Provisional text

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 25 March 2021(1)

Case C-768/19

Bundesrepublik Deutschland
v
SE,
joined parties:
Vertreter des Bundesinteresses beim Bundesverwaltungsgericht

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling – Area of freedom, security and justice – International protection – Subsidiary protection —Directive 2011/95/EU – Third indent of Article 2(j) – Right under national law of an adult to subsidiary protection as the parent of an unmarried minor who is a beneficiary of subsidiary protection – Relevant date for assessing ‘minor’ status)

I. Introduction

1. The present request for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany), dated 15 August 2019 and which was lodged at the Registry of the Court on 18 October 2019, concerns the interpretation of the third indent of Article 2(j) 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, (2) and Article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’). It raises again rather vexing questions regarding the appropriate dates which should govern family reunification applications arising from the grant of international protection to other family members.

2. The request has been made in proceedings between SE and the Bundesrepublik Deutschland (Federal Republic of Germany), concerning the refusal by the latter to grant SE subsidiary protection as the parent of an unmarried minor who is a beneficiary of subsidiary protection in that Member State (SE's son).

3. In order for SE and his son to be considered 'family members' within the meaning of the third indent of Article 2(j) of Directive 2011/95, SE's son must, inter alia, be a minor and unmarried. (3) The Federal Republic of Germany refused to grant SE subsidiary protection on the basis that, while he had applied for asylum in that Member State while his son was a minor, SE filed a formal application for asylum in that Member State one day after his son ceased to be minor.

4. In the present request for a preliminary ruling, the Court is asked to determine, inter alia, what point in time is to be taken into account for the purpose of assessing whether the person eligible for protection (in this case SE's son) is a 'minor' within the meaning of the third indent of Article 2(j) of Directive 2011/95.

5. Before considering these issues, it is, however, first necessary to set out the relevant legal provisions and the facts in the main proceedings.

II. **Legal framework**

A. **EU law**

1. ***Directive 2011/95***

6. Article 1 of Directive 2011/95, headed 'Purpose', provides:

'The purpose of this 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.'

7. Article 2 of Directive 2011/95, headed 'Definitions', provides:

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

…

(j) 'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

- …,

- …,

- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;

(k) 'minor' means a third-country national or stateless person below the age of 18 years;

…’

8. Article 3 of Directive 2011/95, headed ‘More favourable standards’, provides:

‘Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.’

9. Article 23 of Directive 2011/95, headed ‘Maintaining family unity’, provides:

‘1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.

…’

10. Article 24 of Directive 2011/95, headed ‘Residence permits’, provides:

‘…

2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.’

2. ***Directive 2013/32/EU***

11. Article 6 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, (4) headed ‘Access to the procedure’, is worded as follows:

‘1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

…

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

…’

B. **German law**

12. Paragraph 13 of the Asylgesetz (5) (Law on asylum; ‘the AsylG’) provides:

‘(1) An asylum application exists if it can be inferred from the foreign national’s intention, expressed in writing, verbally or in any other way, that he seeks protection in the territory of the Federal Republic from political persecution or that he requests protection against removal or any other form of forced return to a State in which he is at risk of persecution within the meaning of Paragraph 3(1) or of serious harm within the meaning of Paragraph 4(1).

…’

13. Paragraph 14 of the AsylG provides:

‘(1) The asylum application shall be lodged at the local branch of the Federal Office which is assigned to the reception centre responsible for admitting the foreign national. …

…’

14. Paragraph 26 of the AsylG provides:

‘…

(2) An unmarried minor who is the child of a beneficiary of asylum and who was a minor at the time of his asylum application shall be recognised as being eligible for asylum on application if the recognition of the foreign national as a beneficiary of asylum cannot be challenged and that recognition cannot be revoked or withdrawn.

(3) The parents of an unmarried minor who is a beneficiary of asylum or another adult within the meaning of Article 2(j) of Directive [2011/95] shall be recognised as being eligible for asylum on application, if

1. the recognition of the person’s eligibility for asylum cannot be challenged,

2. the family within the meaning of Article 2(j) of Directive [2011/95] already existed in the State in which the person eligible for asylum is politically persecuted,

3. they entered the territory prior to the recognition of the person’s eligibility for asylum or they lodged the asylum application immediately after entering the territory,

4. the recognition of the person’s eligibility for asylum cannot be revoked or withdrawn, and

5. they are responsible for taking care of the person eligible for asylum.

Points 1 to 4 of the first sentence shall apply *mutatis mutandis* to unmarried siblings of the minor person eligible for asylum who are minors at the time of their application.

