Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

22 September 2022 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Border controls, asylum and immigration – Asylum policy – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Application for international protection – Grounds for inadmissibility – Article 2(q) – Concept of 'subsequent application' – Article 33(2)(d) – Rejection by a Member State of an application for international protection as inadmissible on account of the rejection of a previous application made by the person concerned in the Kingdom of Denmark – Final decision taken by the Kingdom of Denmark)

In Case C-497/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court of Schleswig-Holstein, Germany), made by decision of 6 August 2021, received at the Court on 13 August 2021, in the proceedings

**SI,**

**TL,**

**ND,**

**VH,**

**YT,**

**HN**

v

**Bundesrepublik Deutschland,**

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, M. Ilešič and D. Gratsias (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

– the European Commission, by A. Azema and L. Grønfeldt and by G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 33(2)(d) 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), read in conjunction with Article 2(q) thereof.

2 The request has been made in proceedings between SI, TL, ND, VH, YT and HN of the one part, and the Bundesrepublik Deutschland (Federal Republic of Germany) of the other part, concerning the lawfulness of a decision of the Bundesamt für Migration und Flüchtlinge – Außenstelle Boostedt (Federal Office for Migration and Refugees, Boostedt field office, Germany) ('the Office') which had dismissed their applications for international protection as inadmissible.

### Legal context

#### *European Union law*

*The Protocol on the position of Denmark*

3 Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the EU Treaty and to the FEU Treaty ('the Protocol on the position of Denmark') state:

'*Article 1*

Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the [TFEU]. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the [TFEU].

*Article 2*

None of the provisions of Title V of Part Three of the [TFEU], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the [European] Union pursuant to that title, and no decision of the Court of Justice of the European Union interpreting any such provision or measure or any measure amended or amendable pursuant to that Title shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark. In particular, acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged.'

*Directive 2011/95/EU*

4 Recitals 6 and 51 to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9) state:

‘(6) The Tampere conclusions [of 15 and 16 October 1999] … provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

…

(51) In accordance with Articles 1 and 2 of the [Protocol on the position of Denmark], Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.’

5 Article 1 of that directive states that the purpose of the directive is to lay down 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.

6 Article 2 of that directive, entitled ‘Definitions’, provides:

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

(a) “international protection” means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) “beneficiary of international protection” means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

(c) “Geneva Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 [*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)], as amended by the New York Protocol [relating to the status of refugees, concluded in New York] on 31 January 1967;

(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;

…’

*Directive 2013/32*

7 Article 2(b), (e) and (q) of Directive 2013/32 is worded as follows:

‘For the purposes of this Directive:

…

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

…

(e) “final decision” means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome;

…

(q) “subsequent application” means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).’

8 Under Article 10(2) of that directive:

‘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.’

9 Article 33(1) and (2) of that directive provides:

‘1. In addition to cases in which an application is not examined in accordance with 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)], Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU 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;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

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

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

*The Dublin III Regulation*

10 The first paragraph of Article 48 of Regulation No 604/2013 ('the Dublin III Regulation') repealed 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), which had replaced, in accordance with Article 24 thereof, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p.1).

11 In Chapter II, entitled 'General principles and safeguards', Article 3(1) of the Dublin III Regulation states, under the heading 'Access to the procedure for examining an application for international protection':

'Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

12 Article 18(1) of that regulation is worded as follows:

'The Member State responsible under this Regulation shall be obliged to:

…

(c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, 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.'

***The Agreement between the European Union and Denmark***

13 The Agreement between the European [Union] and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2006 L 66, p. 38; 'the Agreement between the European Union and Denmark') was approved on behalf of the European Union by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p.37).

14 Article 2 of the agreement provides as follows:

'1. The provisions of [Regulation No 343/2003] which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 27(2) of [Regulation No 343/2003] and – in respect of implementing measures adopted after the entry into force of this Agreement – implemented by Denmark … shall under international law apply to the relations between the [European Union] and Denmark.

2. The provisions of [Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin

Convention (OJ 2000 L 316, p. 1)] which is annexed to this Agreement and forms part thereof, together with its implementing measures … and – in respect of implementing measures adopted after the entry into force of this Agreement – implemented by Denmark … shall under international law apply to the relations between the [European Union] and Denmark.

