observations submitted on behalf of:

– Mr Bashar Ibrahim, Mr Mahmud Ibrahim, Mrs Fadwa Ibrahim, Mr Bushra Ibrahim and the minor children Mohammad Ibrahim and Ahmad Ibrahim, and Mrs Sharqawi and her minor children Yazan Fattayrji and Hosam Fattayrji, by D. Kösterke-Zerbe, Rechtsanwältin,

– Mr Magamadov, by I. Stern, Rechtsanwältin,

– the German Government, by T. Henze and R. Kanitz, 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. Koós, and M. Tátrai, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 33(2)(a) and of the first paragraph of Article 52 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'), and of Articles 4 and 18 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in four sets of proceedings, where in three instances the opposing parties are Mr Bashar Ibrahim (Case C-297/17), Mr Mahmud Ibrahim, Mrs Fadwa Ibrahim, Mr Bushra Ibrahim and the minor children Mohammad and Ahmad Ibrahim (Case C-318/17), and Mrs Nisreen Sharqawi and her minor children Yazan and Hosam Fattayrji (Case C-319/17), on the one hand, and the Bundesrepublik Deutschland (Federal Republic of Germany), on the other, and in the fourth instance (Case C-438/17) the opposing parties are the Federal Republic of Germany and Mr Taus Magamadov, concerning decisions adopted by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) ('the Federal Office') refusing the parties concerned a right of asylum.

Legal context

International law

3 Under the heading 'Prohibition of torture', Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

European Union law

The Charter

4 Article 1 of the Charter, headed 'Human dignity', provides:

'Human dignity is inviolable. It must be respected and protected.'

5 Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment', states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

6 Article 18 of the Charter, headed 'Right to asylum', provides:

'The right to asylum shall be guaranteed with due respect for the rules of [the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)] and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties").'

7 The first paragraph of Article 47 of the Charter, headed 'Right to an effective remedy and to a fair trial', states:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

8 Article 51(1) of the Charter, that article being headed ‘Field of application’, provides:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

9 Article 52(3) of the Charter, that article being headed ‘Scope and interpretation of rights and principles’, provides:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The Qualification Directive

10 Article 2 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; ‘the Qualification Directive’) provides:

‘For the purposes of this Directive the following definitions shall apply:

(a) “international protection” means refugee status and subsidiary protection status …

...

(d) “refugee” means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) “refugee status” means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) “subsidiary protection status” means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) “application for international protection” 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 this Directive, that can be applied for separately;

…’

11 Chapter II of the Qualification Directive lays down the conditions governing the assessment of applications for international protection.

12 That Chapter II contains Article 4 of the Qualification Directive, that article being headed ‘Assessment of facts and circumstances’, where Article 4(3) provides:

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

...’

13 Chapter III of the Qualification Directive lays down the conditions governing qualification for refugee status. In that context, Articles 9 and 10 of that directive, headed respectively ‘Acts of persecution’ and ‘Reasons for persecution’, set out the factors that must be taken into account in order to assess whether the applicant has been or could be the victim of persecution.

14 Chapter IV of the Qualification Directive, titled ‘Refugee status’, contains Article 13 of that directive, headed ‘Granting of refugee status’, which provides:

‘Member States shall grant refugee status to a third-country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.’

15 Chapters V and VI of the Qualification Directive define, respectively, qualification for subsidiary protection and subsidiary protection status.

16 Chapter VII of the Qualification Directive, containing Articles 20 to 35 of that directive, defines the content of international protection.

The Dublin II and Dublin III Regulations

17 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'), repealed and replaced 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; 'the Dublin II Regulation').

18 Whereas the Dublin II Regulation, in accordance with Article 1 thereof, read together with Article 2(c) thereof, laid down solely the criteria and mechanisms for determining the Member State responsible for examining an application for asylum, under the Convention relating to the status of refugees, signed in Geneva on 28 July 1951 ('the Geneva Convention'), the Dublin III Regulation, as is apparent from Article 1 thereof, is now intended to lay down such criteria and mechanisms with respect to the applications for international protection which, according to the definition in Article 2(b) of the Dublin III Regulation, which refers to the definition set out in Article 2(h) of the Qualification Directive, are applications seeking refugee status or subsidiary protection status.

19 Article 18(1)(d) of the Dublin III Regulation provides that the Member State responsible under that regulation is obliged to take back a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

20 Article 49 of the Dublin III Regulation, headed 'Entry into force and applicability', provides:

'This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply to applications for international protection lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back applicants, irrespective of the date on which the application was made. The Member State responsible for the examination of an application for international protection submitted before that date shall be determined in accordance with the criteria set out in [the Dublin II Regulation].