…

(5) The provisions of subparagraphs 1 to 4 shall apply *mutatis mutandis* to family members within the meaning of subparagraphs 1 to 3 of beneficiaries of international protection. Eligibility for asylum shall be replaced by refugee status or subsidiary protection. …

…'

15. Paragraph 77 of the AsylG provides:

'(1) In disputes coming within the scope of this Law, the court shall take into account the situation of fact and of law obtaining at the time of the last hearing; if judgment is given without a hearing, the relevant point in time shall be that at which judgment is given. …

…'

III. **The facts of the main proceedings and the request for a preliminary ruling**

16. SE requests that he be granted subsidiary protection status on the basis that he is the father of an unmarried minor who has that status. SE is, by his own account, an Afghan national and the father of a son born on 20 April 1998, who entered the territory of the Federal Republic of Germany in 2012 and made an asylum application there on 21 August 2012. (6)

17. By a final decision of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany, 'the Federal Office') of 13 May 2016, the asylum application of SE's son was rejected. He was nevertheless granted subsidiary protection status.

18. By his own account, SE entered the Federal Republic of Germany by land in January 2016. He applied for asylum in February 2016 and filed a formal application for international protection on 21 April 2016.

19. The Federal Office rejected his requests to be granted asylum and refugee status or subsidiary protection status and his request for a declaration that there are grounds prohibiting his deportation pursuant to Paragraph 60(5) and the first sentence of Paragraph 60(7) of the Aufenthaltsgesetz (German Law on residence).

20. By the contested judgment, the Verwaltungsgericht (Administrative Court, Germany) imposed an obligation on the Federal Republic of Germany to grant subsidiary protection status to SE on the basis of Paragraph 26(5), in conjunction with the first sentence of Paragraph 26(3), of the AsylG, as the parent of an unmarried minor who is a beneficiary of subsidiary protection.

21. According to the Verwaltungsgericht (Administrative Court), SE's son was still a minor at the time when the asylum application was made by SE, which is the relevant point in time in this regard. In this connection, an asylum application must be regarded as having been made as soon as the competent authority became aware of the request for asylum of the person seeking protection.

22. In its appeal on a point of law to the referring court, the Federal Republic of Germany contends that the first sentence of Paragraph 26(3) of the AsylG has been infringed. It claims that pursuant to the first sentence of Paragraph 77(1) of the AsylG the decisive factor for the assessment of the factual and legal situation is, in principle, the time of the last hearing before the court ruling on the merits or – in the absence of such a hearing – the time of the final decision of the court ruling on the merits. Paragraph 26(3) of the AsylG does not contain any express statutory exemptions in this regard. Its factual requirements and its structure suggest that, in any event, only a minor who

was still a minor when his or her own status was granted can give rise to a derived right. It maintains that the provision serves the interests of the minor entitled to protection, which, in principle, exist only as long as he or she is a minor.

23. The Federal Republic of Germany also claims that even if 'minor' status were to be based on the date of the parent's asylum application, it is not the point in time when the material request for asylum was made (Paragraph 13 of the AsylG) that is decisive in that regard, but rather the point in time of the formal asylum application (Paragraph 14 of the AsylG). For the purpose of satisfying the application requirement laid down in the first sentence of Paragraph 26(3) of the AsylG, it is not sufficient that the competent authority – in this case the Federal Office – is merely aware of the request for asylum. A prerequisite for recognition is a (formal) application, which, in order to be effective, can be made only with the competent authority.

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

'(1) In the case of an applicant for asylum who, before the point at which the age of majority is reached by his child, by way of whom a family existed in the country of origin and to whom subsidiary protection status was granted, following the attainment of majority, on the basis of an application for protection filed before the age of majority was reached ("the beneficiary of protection"), entered the host Member State of the beneficiary of protection and also made an application for international protection there ("the applicant for asylum"), and in the case of a national provision which, in relation to the granting of a right to be granted subsidiary protection, that right being derived from the beneficiary of subsidiary protection, makes reference to Article 2(j) of Directive [2011/95], is the point in time at which the decision on the asylum application of the applicant for asylum is taken or an earlier point in time to be taken into account for the question as to whether the beneficiary of protection is a "minor" within the meaning of the third indent of Article 2(j) of Directive [2011/95], such as the point in time at which

(a) the beneficiary of protection was granted subsidiary protection status,

(b) the applicant for asylum made his asylum application,

(c) the applicant for asylum entered the host Member State, or

(d) the beneficiary of protection made his asylum application?

(2) In the event

(a) that the point in time at which the application is made is decisive:

Is the request for protection expressed in writing, verbally or in any other way and made known to the national authority responsible for the asylum application (request for asylum) or the formal application for international protection to be taken as the basis in this respect?

(b) that the point in time at which the applicant for asylum enters the territory or the point in time at which he makes the asylum application is decisive: Is it also significant whether, at that point in time, the decision on the application for protection of the beneficiary of protection who was subsequently recognised as being a beneficiary of subsidiary protection had not yet been taken?