3. The date of entry into force of this Agreement shall apply instead of the date referred to in Article 29 of [Regulation No 343/2003], and Article 27 of [Regulation No 2725/2000].'

15 Neither Directive 2011/95 nor Directive 2013/32 is covered by the Agreement between the European Union and Denmark.

***German law***

*The AsylG*

16 Paragraph 26a, entitled 'Safe third countries', of the Asylgesetz (Law on Asylum) (BGBl. 2008 I, p. 1798), in the version applicable to the facts at issue in the main proceedings ('the AsylG'), provides:

'(1) Any foreign national who has entered the federal territory from a third country within the meaning of the first sentence of Article 16a(2) of the Grundgesetz (Basic Constitutional Law) (safe third country) cannot invoke Article 16a(1) of the Grundgesetz. …

(2) In addition to the Member States of the European Union …, safe third countries are those listed in Annex I. …

…'

17 Paragraph 29 of the AsylG, entitled 'Inadmissible applications', is worded as follows:

'(1) An application for asylum shall be inadmissible if:

…

5. In the case of a subsequent application under Paragraph 71 or a second application under Paragraph 71a, a further asylum procedure need not be conducted. …

…'

18 Paragraph 31 of the AsylG, entitled 'Decisions by the [Federal Office for Migration and Refugees] on asylum applications', provides:

'…

(2) In decisions on admissible asylum applications … it shall be expressly determined whether the foreign national is granted refugee status or subsidiary protection and whether he or she is granted asylum. …

…'

19 Paragraph 71 of the AsylG, entitled 'Subsequent application', provides:

'(1) If, after withdrawal or unchallengeable rejection of a previous asylum application, the foreign national files a new asylum application (subsequent application), a new asylum procedure shall be conducted only if the conditions of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz (Law on administrative procedure (BGBl. 2013 I, p. 102)) are met; this shall be examined by the Federal Office [for Migration and Refugees] ….

…’

20 Paragraph 71a of the AsylG, entitled ‘Second application’, provides:

‘(1) If the foreign national makes an asylum application (second application) in the federal territory following unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a) in which [EU] law on the responsibility for conducting asylum procedures applies or which has concluded an international agreement thereon with the Federal Republic of Germany, a further asylum procedure shall be conducted only if the Federal Republic of Germany is responsible for conducting the asylum procedure and the conditions of Paragraph 51(1) to (3) of the Law on administrative procedure are met; this shall be examined by the Federal Office [for Migration and Refugees].

…

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

21 On 10 November 2020, the applicants in the main proceedings, Georgian nationals, submitted asylum applications to the Office.

22 It is apparent from the order for reference that, when those applications were being considered, the applicants in the main proceedings stated that they had left Georgia in 2017 to travel to Denmark, where they lived for three years and where they submitted applications for asylum which were refused.

23 By letter of 31 March 2021, the Kingdom of Denmark confirmed, in response to a request for information from the Office, that the applicants in the main proceedings had made applications for international protection on 28 November 2017, which had been rejected on 30 January 2019. Since the actions brought before the Danish courts by the applicants in the main proceedings against the decisions rejecting their applications were dismissed on 27 April 2020, those decisions became definitive.

24 The Office therefore examined the applications for asylum of the applicants in the main proceedings as ‘second applications’ within the meaning of Article 71a of the AsylG and, by decision of 3 June 2021, rejected them as inadmissible, pursuant to Article 29(1)(5) of the AsylG. The Office observed that the applicants in the main proceedings had already submitted applications for asylum which had been definitively rejected in Denmark, which, in accordance with the judgment of 20 May 2021, *L.R. (Asylum application rejected by Norway)* (C-8/20, EU:C:2021:404), had to be regarded as a ‘safe third country’ within the meaning of Article 26a of the AsylG. According to the Office, the conditions justifying a new asylum procedure were not met, since the account of the facts put forward by the applicants in the main proceedings in support of their applications did not reveal any change in the factual situation as compared with the factual situation which formed the basis of their first application, which was rejected by the Danish authorities.

25 The applicants in the main proceedings brought an action before the referring court against the decision of the Office.