...'

Directive 2005/85 and the Procedures Directive

21 The Procedures Directive recast 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).

22 According to Article 1 of Directive 2005/85, the purpose of that directive was to establish minimum standards on procedures for granting and withdrawing refugee status. Article 2(b) of that directive defined an 'application for asylum' as meaning an application made by a third-country national or stateless person which could be understood as a request for international protection from a Member State under the Geneva Convention.

23 Article 25 of Directive 2005/85 provided:

‘1. In addition to cases in which an application is not examined in accordance with [the Dublin II Regulation], Member States are not required to examine whether the applicant qualifies as a refugee … where an application is considered inadmissible pursuant to this Article.

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

(a) another Member State has granted refugee status;

...’

24 According to Article 1 of the Procedures Directive, the purpose of that directive is to establish common procedures for granting and withdrawing international protection pursuant to the Qualification Directive.

25 Article 2(b) of the Procedures Directive defines an ‘application for international protection’ as being a request for protection from a Member State made by a third-country national or a stateless person 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 the Qualification Directive, that can be applied for separately.

26 Article 10(2) of the Procedures Directive provides:

‘When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.’

27 Article 33 of the Procedures Directive, headed ‘Inadmissible applications’, provides:

‘1. In addition to cases in which an application is not examined in accordance with [the Dublin III Regulation], Member States are not required to examine whether the applicant qualifies as a refugee in accordance with [the Qualification Directive] where an application is considered inadmissible pursuant to this Article.

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

(a) another Member State has granted international protection;

...

(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 [the Qualification Directive] have arisen or have been presented by the applicant …

...’

28 Article 40(2) to (4) of the Procedures Directive, that article being headed ‘Subsequent application’, provide:

‘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 [the Qualification Directive].

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 [the Qualification Directive], 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.’

29 Article 51(1) of the Procedures Directive provides:

‘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.’

30 The first paragraph of Article 52 of the Procedures Directive states:

‘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].’

31 The first subparagraph of Article 53 of the Procedures Directive provides that Directive 2005/85 is repealed for the Member States bound by the Procedures 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 that directive set out in Annex II, Part B.

32 The first subparagraph of Article 54 of the Procedures Directive provides that that directive is to ‘enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*’, that date being 29 June 2013.

German law

33 Paragraph 29 of the Asylgesetz (Asylum Act; ‘the AsylG’), as amended with effect from 6 August 2016 by the Integrationsgesetz of 31 July 2016 (Integration Act, BGBl. 2016 I, p. 1939, ‘the Integrationsgesetz’), is headed ‘Inadmissible applications’ and provides:

‘(1) An application for asylum is inadmissible if:

1. another State is responsible for examining the application for asylum

(a) according to [the Dublin III Regulation], or

(b) based on other European Union law or another international agreement

...

2. another Member State of the European Union has already granted to the foreign national the international protection referred to in Paragraph 1(1), point 2,

...'

34 Paragraph 77(1) of the AsylG provides:

'In disputes falling within the scope of this law, the court shall rely on the situation of fact and of law obtaining at the time of the last hearing; if a judgment is given without a hearing, the relevant point in time shall be that at which the judgment is given. ...'

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

Joined Cases C-297/17, C-318/17 and C-319/17

35 The applicants in the main proceedings are applicants for asylum who are stateless Palestinians that resided in Syria.

36 Mr Bashar Ibrahim, the applicant in the main proceedings in Case C-297/17, is the son of Mr Mahmud Ibrahim and Mrs Ibrahim and the brother of three other children of Mr Mahmud Ibrahim and Mrs Ibrahim, who together with their parents are the applicants in the main proceedings in Case C-318/17. Mrs Nisreen Sharqawi and her infant children are the applicants in the main proceedings in Case C-319/17.

37 The parties concerned left Syria in 2012 in order to travel to Bulgaria where, by decisions of 26 February and 7 May 2013, they were granted subsidiary protection. In November 2013 they travelled onwards through Romania, Hungary and Austria and entered Germany, where, on 29 November 2013, they lodged new applications for asylum.

38 On 22 January 2014 the Federal Office sent take back requests with respect to the persons concerned to the Bulgarian refugee authority, which rejected those requests by letters of 28 January and 10 February 2014. According to the latter authority, the subsidiary protection previously granted in Bulgaria to the applicants in the main proceedings means that, in this case, the take back rules laid down by the Dublin III Regulation are inapplicable. Moreover, the competent Bulgarian authority was said to be the local border police.