(3)(a) What requirements are to be imposed in the situation described in Question 1 in order for the applicant for asylum to be a "family member" (Article 2(j) of Directive [2011/95]) who is present "in the same Member State in relation to the application for international protection" in which the person who was granted international protection is present and by way of whom the family "already" existed "in the country of origin"? Does this require, in particular, that family life between the beneficiary of protection and the applicant for asylum within the meaning of Article 7 of the Charter has been resumed in the host Member State, or is the mere simultaneous presence of the beneficiary of protection and the applicant for asylum in

the host Member State sufficient in this respect? Is a parent a family member even if, depending on the circumstances of the individual case, entry into the territory was not intended for the purpose of actually assuming responsibility within the meaning of the third indent of Article 2(j) of Directive [2011/95] for a beneficiary of international protection who is still a minor and unmarried?

(b) If Question 3(a) is to be answered to the effect that family life between the beneficiary of protection and the applicant for asylum within the meaning of Article 7 of the Charter must have been resumed in the host Member State, is the point in time at which it resumed significant? In that regard, must account be taken, in particular, of whether family life was re-established within a certain period of time after the applicant for asylum entered the territory, or at the point in time at which the applicant for asylum makes the asylum application or at a point in time at which the beneficiary of protection was still a minor?

(4) Does the status of an applicant for asylum as a family member within the meaning of the third indent of Article 2(j) of Directive [2011/95] end when the beneficiary of protection reaches the age of majority and the associated responsibility for a person who is a minor and unmarried ceases to exist? In the event that this is answered in the negative: Does this status as a family member (and the associated rights) continue to exist indefinitely beyond that point in time or does it cease to exist after a certain period of time (if so: what period of time?) or upon the occurrence of certain events (if so: which events?)?'

IV. **The procedure before the Court**

25. Written observations were submitted by the German and Hungarian Governments and the European Commission. On 26 May 2020, the proceedings in present case were stayed by decision of the President of the Court pursuant to Article 55(1)(b) of the Rules of Procedure of the Court of Justice until the judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577). That judgment was notified to the referring court in the present proceedings in order to ascertain whether it wished to maintain its request for a preliminary ruling. By order dated 19 August 2020, which arrived at the Court Registry on 26 August 2020, the referring court informed the Court that it wished to maintain its request for a preliminary ruling. By decision of the President of the Court of 28 August 2020, the stay of proceeding in the present case was lifted.

26. By decision of the Court dated 10 November 2020, the German Government was asked to clarify the difference – particularly in terms of procedure, time limits and conditions – that exist in German law between the informal application for asylum, within the meaning of Paragraph 13(1) of the AsylG and the formal application for asylum, within the meaning of Paragraph 14(1) of the same law. The German Government replied to that question on 14 December 2020.

27. By decision of the Court dated 10 November 2020, the interested parties, pursuant to Article 23 of the Statute of the Court of Justice of the European Union, were invited to comment on the possible consequences to be drawn from judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577) for the purposes of the answer to be given in particular to the first question referred in the present proceedings. The Hungarian Government and the Commission lodged observations in that regard.

V. **Jurisdiction of the Court**

28. The German Government has raised doubts as regards the jurisdiction of the Court to deal with the questions referred for a preliminary ruling. According to that government, the questions referred concern the interpretation of a national provision which is not imposed by EU law and which, by its wording, refers to the definitions provided by EU law in Article 2(j) of Directive 2011/95 only with regard to the concepts of 'another adult' and 'family'.

29. It must be noted that by its questions the referring court seeks an interpretation of the third indent of Article 2(j) of Directive 2011/95 and Article 7 of the Charter. No reference is made to national law in those questions.

30. It follows, however, from the request for a preliminary ruling that SE claims international protection as a family member (parent of an unmarried minor child) on the basis of Paragraph 26(5), in conjunction with the first sentence of Paragraph 26(3) of the AsylG rather than on the basis of EU law, in particular, Directive 2011/95. It would appear nonetheless that the question whether, at the relevant point in time, SE's son is an unmarried minor and thus whether SE is a family member in accordance with the third indent of Article 2(j) of Directive 2011/95 is pivotal in determining SE's status under national law. This is due to the reference to Article 2(j) of Directive 2011/95 contained in Paragraph 26(3) of the AsylG. (7)

31. In its judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraphs 68 to 74), the Court noted that Directive 2011/95 does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status. It follows that Article 23 of that directive merely requires Member States to amend their national laws so that family members, within the meaning of Article 2(j) of the directive, of the beneficiary of such a status are, if they are not individually eligible for the same status, entitled to certain benefits, which include, inter alia, a residence permit, access to employment or to education, which are intended to maintain family unity. However, Article 3 of Directive 2011/95 permits a Member State, when granting international protection to a family member pursuant to the system established by that directive, to provide for an extension of the scope of that protection to other family members, provided that they do not fall within the scope of a ground for exclusion laid down in Article 12 of that directive and that their situation is, due to the need to maintain family unity, consistent with the rationale of international protection.

32. The Court has also held that the grant of refugee status or subsidiary protection to family members as a derived right, in order to maintain the family unity of those concerned, is consistent with the rationale of international protection underlying the granting of that status. (8)

33. It would appear from the file before the Court, subject to verification by the referring court, (9) that the Federal Republic of Germany has availed of the possibility pursuant to Article 3 of Directive 2011/95 to provide more extensive protection to certain family members referred to in Article 2(j) of Directive 2011/95.