26 The referring court states that, under German law, a ‘subsequent application’ within the meaning of Article 71 of the AsylG is a new application for asylum lodged in Germany, after the rejection of a first application for asylum, also made in Germany. A ‘second application’, within the meaning of Article 71a of the AsylG, is an application for asylum lodged in Germany after the rejection of an asylum application made in a safe third country, within the meaning of Article 26a of the AsylG, that is to say, inter alia, in another EU Member State. Those two types of application are the subject matter of a procedure which differs from the procedure applicable to a first application for asylum. The spirit and purpose of Article 71a of the AsylG are to treat the ‘second application’ in the same way as a ‘subsequent application’ and, thereby, to treat the decision taken by the third country, which ruled on the first application for asylum

of an applicant who has submitted a second application in Germany, in the same way as a decision taken by the German authorities on a first application for asylum.

27 The referring court considers, therefore, that, for the purposes of ruling on the dispute before it, it is necessary to clarify whether Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) of that directive, may apply where a final decision on a previous application for international protection has been taken in another Member State.

28 Furthermore, the referring court observes that Directive 2013/32 does not use the term 'second application' and uses, in particular in Article 33(2)(d) and Article 2(q) of Directive 2013/32, only the term 'subsequent application'. It is therefore possible to infer that Article 33(2)(d) of that directive applies only in the case of a subsequent application submitted in the same Member State as that in which the first application for international protection of the person concerned was lodged and rejected. It could also be argued in that regard that the Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the [European] Union and repealing Directive 2013/32 (COM(2016) 467 final), which envisaged the regulation concerned including a provision expressly stating that, after a final decision rejecting a previous application, any further application made by the same applicant in any Member State must be considered by the Member State responsible to be a subsequent application.

29 The referring court states that, although, in a judgment of 14 December 2016, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) left open whether there can be a 'subsequent application', within the meaning of Directive 2013/32 where the first procedure which led to the rejection of the first application for international protection of the person concerned took place in another Member State, it is apparent from the subsequent case-law of the lower German administrative courts that that question must be answered in the affirmative, which appears also to be the position of the referring court.

30 If the Court of Justice were also to answer in the affirmative, the referring court asks whether the same would hold where, after a first application for asylum has been rejected by the competent authorities of the Kingdom of Denmark, a further application for international protection is made in another Member State. The referring court recalls, in that regard, that it is true that the Kingdom of Denmark is a Member State of the European Union, but states that under the Protocol on the position of Denmark, that Member State is not bound by Directive 2011/95 or 2013/32. As is apparent from the definitions in Article 2 of Directive 2013/32 and the judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)* (C-8/20, EU:C:2021:404), a further application for international protection can be characterised as a 'subsequent application' within the meaning of that directive only where the previous application by that applicant sought to obtain refugee status or the subsidiary protection status under Directive 2011/95.

31 Therefore, the referring court takes the view that the term 'Member State' within the meaning of the Directive 2013/32 must be interpreted restrictively, in order only to apply to Member States which participate in the Common European Asylum System through their being bound by Directives 2011/95 and 2013/32. That is not the situation in respect of the Kingdom of Denmark which, under the Agreement between the European Union and Denmark, participates only in the system established by the Dublin III Regulation.

32 Should the referring court's question mentioned in paragraph 30 be answered in the negative, the referring court considers that it is necessary to clarify whether, in so far as the application for asylum made by the applicants in the main proceedings has already been rejected by the Danish authorities on the basis of an examination founded, in essence, on the same criteria as those laid down in Directive 2011/95 for the grant of refugee status, it would be possible to set aside only part of the decision of the Office which is the subject of the main proceedings, which would involve requiring a new examination to be undertaken of the application for asylum made by the applicants in the main proceedings solely in relation to whether it would be possible to grant them subsidiary protection status. Although, for refugees and for persons who under EU law may claim subsidiary protection, Danish law lays down a protection system similar to that

laid down by EU law, the referring court inclines towards the view that it is not possible to set aside part of the decision contested before it.