39 By decisions of 27 February and 19 March 2014, the Federal Office refused to grant a right to asylum to the persons concerned, without examining the substance of their applications, on the ground that they came from a safe third country. The Federal Office ordered that they should be removed to Bulgaria.

40 By judgments of 20 May and 22 July 2014, the Verwaltungsgericht Trier (Administrative Court, Trier, Germany) dismissed the actions brought against those decisions.

41 By judgments of 18 February 2016, the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rheinland-Pfalz, Germany) annulled the decisions ordering the removal to Bulgaria of the persons concerned, but dismissed the actions brought before it for the remainder. According to that court, the refusal to grant asylum in Germany to the persons concerned was correct, since those persons had arrived in Germany from a safe third country, namely Austria. The decisions ordering the removal to Bulgaria were however unlawful in that it had not been established that the Republic of Bulgaria remained willing to take back the applicants.

42 The applicants in the main proceedings brought an appeal against those judgments partially dismissing their actions before the Bundesverwaltungsgericht (Federal Administrative Court, Germany). The applicants claim, in particular, that, in accordance with the second sentence of the second paragraph of Article 49 of the Dublin III Regulation, their situation continues to fall within the scope of the Dublin II Regulation and that the latter regulation remains applicable, even after the granting of subsidiary protection. Under the provisions of the Dublin II Regulation, the initial responsibility of the Republic of Bulgaria was, according to the applicants, transferred to the Federal Republic of Germany in the course of the procedure laid down by that regulation.

43 The Federal Republic of Germany considers that the asylum applications at issue in the main proceedings are now inadmissible under Paragraph 29(1), point 2, of the AsylG, the content of which corresponds to that of Article 33(2)(a) of the Procedures Directive.

44 The Bundesverwaltungsgericht (Federal Administrative Court) holds that the Federal Office could not refuse to examine the asylum applications submitted to it on the ground that the applicants came from a safe third country. Since national law must be interpreted so as to conform to 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 decisions at issue can be considered to be rejection decisions based on the inadmissibility of the asylum applications, pursuant to Paragraph 29(1), point 2, of the AsylG.

45 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer to the Court of Justice the following questions in each of Cases C-297/17, C-318/17 and C-319/17, for a preliminary ruling:

‘(1) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] preclude the application of national legislation which, in transposition of the power conferred in Article 33(2)(a) of [the Procedures Directive], which is more extensive than that conferred in the directive that preceded it, provides that an application for international protection is inadmissible if the applicant has been granted subsidiary protection in another Member State, in so far as the national legislation, in the absence of any national transitional provisions, is also applicable even to applications lodged before 20 July 2015?

In particular, does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] allow the Member States, in particular, to transpose the extended power conferred in Article 33(2)(a) of [the Procedures Directive] retroactively, with the result that even applications which were lodged before that extended power was transposed into national law but which were not yet the subject of a final decision at the time of transposition are inadmissible?

(2) Does Article 33 of [the Procedures Directive] confer on the Member States a right to choose whether to reject an application for asylum as inadmissible either on the basis that responsibility lies with another Member State (the Dublin Regulation) or on the basis of Article 33(2)(a) of [the Procedures Directive]?

(3) If the answer to Question 2 is in the affirmative, does EU law prevent a Member State from transposing the power conferred by Article 33(2)(a) of [the Procedures Directive] so as to reject an application for international protection as being inadmissible on the ground that subsidiary protection has been granted in another Member State, where:

(a) the applicant seeks to have the subsidiary protection granted to him in another Member State enhanced (by recognition of refugee status) and the asylum procedure in the other Member State was (and continues to be) vitiated by systemic flaws, or

(b) the form which the international protection takes, that is to say the living conditions of those benefiting from subsidiary protection, in the other Member State which has already granted the applicant subsidiary protection,

– is contrary to Article 4 of the [Charter] and to Article 3 of the ECHR, or

– does not satisfy the requirements of Article 20 et seq. of [the Qualification Directive] but does not in and of itself infringe Article 4 of the Charter or Article 3 of the ECHR?

(4) If Question 3(b) is to be answered in the affirmative, is this also the case where, although the persons qualifying for subsidiary protection do not receive any subsistence benefits or those which they do receive are markedly inferior to those available in other Member States, they are in that regard not treated any differently from nationals of that Member State?

(5) If Question 2 is answered in the negative:

(a) Is the Dublin III Regulation applicable in a procedure for the grant of international protection if the asylum application was lodged before 1 January 2014 but the take back request was not sent until after 1 January 2014 and the applicant had previously (in February 2013) been granted subsidiary protection in the requested Member State?