34. It is settled case-law that the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall within the field of application of EU law directly, provisions of EU law have been rendered applicable by domestic law due to a *renvoi* made by that law to the content of those provisions. In such circumstances, it is clearly in the interest of the European Union that, in order to forestall potential future differences of interpretation, provisions taken from EU law should be interpreted uniformly. Thus, an interpretation by the Court of provisions of EU law in situations not falling within the scope of EU law is warranted where such provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those situations and situations falling within the scope of EU law are treated in the same way. (10)

35. Given that Paragraph 26(3) of the AsylG refers specifically to the concept of 'family' pursuant to Article 2(j) of Directive 2011/95 and that there is nothing to indicate that the latter provision is not directly and unconditionally applicable to situations such as that at issue in the main proceedings, it is therefore clearly in the interest of the European Union that the Court rule on the present request for a preliminary ruling.

36. I thus consider that the Court has jurisdiction to answer the questions referred.

VI. Consideration of the questions referred

A. First and second questions

1. *Preliminary remarks*

37. By its first and second questions, which can conveniently be treated together, the referring court seeks to determine, in a situation such as that in the main proceedings, where a parent (in this case, SE) is seeking to derive a right to subsidiary protection under national law on the

basis of the subsidiary protection status of an unmarried minor child, what point in time is to be taken into account for the purpose of determining whether the person eligible for international protection – in this case, SE's son – is a 'minor' in accordance with the third indent of Article 2(j) of Directive 2011/95. (11)

38. As the Commission pointed out in its observations, the answer to that question is necessary from an EU law perspective in order to determine whether SE is entitled to claim, as provided by Article 23(2) of Directive 2011/95, the benefits laid down in Articles 24 to 35 of that directive. (12)

39. The definition of 'minor' contained in Article 2(k) of Directive 2011/95, which refers to 'a third-country national or stateless person below the age of 18 years', is not in question in the main proceedings.

40. What is in question, however, is the relevant point in time when a person's 'minor' status is assessed in order to determine whether that minor and another person are 'family members' for the purposes of the third indent of Article 2(j) of Directive 2011/95. In accordance with Article 2(j) of Directive 2011/95, the term 'family members' includes, in so far as the family already existed in the country of origin, the father of an unmarried minor who is the beneficiary of international protection who is present in the same Member State in relation to the application for international protection.

41. The referring court has presented this Court with five temporal options, namely:

– the date on which SE's asylum application was decided (main body of Question 1);

– the date on which SE's son was granted subsidiary protection (Question 1(a));

– the date on which SE applied for asylum (Question 1(b));

– the date SE entered Germany; (Question 1(c)); or

– the date on which SE's son made his asylum application (Question 1(d)).

42. The German Government considers that the relevant point in time for assessing 'minor' status pursuant to the third indent of Article 2(j) of Directive 2011/95 is the date of the decision ruling on the application of the family member who wishes to assert a right, derived from that of the beneficiary of protection.

43. The Hungarian Government considers that the use of the present tense in the third indent of Article 2(j) of Directive 2011/95 militates against a retroactive interpretation of 'minor' status. The factual and legal situation on which a decision is based should thus be examined and evaluated in the light of the circumstances existing at the time the decision is adopted. A different interpretation in the present proceedings would mean that the authorities would have to base their decision on a fiction that the person is still a minor when that is no longer the case. Such a fiction cannot be derived from the text of Directive 2011/95 or its objectives and would be contrary to legal certainty. According to that government, the relevant point in time is the date of the decision on the application for international protection lodged by the family member of the beneficiary of international protection.

44. By contrast, the Commission considers that the third indent of Article 2(j) and Article 23(2) of Directive 2011/95 must be interpreted as meaning that a third-country national or a stateless person who was under the age of 18 years at the time he or she submitted an application for international protection in a Member State, but who has become of an adult during the procedure and to whom the subsidiary protection status was subsequently granted, is to be considered as a 'minor' for the proposes of the third indent of Article 2(j) if his or her father entered the territory of the same Member State before the beneficiary of protection reached the age of majority and submitted the application referred

to in Article 23(2) of Directive 2011/95 within a reasonable period of time from the day on which the beneficiary of protection was recognised as such.

2. ***Judgment of 12 April 2018,* A and S *(C-550/16, EU:C:2018:248)***

45. It is clear from the request for a preliminary ruling that the different temporal options presented by the referring court were inspired, at least in part, by the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248). (13) I shall therefore outline in some detail the facts and ruling in that case for greater comprehension of the different temporal options presented by the referring court.

46. The case giving rise to the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248) concerned the right of an unaccompanied minor who entered the Netherlands and applied for asylum when she was a minor but who obtained refugee status and applied for family reunification with her parents *after* she reached the age of majority.