33 In those circumstances, the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court of Schleswig-Holstein, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘(1) Is national legislation under which an application for international protection can be rejected as an inadmissible subsequent application compatible with Article 33(2)(d) and Article 2(q) of Directive [2013/32] if the unsuccessful initial asylum procedure was conducted in a different EU Member State?

(2) If the answer to Question 1 is in the affirmative: is national legislation under which an application for international protection can be rejected as an inadmissible subsequent application compatible with Article 33(2)(d) and Article 2(q) of Directive [2013/32] even if the unsuccessful initial asylum procedure was conducted in Denmark?

(3) If the answer to Question 2 is in the negative: is national legislation under which an application for asylum is inadmissible in the event of a subsequent application and which makes no distinction in that respect between refugee status and subsidiary protection status compatible with Article 33(2) [(d)] of Directive [2013/32]?’

**Consideration of the questions referred**

34 As a preliminary point, it should be observed that the dispute in the main proceedings seeks the annulment of decisions rejecting applications for international protection by Georgian nationals whose previous applications for international protection had been rejected by the Kingdom of Denmark.

35 As the referring court observes, as regards Title V of Part Three of the FEU Treaty, which covers, inter alia, policies relating to border controls, asylum and immigration, the Kingdom of Denmark enjoys, under the Protocol on the position of Denmark, a special status which distinguishes it from the other Member States.

36 Therefore, in order to provide a useful answer to the referring court, it is sufficient to analyse the questions referred solely in so far as they concern the situation of a previous application for international protection rejected by the Danish authorities, there being no need to take account of the situation in which a comparable application has been rejected by the authorities of another Member State (see, by analogy, judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)*, C-8/20, EU:C:2021:404, paragraph 30).

37 It must therefore be considered that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof, and Article 2 of the Protocol on the position of Denmark, must be interpreted as precluding legislation of a Member State other than the Kingdom of Denmark which provides for the possibility of rejecting as inadmissible, in whole or in part, an application for international protection within the meaning of Article 2(b) of that directive, which has been made to that Member State by a national of a third country or a stateless person whose previous application for international protection, made to the Kingdom of Denmark, has been rejected by the latter Member State.

38 In accordance with the Court’s case-law, Article 33(2) of Directive 2013/32 sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible (judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)*, C-8/20, EU:C:2021:404, paragraph 31 and the case-law cited).

39 Article 33(2)(d) of Directive 2013/32 provides that Member States may reject an application for international protection as inadmissible if it constitutes a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 have arisen or have been presented by the applicant.

40 The term ‘subsequent application’ is defined in Article 2(q) of Directive 2013/32 as a further application for international protection made after a final decision has been taken on a previous application.

41 That definition accordingly uses the terms ‘application for international protection’ and ‘final decision’ which are also defined in Article 2(b) and (e) of that directive, respectively.

42 As regards, in the first place, the term ‘application for international protection’ or ‘application’, it is defined in Article 2(b) of Directive 2013/32 as 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, within the meaning of Directive 2011/95.

43 Although an application for international protection made to the competent authorities of the Kingdom of Denmark in accordance with the domestic provisions of that Member State is unquestionably an application for protection from a Member State, the fact remains that it does not constitute an application ‘seek[ing] refugee status or subsidiary protection status’ as provided for in Directive 2011/95 since, in accordance with the Protocol on the position of Denmark, that directive does not apply to the Kingdom of Denmark, as is, moreover, stated in recital 51 of that directive.

44 As regards, in the second place, the term ‘final decision’, it is defined in Article 2(e) of Directive 2013/32 as a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95 and which is no longer subject to a remedy within the framework of Chapter V of Directive 2013/32.

45 For the same reasons as set out in paragraph 43 of the present judgment, a decision taken by the Kingdom of Denmark in respect of an application for international protection cannot fall within that definition.

46 In the light of those factors, and without prejudice to the separate question whether the term ‘subsequent application’ applies to a further application for international protection made to a Member State after another Member State which is not the Kingdom of Denmark has rejected, by a final decision, a previous application, it is apparent from a combined reading of Article (2)(b), (e) and (q) of Directive 2013/32 that an application for international protection made to a Member State cannot be characterised as a ‘subsequent application’ if it has been made after the Kingdom of Denmark has rejected a comparable application by the same applicant.