(b) Do the Dublin Regulations support the inference of an — implicit — transfer of responsibility to the Member State which has requested that an applicant be taken back, where the requested responsible Member State has rejected a take back request made, within the prescribed time limit, under the Dublin provisions and has instead referred to an international readmission agreement?'

Case C-438/17

46 Mr Magamadov, an applicant for asylum who is of Russian nationality but declares himself to be Chechen, arrived in 2007 in Poland where, by a decision of 13 October 2008, he was granted subsidiary protection. In June 2012, with his wife and his child, he entered Germany, where, on 19 June 2012, he lodged an application for asylum.

47 On 13 February 2013 the Federal Office sent a take back request with respect to Mr Magamadov and his family to the Polish authorities, who, on 18 February 2013, stated that they were willing to take them back.

48 By a decision of 13 March 2013, the Federal Office held, without any examination of their substance, that the asylum applications submitted by the applicant and his family were inadmissible, on the ground that the Republic of Poland was responsible for the examination of those applications, and ordered the transfer of the persons concerned to Poland. When that transfer did not

occur within the period prescribed because of medical problems suffered by Mr Magamadov's wife, the Federal Office, by a decision of 24 September 2013, withdrew its decision of 13 March 2013 on the ground that the Federal Republic of Germany had become the Member State responsible, because the prescribed period had expired. By a decision of 23 June 2014, the Federal Office refused to grant Mr Magamadov international protection and a right of asylum, on the ground that he had arrived in Germany from a safe third country, namely Poland, and ordered his removal to Poland.

49 By a judgment of 19 May 2015, the Verwaltungsgericht Potsdam (Administrative Court, Potsdam, Germany) dismissed the action brought against that decision.

50 By judgment of 21 April 2016, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany) annulled the decision of the Federal Office of 23 June 2014. That court held that the rule to the effect that a right to asylum should not be granted to a foreign national coming from a safe country was not applicable in the main proceedings, because of the derogation laid down in Paragraph 26a(1), third sentence, point 2, of the AsylG, which states that the safe third-country rule is not relevant where, as in this case, the Federal Republic of Germany has become responsible under EU law for the examination of the application of the person concerned for protection. As the asylum application at issue in the case in the main proceedings was lodged before 20 July 2015, Directive 2005/85 is applicable in this case. That directive permits a Member State to reject an application for asylum, without any examination of its substance, only where another Member State has recognised the refugee status of the person concerned.

51 The Federal Republic of Germany brought an appeal on a point of law against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court). The Federal Republic of Germany claims inter alia that the application for asylum at issue in the main proceedings is now inadmissible, under Paragraph 29(1), point 2, of the AsylG, as amended by the Integrationsgesetz, since Mr Magamadov was granted international protection in Poland. Mr Magamadov considers that his application for asylum, lodged on 19 June 2012, is not inadmissible since the Republic of Poland did not grant him refugee status, but merely subsidiary protection.

52 The Bundesverwaltungsgericht (Federal Administrative Court) holds that the Federal Office could not refuse to examine the asylum application submitted to it on the ground that the applicant came from a safe third country. Since national law must be interpreted so as to conform to 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 can be considered to be a rejection decision based on the inadmissibility of the asylum applications, pursuant to Paragraph 29(1), point 2, of the AsylG.

53 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] preclude the application of national legislation which, in transposition of the power conferred in Article 33(2)(a) of [the Procedures Directive], which is more extensive than that conferred in the directive that preceded it, provides that an application for international protection is inadmissible if the applicant has been granted subsidiary protection in another Member State, in so far as the national legislation, in the absence of any national transitional provisions, is applicable even to applications lodged before 20 July 2015? Is that in any event the case if, in accordance with

Article 49 of [the Dublin III Regulation], the asylum application still falls entirely within the scope of [the Dublin II Regulation]?

(2) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] allow the Member States, in particular, to transpose the extended power conferred in Article 33(2)(a) of [the Procedures Directive] retroactively, with the result that even applications that were lodged before the entry into force of [the Procedures Directive] and before that extended power was transposed into national law, but that were not yet the subject of a final decision at the time of transposition, are inadmissible?'

Procedure before the Court

54 By decision of the President of the Court of 9 June 2017, Cases C-297/17, C-318/17 and C-319/17 were joined for the purposes of the written procedure, the oral procedure and the judgment, since the questions referred for a preliminary ruling in those three cases were identical. Further, by decision of the Court of 30 January 2018 those cases and Case C-438/17 were joined for the purposes of the oral procedure and of the judgment.