47. The Court was asked whether Article 2(f) (14) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (15) must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the submission of his or her asylum application in that State, but who, in the course of the asylum procedure, reaches the age of majority and is, thereafter, granted asylum with retroactive effect to the date of his or her application must be regarded as a 'minor' for the purposes of that provision. The Court held that Article 2(f) of Directive 2003/86, read in conjunction with Article 10(3)(a) (16) thereof, should be interpreted in that fashion so that a third-country national or stateless person who is below the age of 18 at the moment of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must nonetheless be regarded as a 'minor' for the purposes of that provision.

48. According to the Court, if the right to family reunification under Article 10(3)(a) of Directive 2003/86 were to depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned, instead of prompting national authorities to treat applications for international protection from unaccompanied minors urgently in order to take account of their particular vulnerability, such an interpretation could have the opposite effect, frustrating the objective pursued both by Directive 2013/32 and by Directives 2003/86 and 2011/95 of ensuring that, in accordance with Article 24(2) of the Charter, the best interests of the child is in practice a primary consideration for Member States in the application of those directives. (17)

49. The Court thus considered that taking the date on which the application for international protection was submitted as that by reference to which it is appropriate to assess the age of a refugee for the purposes of Article 10(3)(a) of Directive 2003/86 enables identical treatment and foreseeability to be guaranteed for all applicants who are in the same situation chronologically, by ensuring that the success of the application for family reunification depends principally upon facts attributable to the applicant and not to the administration such as the time taken processing the application for international protection or the application for family reunification. The Court stated, however, that a refugee who had the status of an unaccompanied minor at the time of his or her application but who attained his or her majority during the procedure must make an application seeking reunification within a reasonable time. (18) In that regard, the Court considered that the application must be submitted within a period of three months of the date on which the 'minor' concerned was declared to have refugee status.

3. ***Judgment of 16 July 2020,* État belge (Family reunification – minor child) *(C-133/19, C-136/19 and C-137/19, EU:C:2020:577)***

50. I also consider that the judgment of 16 July 2020, *État belge (Family reunification – minor child*) (C-133/19, C-136/19 and C-137/19, EU:C:2020:577), which was adopted following the reference for a preliminary ruling in the present case, is of relevance.

51. In that case, the Court was asked, inter alia, whether point (c) of the first subparagraph of Article 4(1) of Directive 2003/86 must be interpreted as meaning that the date which should be referred to for the purpose of determining whether an unmarried third-country national or

refugee is a ‘minor child’, within the meaning of that provision, is that of the submission of the application for entry and residence for the purpose of family reunification for minor children, or that of the decision on that application by the competent authorities of that Member State, as the case may be, after an action brought against a decision rejecting such an application.

52. The Court stated in unequivocal terms in paragraphs 36 and 37 of that judgment, that to consider the date on which the competent authority of the Member State concerned decided on the application for entry and residence in the territory of that State for the purposes of family reunification as the date which must be referred to in order to assess the age of the applicant for the purposes of applying point (c) of the first subparagraph of Article 4(1) of Directive 2003/86 would not be consistent with the objectives pursued by that directive or the requirements arising from Article 7 and Article 24(2) of the Charter, as the competent national authorities and courts would not be prompted to treat applications of minors as a matter of priority with the urgency necessary to take account of their vulnerability and could thus act in a way which would jeopardise the very rights of those minors to family reunification. The Court thus considered that point (c) of the first subparagraph of Article 4(1) of Directive 2003/86 must be interpreted as meaning that the date which should be referred to for the purpose of determining whether an unmarried third-country national or refugee is a minor child, within the meaning of that provision, is that of the submission of the application for entry and residence for the purpose of family reunification for minor children, and not that of the decision on that application by the competent authorities of that Member State.

4. *Brief analysis of judgments in question*

53. As I have indicated, the judgments of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248) and of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577) concerned the interpretation of Directive 2003/86.

54. It should be stressed at the outset that Directive 2003/86 was adopted on the 22 September 2003. The adoption of that directive was thus approximately six months prior to the adoption of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. (19) Directive 2004/83, which was later replaced by Directive 2011/95, introduced the concept of subsidiary protection status for the first time in EU law. This chronology serves to explain why Directive 2003/86 refers only to refugees and not to third-country nationals or stateless persons enjoying subsidiary protection status. While the rights of family members of refugees are largely governed by Directives 2003/86 and 2011/95, (20) the former directive does not concern the rights of family members of those enjoying subsidiary protection status.

55. Indeed, in paragraph 34 of the judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192), the Court confirmed that Directive 2003/86 must be interpreted as not applying to third country national family members of a beneficiary of subsidiary protection. (21)

56. I believe that the solution adopted in the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248) in respect of the right to family reunification of an unaccompanied minor who enjoyed refugee status pursuant to Article 2(f) and Article 10(3)(a) of Directive 2003/86 is instructive so far as the present case is concerned. The analysis contained in that case is not, however, fully transposable to the present one as there are certain key factual and legal differences. In particular, in the case giving rise to the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), it was the *unaccompanied minor child* who sought family reunification on the basis of Article 10(3)(a) of Directive 2003/86 rather than (as here) a parent seeking to join his child on the basis, inter alia, of Article 23 et seq. of Directive 2011/95.