47 Consequently, the existence of a previous decision of the Kingdom of Denmark rejecting an application for international protection made to that Member State in accordance with its domestic provisions does not make it possible for an application for international protection, within the meaning of Directive 2011/95, made by the person concerned to another Member State after the adoption of that previous decision to be characterised as a ‘subsequent application’ within the meaning of Article 2(q) and Article 33(2)(d) of Directive 2013/32.

48 Neither the Agreement between the European Union and Denmark nor the possibility that Danish legislation may lay down, for the grant of international protection, conditions identical to those laid down in Directive 2011/95, or similar, can result in a different conclusion.

49 In the first place, it is true that, under Article 2 of the Agreement between the European Union and Denmark, the Dublin III Regulation is also implemented by the Kingdom of Denmark. Accordingly, in a situation, such as that at issue in the main proceedings, where the persons concerned have made an application for international protection in the Kingdom of Denmark, another Member State to which those persons concerned have made a further application for international protection may, if the conditions

referred to in point (c) or (d) of Article 18(1) of that regulation are satisfied, request the Kingdom of Denmark to take back those persons concerned.

50 However, from this it cannot be inferred that, where such taking back is not possible or does not occur, the Member State concerned is entitled to regard the further application for international protection which that person has made to its own bodies as a ‘subsequent application’ within the meaning of Article 33(2)(d) of Directive 2013/32 (see, by analogy, judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)*, C-8/20, EU:C:2021:404, paragraph 44).

51 While the Agreement between the European Union and Denmark provides, in essence, for the Kingdom of Denmark to implement certain provisions of the Dublin III Regulation, that agreement does not, however, stipulate that Directive 2011/95 or Directive 2013/32 are to apply to the Kingdom of Denmark.

52 In the second place, even if, as the referring court states, applications for refugee status made to the Kingdom of Denmark are examined by the authorities of that Member State on the basis of criteria which are in substance identical to those laid down in Directive 2011/95, that fact cannot justify the rejection, even if limited to the part concerning the grant of refugee status, of an application for international protection made to another Member State by an applicant whose previous application seeking that status was rejected by the Danish authorities.

53 In addition to the fact that the unequivocal wording of the relevant provisions of Directive 2013/32 precludes an interpretation of Article 33(2)(d) thereof to that effect, the application of Article 33(2)(d) cannot depend, at the risk of undermining legal certainty, on an assessment of the specific level of protection of applicants for international protection in the Kingdom of Denmark (see, by analogy, judgment of 20 May 2021, *L.R. (Application for asylum rejected by Norway)*, C-8/20, EU:C:2021:404, paragraph 47).

54 In that regard, it should be noted that Directive 2011/95 does not merely provide for refugee status, as established in international law, namely in the Geneva Convention as defined in Article 2(c) of Directive 2011/95, but also affirms subsidiary protection status, which, as is apparent from recital 6 of that directive, supplements the rules on refugee status.

55 Consequently, the answer to the question referred is that Article 33(2)(d) of Directive 2013/32, read in conjunction with Article 2(q) thereof and Article 2 of the Protocol on the position of Denmark, must be interpreted as precluding legislation of a Member State other than the Kingdom of Denmark which provides for the possibility of rejecting as inadmissible, in whole or in part, an application for international protection within the meaning of Article 2(b) of that directive, which has been made to that Member State by a national of a third country or a stateless person whose previous application for international protection, made to the Kingdom of Denmark, has been rejected by the latter Member State.

## Costs

56 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 (Tenth Chamber) hereby rules:

**Article 33(2)(d) 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, read in conjunction with Article 2(q) thereof and Article 2 of Protocol (No 22) on the position of Denmark annexed to the EU Treaty and to the FEU Treaty,**

**must be interpreted as precluding legislation of a Member State other than the Kingdom of Denmark which provides for the possibility of rejecting as inadmissible, in whole or in part, an application for international protection within the meaning of Article 2(b) of that directive, which has been made to that Member State by a national of a third country or a stateless person whose previous application for international protection, made to the Kingdom of Denmark, has been rejected by the latter Member State.**

[Signatures]

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* Language of the case: German.