55 In its requests for a preliminary ruling, the referring court requested that the case be determined under an expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice. Those requests were rejected by 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), and of 19 September 2017, *Magamadov* (C-438/17, not published, EU:C:2017:723).

Consideration of the questions referred

The first question in Cases C-297/17, C-318/17 and C-319/17 and the questions in Case C-438/17

56 By these questions, which can be examined together, the referring court seeks, in essence, to ascertain whether the first paragraph of Article 52 of the Procedures Directive must be interpreted as meaning that it permits a Member State to provide for the immediate application of the provision of national law that transposes Article 33(2)(a) of that directive to asylum applications on which no final decision has yet been made and which were lodged before 20 July 2015 and before the entry into force of that provision of national law. With respect to Case C-438/17, that court seeks, further, to ascertain whether the position is the same where an application for asylum was lodged before the entry into force of the Procedures Directive and where that application still falls, in accordance with Article 49 of the Dublin III Regulation, fully within the scope of the Dublin II Regulation.

57 Under Article 33(2)(a) of the Procedures Directive, the Member States may consider an application for international protection as being inadmissible where international protection has been granted by another Member State.

58 Since Article 33(2)(a) provides that a Member State may also reject such an application as being inadmissible in situations where the applicant has been granted only subsidiary protection in another Member State, that provision extends the option previously provided for in Article 25(2)(a) of Directive 2005/85, which permitted such rejection solely where the applicant had been granted refugee status in another Member State.

59 It follows from Article 51(1) of the Procedures Directive that the Member States were required bring into force the laws, regulations and administrative provisions necessary to comply with, inter alia, Article 33 of that directive by 20 July 2015 at the latest. Further, in accordance the first paragraph of Article 53 of the Procedures Directive, Directive 2005/85 was repealed with effect from 21 July 2015.

60 The first paragraph of Article 52 of the Procedures Directive contains transitional provisions.

61 Accordingly, the first sentence of the first paragraph of Article 52 of that directive provides that Member States are to 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'.

62 The second sentence of the first paragraph of Article 52 of the Procedures Directive states that applications lodged 'before 20 July 2015' and procedures for the withdrawal of refugee status started before that date are to be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85.

63 It is apparent from an examination of the *travaux préparatoires* of the Procedures Directive, in particular a comparison of Position (EU) No 7/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, adopted by the Council on 6 June 2013 (OJ 2013 C 179 E, p. 27), with the Commission Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009) 554 final), that the words 'or an earlier date' in the first sentence of the first paragraph of Article 52 of the Procedures Directive were added in the course of the legislative process (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 71).

64 Consequently, notwithstanding the tension between the first and second sentences of the first paragraph of Article 52 of the Procedures Directive, it is apparent from those *travaux préparatoires* that the EU legislature intended to allow the Member States who wished to do so to apply their provisions implementing that directive, with immediate effect, to applications for international protection lodged before 20 July 2015 (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 72).

65 Further, there is nothing in those *travaux préparatoires* to indicate that the EU legislature had intended to restrict that option, which the first paragraph of Article 52 of the Procedures Directive grants to the Member States, solely to the provisions that are more favourable to the applicants for international protection than those previously adopted for the purposes of transposing Directive 2005/85.

66 The fact remains that, while the first paragraph of Article 52 of the Procedures Directive permitted the Member States to apply their provisions implementing that directive to applications for international protection lodged before 20 July 2015, it did not compel them to do so. Since that provision offers, by using the wording 'started after 20 July 2015 or an earlier date', various possibilities with respect to temporal application, it is important, in order for the principles of legal certainty and equality before the law to be observed in the implementation of EU law and for applicants for international protection to be protected from arbitrariness, that each Member State bound by that directive examines applications for international protection lodged within the same

period on its territory in a predictable and uniform manner (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 73).

67 It is apparent from the orders for reference that the provision whereby the additional ground for inadmissibility laid down in Article 33(2)(a) of the Procedures Directive was transposed into German law, namely Paragraph 29(1), point 2, of the AsylG, entered into force with effect from 6 August 2016 and that, in the absence of national transitional provisions, the referring court must, pursuant to the first sentence of Paragraph 77(1) of the AsylG, base its decision, on the disputes in the main proceedings, on the situation in fact and in law obtaining at the time of the last hearing before that court or, if a judgment is given without a hearing, the date at which its judgment is given, and, therefore, on Paragraph 29 of the AsylG in the version in force on that date, unless the first paragraph of Article 52 of the Procedures Directive precludes the immediate application of that version to applications which were lodged before the entry into force of that directive but on which no final decision has been made.