57. Moreover, while the present case concerns the question of the rights of a parent of an individual who was granted subsidiary protection status, the case giving rise to the judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577) is also somewhat different as it concerns the interpretation of point (c) of the first subparagraph of Article 4(1) of Directive 2003/86 which requires Member States to authorise entry and residence of the unmarried minor children of a refugee.

5. ***Application of case-law in present case***

58. It must be noted that the third indent of Article 2(j) of Directive 2011/95 does not specify the point in time to be taken into account. While the EU legislature might with advantage have clarified that point, nevertheless, despite this absence, it does not follow that each Member State may unilaterally determine which moment it wishes to choose in order to determine whether certain persons are 'family members' for the purposes of the third indent of Article 2(j) of Directive 2011/95. I reach this conclusion for several reasons.

59. First, the third indent of Article 2(j) of Directive 2011/95 does not make any reference to national law or to Member States and, secondly, there is nothing in that provision or indeed any other provision of Directive 2011/95 to suggest that the EU legislature intended to leave to each Member State the responsibility for determining the relevant point in time in question.

60. In its judgments of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 41), and of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 30), the Court recalled that, in accordance with the need for a uniform application of EU law and the principle of equality, a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, and that interpretation must take into account, inter alia, the context of the provision and the objective pursued by the legislation in question.

61. In my view, the third indent of Article 2(j) of Directive 2011/95 must be read in the light of the Article 23 of that directive, the first paragraph of which stipulates in very clear, unequivocal language that 'Member States *shall ensure* that family unity can be maintained' (Emphasis added). In addition, recital 16 of Directive 2011/95 states that that directive respects the fundamental rights and the principles recognised by the Charter and seeks to promote the application, inter alia, of Articles 7 and 24 of the Charter.

62. It is settled case-law that Article 7 of the Charter, which recognises the right to respect for private or family life, must be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3) of the Charter, for a child to maintain on a regular basis a personal relationship with both parents. (22)

63. It follows from the above that the third indent of Article 2(j) of Directive 2011/95 must be interpreted in the interest of the child concerned and with a view to promoting family life.

64. I consider that it would be neither in the interest of the child concerned nor the promotion of family life in the context of proceedings such as those in the present case nor, indeed, for that matter in keeping with the rationale of the judgments of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), and of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577), if the relevant time for the assessment of 'minor' status under the third indent of Article 2(j) of Directive 2011/95 were to be the date on which SE's asylum application was actually decided; (23) or the date on which SE's son was granted subsidiary protection. (24)

65. It is clear from the judgments of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 55) and of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577), that the Court did not envisage that an applicant's right to family life should be made dependent on the rapidity and length of a national application and decision-making process. The principle which subtends these two decisions is that the entitlement to make an application for family reunification cannot be made to turn on the happenstance of the dates on which certain decisions are made by third parties.

66. In my view, this is so irrespective of whether the recognition of subsidiary protection status under Directive 2011/95 is a declaratory act or not. In that regard, it should be noted that recital 21 of Directive 2011/95 states that recognition of refugee status is a declaratory act. There is, however, no equivalent recital in Directive 2011/95 in respect of subsidiary protection. (25) Nonetheless, while the judgment of 12 April

2018, *A and S* (C-550/16, EU:C:2018:248) refers to the fact that recognition of refugee status is declaratory, (26) the Court in that judgment underscored the fact that to make the right to family reunification under Article 10(3)(a) of Directive 2003/86 depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision. Such a state of affairs would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty. (27)

67. A similar approach was adopted by the Court in its judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577). The Court, however, in its reasoning did not rely on the declaratory nature of an act recognising refugee status but rather emphasised the rights derived from Article 7 and Article 24(2) and (3) of the Charter and the interests of the children concerned. It observed that the right to family reunification should not be dependent on what were essentially random and unforeseeable circumstances, which were entirely attributable to the competent national authorities and the courts of the Member States concerned. (28)

68. It would appear from the national file before the Court in the present proceedings that, subject to verification by the referring court, there is a gap of nearly four years from when SE's son applied for asylum (21 August 2012) and the date on which he was granted subsidiary protection (13 May 2016). No explanation has been provided by the referring court for the considerable lapse of time in question. One could perhaps surmise, subject to verification by the referring court, that this may be due to certain legal challenges brought by SE's son against the Federal Office's rejection of his asylum application. It is sufficient to say that SE's asylum application has been pending since 2016.