68 In that regard, it must be stated, first, that a provision of national law such as the first sentence of Paragraph 77(1) of the AsylG ensures that applications for international protection, which have been lodged in the course of the same period in German territory and on which no final decision had been made at the time of the entry into force of Paragraph 29(1), point 2, of the AsylG, are examined in a predictable and uniform manner.

69 Second, as follows from the considerations set out in paragraphs 64 and 65 of the present judgment, the first paragraph of Article 52 of the Procedures Directive does not preclude a provision of national law that transposes the additional ground for inadmissibility provided for by Article 33(2)(a) of that directive from being, in accordance with national law, applicable *ratione temporis* to asylum applications which were lodged before 20 July 2015 and before the entry into force of that transposing provision, but on which no final decision has been made.

70 Third, while the first paragraph of Article 52 of the Procedures Directive also does not preclude, in principle, the immediate application of the provisions of that directive to applications which were lodged before its entry into force, it is however clear that an immediate application of the additional ground for inadmissibility provided for in Article 33(2)(a) of that directive cannot extend to a situation such as that at issue in Case C-438/17, where both the application for asylum submitted in Germany and the take back request were lodged before 1 January 2014, so that that application, in accordance with Article 49 of the Dublin III Regulation, remains fully within the scope of the Dublin II Regulation.

71 That is because the Procedures Directive, which was adopted on the same day as the Dublin III Regulation, provides, in the same way as the latter, for an extension of its scope to applications for international protection, as compared with Directive 2005/85 which preceded it and which governed solely asylum procedure. This is the wider legislative framework surrounding the introduction of the additional ground for inadmissibility provided for in Article 33(2)(a) of the Procedures Directive, which permits Member States also to reject an application for asylum as being inadmissible where the applicant has been granted by another Member State not a right to asylum, but solely subsidiary protection.

72 Further, whereas Article 25(1) of Directive 2005/85 refers to the Dublin II Regulation, Article 33(1) of the Procedures Directive refers to the Dublin III Regulation.

73 It follows therefore from the structure of the Dublin III Regulation and from that of the Procedures Directive, and from the wording of Article 33(1) of that directive, that the additional

ground for inadmissibility provided for in Article 33(2)(a) of that directive is not intended to be applicable to an application for asylum which still falls entirely within the scope of the Dublin II Regulation.

74 In the light of the foregoing, the answer to the first question in Cases C-297/17, C-318/17 and C-319/17 and to the questions referred in Case C-438/17 is that the first paragraph of Article 52 of the Procedures Directive must be interpreted as meaning that it permits a Member State to provide for the immediate application of the provision of national law transposing Article 33(2)(a) of that directive to applications for asylum on which no final decision has yet been made, which were lodged before 20 July 2015 and before the entry into force of that provision of national law. However, the first paragraph of Article 52 of that directive, read in the light of, inter alia, Article 33 thereof, precludes such an immediate application in a situation where both the application for asylum and the take back request were lodged before the entry into force of the Procedures Directive and, in accordance with Article 49 of the Dublin III Regulation, still fall fully within the scope of the Dublin II Regulation.

The second question in Cases C-297/17, C-318/17 and C-319/17

75 It is apparent from the order for reference that, by that question, the referring court seeks to ascertain whether Article 33 of the Procedures Directive must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must first have resorted to the take charge or take back procedures provided for by the Dublin II or Dublin III Regulations.

76 Article 33(1) of the Procedures Directive provides that, in addition to cases in which an application is not examined in accordance with the Dublin III Regulation, Member States are not required to examine whether an applicant qualifies for international protection in accordance with the Qualification Directive where an application is considered inadmissible pursuant to Article 33 of that directive. Article 33(2) of that directive sets out an exhaustive list of the situations in which the Member States may consider an application for international protection to be inadmissible.

77 It is apparent from the wording of Article 33(1) of the Procedures Directive, particularly from the use of the phrase ‘in addition to cases in which an application is not examined in accordance with [the Dublin III Regulation]’, and from the objective of procedural economy pursued by that provision, that, in the situations listed in Article 33(2) of that directive, that provision permits the Member States to reject an application for international protection as being inadmissible without those States being obliged to have recourse, as the first resort, to the take charge or take back procedures provided for by the Dublin III Regulation.

78 Further, with respect to applications for international protection, such as those at issue in Cases C-297/17, C-318/17 and C-319/17, which fall in part within the scope of the Dublin III Regulation, a Member State cannot properly make a request of another Member State that it take charge of or take back, within the procedures set out by that regulation, a third-country national who has submitted an application for international protection in the former Member State after having been granted subsidiary protection by the latter Member State.

79 In such a situation, the EU legislature took the view that the rejection of such an application for international protection had to be made by means of a decision of inadmissibility, pursuant to Article 33(2)(a) of the Procedures Directive, rather than by means of a decision to transfer the person concerned and not to examine the application, under Article 26 of the Dublin III Regulation (see order of 5 April 2017, *Ahmed*, C-36/17, EU:C:2017:273, paragraphs 39 and 41).

80 In those circumstances, the answer to the second question in Cases C-297/17, C-318/17 and C-319/17 is that, in a situation such as that at issue in those cases, Article 33 of the Procedures Directive must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must, or must be able, to have recourse, as the first resort, to the take charge or take back procedures provided for by the Dublin III Regulation.

The third and fourth questions in Cases C-297/17, C-318/17 and C-319/17

81 By those questions, which can be examined together, the referring court seeks to ascertain, first, whether Article 33(2)(a) of the Procedures Directive must be interpreted as precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has already been granted subsidiary protection by another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter, or do not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of Article 4 of the Charter. The referring court is uncertain whether, in some cases, the position is the same where those granted such protection do not receive, in that other Member State, any subsistence allowance, or where such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State.

82 Second, the referring court seeks to ascertain whether Article 33(2)(a) of the Procedures Directive must be interpreted as precluding a Member State from exercising that option where the asylum procedure in the other Member State was and continues to be vitiated by systemic flaws.

83 As regards, first, the situation referred to in paragraph 81 of the present judgment, it must be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected, and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 of the Charter, which enshrine one of the fundamental values of the European Union and its Member States (judgment of today's date, *Jawo*, C-163/17, paragraph 80 and the case-law cited).

84 The principle of mutual trust between the Member States is in EU law, of fundamental importance, given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of today's date, *Jawo*, C-163/17, paragraph 81 and the case-law cited).

85 Accordingly, in the context of the Common European Asylum System, it must be presumed that the treatment of applicants for international protection in each Member State complies with the requirements of the Charter, the Geneva Convention and the ECHR (judgment of today's date, *Jawo*, C-163/17, paragraph 82 and the case-law cited). That applies, in particular, to the application of Article 33(2)(a) of the Procedures Directive, which constitutes, in the context of the Common

European Asylum System established by that directive, an expression of the principle of mutual trust.

86 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, so that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights (judgment of today's date, *Jawo*, C-163/17, paragraph 83 and the case-law cited).

87 Against that background, it must be stated that, having regard to the general and absolute nature of the prohibition laid down in Article 4 of the Charter, which is closely linked to respect for human dignity and which prohibits, without any possibility of derogation, inhuman or degrading treatment in whatever form, it is immaterial, for the purposes of the application of Article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 88).

88 Accordingly, where a court or tribunal hearing an action brought against a decision rejecting a new application for international protection as being inadmissible has available to it evidence produced by the applicant in order to establish the existence of such a risk in the Member State that has previously granted subsidiary protection, that court or tribunal is obliged 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 guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 90 and the case-law cited).

89 In that regard, it must be stated that, if the deficiencies mentioned in the preceding paragraph of the present judgment are to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 of the ECHR, and the meaning and scope of which is therefore, under Article 52(3) of the Charter, the same as those laid down by the ECHR, those deficiencies must attain a particularly high level of severity, which depends on all the circumstances of the case (judgment of today's date, *Jawo*, C-163/17, paragraph 91 and the case-law cited).

90 That particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (judgment of today's date, *Jawo*, C-163/17, paragraph 92 and the case-law cited).

91 That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment (judgment of today's date, *Jawo*, C-163/17, paragraph 93).

92 Given the concerns of the referring court on this point, it must be made clear that, having regard to the importance of the principle of mutual trust for the common European asylum system, infringements of the provisions of Chapter VII of the Qualification Directive which do not result in

a breach of Article 4 of the Charter do not prevent the Member States from exercising the option granted by Article 33(2)(a) of the Procedures Directive.

93 As regards the fact, also mentioned by the referring court, that those granted subsidiary protection do not receive, in the Member State which granted such protection to the applicant, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, that can lead to the finding that that applicant is exposed in that Member State to a real risk of suffering treatment that is in breach of Article 4 of the Charter only if the consequence is that the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that meets the criteria described in paragraphs 89 to 91 of the present judgment.