69. In my view, aside from the risk of erosion of rights, (29) guaranteed under Article 7 and Article 24 of the Charter, it would also be contrary to Article 47 of the Charter and the right to an effective remedy if the fact that an applicant for international protection was required to invoke the judicial remedies provided under Article 46 of Directive 2013/32 could thereby lead to a situation where family members would lose their right to maintain family unity and all ensuing rights granted under, inter alia, Directive 2011/95 as a result of the lapses of time which such litigation inevitably generated and which appear to have been beyond the control of the applicant. Such a situation could greatly hinder and deter in an unreasonable manner reliance on judicial remedies which might otherwise be available. (30)

70. In that regard, I consider that the fact, as indicated by the German and Hungarian Governments, (31) that Article 46(3) of Directive 2013/32 requires a full and *ex nunc* examination of the facts and points of law by a court or tribunal of a Member State seised at first instance of an appeal against a decision on an application for international protection is not relevant when deciding, inter alia, what point in time is to be taken into account for the purpose of assessing whether the person eligible for protection (in this case SE's son) is a 'minor' within the meaning of the third indent of Article 2(j) of Directive 2011/95. The purpose of Article 46(3) of Directive 2013/32 is to ensure that the decision of the competent court on international protection is based on up-to-date facts and law. (32) That provision has no bearing whatsoever on the right of family members to claim, pursuant to Article 23(2) of Directive 2011/95, the benefits referred to in Articles 24 to 35 of that directive or indeed the point in time in accordance with which those rights are derived.

71. As regards the temporal option indicated in Question 1(c), namely the date that SE entered the Federal Republic of Germany, Article 2(j) of Directive 2011/95 clearly requires that the family members in question are 'present in the same Member State in relation to the application for international protection'. (33) For that provision to apply, SE must thus have entered the Federal Republic of Germany prior to his son reaching the age of majority and SE's son must have applied for international protection when he was a minor, given that SE seeks to derive rights in that regard.

72. While presence in the Member State in question and an application of international protection by the 'minor' in question are necessary conditions, they are not however sufficient in themselves to give rise to a right to the benefits referred to in Article 23(2) of Directive 2011/95. The family members of the beneficiary of international protection who do not individually qualify for such protection, must, in accordance with Article 23(2) of Directive 2011/95, actually '*claim* the benefits referred to in Articles 24 to 35 …'. (34) In my view, it is that claim which triggers

an examination of entitlement to the benefits in question and is thus the relevant point in time for assessing the 'minor' status of the beneficiary of international protection referred to in Article 23(2) of Directive 2011/95.

73. I therefore consider, that in order for a father to benefit from the rights provided by Article 23(2) of Directive 2011/95 on the basis that he is a 'family member' of a 'minor' who is a beneficiary of international protection, those rights must actually be asserted or claimed by the father in question while the beneficiary of international protection is still a minor. In a case such as that in the main proceedings, the relevant point in time for the purpose of assessing 'minor' status pursuant to the third indent of Article 2(j) of Directive 2011/95, is thus, in principle, the date on which the applicant for asylum (SE) made his asylum application (Question 1(b) – 2016). In the light of the clear wording of Article 23(2) of Directive 2011/95, I do not consider therefore that the date on which the beneficiary of international protection (SE's son) made his asylum application (35) is, in itself, relevant for the purpose of assessing 'minor' status pursuant to the third indent of Article 2(j) of Directive 2011/95 (Question 1(d) – 2012).

74. The relevant point in time for assessing the 'minor' status of SE's son pursuant to the third indent of Article 2(j) of Directive 2011/95 is thus the date on which SE applied for asylum (Question 1(b) – 2016), provided SE's son applied for international protection *prior* to reaching the age of majority and provided *both* family members in question are also present in the same Member State prior to SE's son reaching the age of majority.

75. Given that I consider that the point in time when SE made his application for asylum is decisive, it follows in turn that the second question raised by the referring court is also of some importance. This question concerns whether the material point in time is the date on which the request for asylum is made or whether it is the date on which the asylum application is formally lodged. (36)

76. That question requires an interpretation of Article 6 of Directive 2013/32. In my view, the answer to the question raised by the referring court may be found in paragraphs 92 to 94 of the judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection*) (C-36/20 PPU, EU:C:2020:495), which states in essence that, in accordance with Article 6(1) of Directive 2013/32, a third-country national acquires the status of an applicant for international protection, within the meaning of Article 2(c) of Directive 2013/32, *from the point when he or she 'makes' such an application*. The act of 'making' an application for international protection does *not* entail any administrative formalities since those formalities must be observed when the application is 'lodged'. Thus the acquisition of the status of applicant for international protection cannot be subject either to the registration or to the lodging of the application and the fact that a third-country national has expressed his or her wish to apply for international protection before 'other authorities' within the meaning of the second subparagraph of Article 6(1) of Directive 2013/32 is sufficient to confer the status of applicant for international protection on that person. The making of such an application is, accordingly, sufficient to trigger the time limit of six working days within which the Member State concerned must register the application.

77. It would appear therefore, subject to verification by the referring court, that the relevant point in time in respect of SE's asylum application was in February 2016 rather than the date of his formal application for international protection on 21 April 2016. As SE's asylum application was thus made while his son was still a minor, it follows in turn that SE was a family member for the purposes of the third indent of Article 2(j) of Directive 2011/95.