94 In any event, the mere fact that social protection and/or living conditions are more favourable in the Member State to which the new application for international protection has been made than in the Member State that has previously granted subsidiary protection cannot support the conclusion that the person concerned would be exposed, in the event of a transfer to the latter Member State, to a real risk of suffering treatment in breach of Article 4 of the Charter (see, by analogy, judgment of today's date, *Jawo*, C-163/17, paragraph 97).

95 As regards, second, the situation referred to in paragraph 82 of the present judgment, it is apparent from the request for a preliminary ruling that the deficiencies in the asylum procedure identified by the referring court consist, according to that court, in the fact that the Member State which granted the subsidiary protection can be predicted to refuse, contrary to the Qualification Directive, to grant refugee status to applicants for international protection and that, contrary to Article 40(3) of the Procedures Directive, that Member State also does not examine subsequent applications, notwithstanding that there may be new evidence or findings that significantly increase the probability of the applicant satisfying the conditions required to claim refugee status.

96 The referring court seeks to ascertain, in that regard, whether the combined provisions of Article 18 of the Charter and of Article 78 TFEU dictate that, in such a situation, a Member State must examine the further application for international protection notwithstanding a rule of domestic law that gives effect to Article 33(2)(a) of the Procedures Directive.

97 It must be borne in mind that both the Qualification Directive and the Procedures Directive were adopted on the basis of Article 78 TFEU and with the aim of attaining the objective laid down by that article and of assuring compliance with Article 18 of the Charter.

98 Under the Qualification Directive, in particular Article 13 thereof, the Member States are obliged to grant refugee status to any third-country national or stateless person who qualifies as a refugee, in accordance with Chapters II and III of that directive. In order to determine whether that is the case, the Member States must, in accordance with Article 4(3) of that directive, undertake an individual assessment of each application for international protection. Accordingly only where the Member States establish, following such an individual assessment, that an applicant for such protection does not satisfy the conditions laid down in Chapter III, but does satisfy those laid down in Chapter V, of that directive, can they grant to that applicant the status conferred by subsidiary protection instead of refugee status.

99 However, if the asylum procedure in a Member State were to lead to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive, the treatment

of applicants for asylum in that Member State could not be regarded as compliant with the obligations stemming from Article 18 of the Charter.

100 That said, the other Member States may reject a further application submitted to them by the person concerned as being inadmissible, pursuant to Article 33(2)(a) of the Procedures Directive, read with due regard to the principle of mutual trust. In such circumstances, it is for the Member State that granted subsidiary protection to resume the procedure for the obtaining of refugee status.

101 It follows from all the foregoing that the answer to the third and fourth questions in Cases C-297/17, C-318/17 and C-319/17 is as follows:

– Article 33(2)(a) of the Procedures Directive must be interpreted as meaning that it does not preclude a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter. The fact that the beneficiaries of such subsidiary protection do not receive, in that Member State, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, can lead to the finding that that applicant would be exposed in that Member State to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.

– Article 33(2)(a) of the Procedures Directive must be interpreted as not precluding a Member State from exercising that option, where the asylum procedure in the other Member State that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive.

The fifth question in Cases C-297/17, C-318/17 and C-319/17

102 In the light of the answer given to, in particular, the second question in Cases C-297/17, C-318/17 and C-319/17, there is no need to answer the fifth question referred in those cases.

Costs

103 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 (Grand Chamber) hereby rules:

1. **The first paragraph of Article 52 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 it permits a Member State to provide for the immediate application of the provision of national law transposing Article 33(2)(a) of that directive to applications for asylum on which no final decision has yet been made, which were lodged before 20 July 2015 and before the entry into force of that provision of national law. However, the first paragraph of Article 52 of that directive, read in the light of, inter alia,**

Article 33 thereof, precludes such an immediate application in a situation where both the application for asylum and the take back request were lodged before the entry into force of Directive 2013/32 and, in accordance with Article 49 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, still fall fully within the scope of 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**.**

2. **In a situation such as that at issue in Cases C-297/17, C-318/17 and C-319/17, Article 33 of Directive 2013/32 must be interpreted as meaning that it is not a condition for Member States to be able to reject an application for asylum as being inadmissible under Article 33(2)(a) of the directive that they must, or must be able, to have recourse, as the first resort, to the take charge or take back procedures provided for by Regulation No 604/2013.**

3. **Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State would not expose him 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 fact that the beneficiaries of such subsidiary protection do not receive, in that Member State, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, can lead to the finding that that applicant would be exposed in that Member State to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.**

Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a Member State from exercising that option, where the asylum procedure in the other Member State that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III 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.

[Signatures]

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* Language of the case: German.