78. In answer to the first and second questions of the referring court, I therefore consider that in the circumstances of a case such as that in the main proceedings, the relevant point in time for assessing the 'minor' status of the beneficiary of international protection pursuant to the third indent of Article 2(j) of Directive 2011/95, is the date on which his father makes an application for international protection pursuant to Article 6(1) of Directive 2013/32, provided that the beneficiary of international protection has applied for that protection prior to reaching the age of majority and both family members in question are present in the same Member State prior to beneficiary of international protection reaching the age of majority.

B. **Third question referred**

79. By its third question, the referring court wishes to ascertain whether the third indent of Article 2(j) of Directive 2011/95, read in conjunction with Article 23(1) of that directive, requires the resumption, between the 'family members' in question, of family life within the meaning of Article 7 of the Charter or whether the mere simultaneous presence of the beneficiary of protection and his or her family member in the Member State in question is sufficient for establishing the status of family member. (37)

80. The third indent of Article 2(j) of Directive 2011/95 makes the concept of 'family members' in respect of a father of a beneficiary of international protection (38) dependent solely on the three conditions, namely, that the family already existed in the country of origin, (39) that the family members of the beneficiary of protection are present in the same Member State in relation to the application for international protection and that the beneficiary of international protection is an unmarried minor.

81. That provision and, in particular, the requirement of presence in the same Member State does not require the resumption between the family members in question of family life within the meaning of Article 7 of the Charter. Article 7 of the Charter requires that family life is respected. It does not, however, impose any specific requirements on family members in respect of the intensity of their family relationship.

82. Article 23(1) of Directive 2011/95 provides that Member States shall ensure that family unity can be maintained. In that regard, Article 23(2) of that directive imposes on the Member States precise positive obligations, with corresponding clearly defined individual, subjective rights. That provision requires Member States to ensure that 'family members', as defined by Article 2(j) of Directive 2011/95, are entitled to claim the benefits referred to in Articles 24 to 35 of that directive. Those benefits must, in principle, be granted to family members. (40) No margin of appreciation is left to the Member States in that regard. (41)

83. As the Commission rightly indicated in its observations, the resumption of a family relationship may not, in fact, be purely dependent on the wishes of the family members in question but rather on conditions beyond their control, such as where they are housed. Perhaps more importantly, given that Directive 2011/95 has not imposed any criteria whatsoever in that regard, it is not clear how the resumption of a family relationship could be monitored and assessed by the competent national authorities in a fair, objective and proportionate manner.

84. If, however, an unmarried minor on reaching the age of majority expressly indicates in writing that he or she does not wish to maintain family unity, then the purpose of Article 23 of Directive 2011/95 cannot be achieved and the competent national authorities are not required to grant to family members the corresponding benefits under Articles 24 to 35 of that directive.

85. Although SE's son turned 18 and reached the age of majority on 20 April 2016, there is no indication in the file before the Court, subject to verification by the referring court, that he objected at any stage to the maintenance of family unity or to being re-united with his father.

C. **Fourth question referred**

86. By its fourth question, the referring court seeks clarification as to whether the status of an applicant for asylum as a family member (SE) within the meaning of the third indent of Article 2(j) of Directive 2011/95 ends when the beneficiary of protection (SE's son) reaches the age of majority or marries. The referring court seeks also to ascertain, in the event that the status of the father of the beneficiary of protection as a family member, within the meaning of the third indent of Article 2(j) of Directive 2011/95/EU, does in principle continue to exist beyond the point at which the child reaches the age of majority, whether – beyond the situation in which the father's stay in the host Member State or the child's eligibility for protection comes to an end – that status ceases to exist at a certain point in time or upon the occurrence of a certain event. (42)

87. I consider that, in accordance with the third indent of Article 2(j) and Article 23(2) of Directive 2011/95, the rights of family members do *not* persist for an unlimited period of time.

88. In my view, the right of family members pursuant to the third indent of Article 2(j) of Directive 2011/95 to claim the benefits referred to in Articles 24 to 35 of that directive persists after the beneficiary of subsidiary protection reaches the age of majority, for the duration of the period

of validity of the residence permit granted to them in accordance with Article 24(2) of that directive.

89. In that regard, Article 24(2) of Directive 2011/95 provides that 'Member States shall issue to beneficiaries of subsidiary protection status and *their family members* a renewable residence permit which must be valid for *at least 1 year* and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require'. (43)

VII. **Conclusion**

90. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany), as follows:

In the circumstances of a case such as that in the main proceedings, the relevant point in time for assessing the 'minor' status of the beneficiary of international protection pursuant to the third indent of Article 2(j) 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, is the date on which his father makes an application for international protection pursuant to Article 6(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, provided that the beneficiary of international protection has applied for that protection prior to reaching the age of majority and both family members in question are present in the same Member State prior to beneficiary of international protection reaching the age of majority.

In accordance with the third indent of Article 2(j) of Directive 2011/95, the concept of 'family members' in respect of a father of a beneficiary of international protection is dependent solely on the three conditions, namely that the family already existed in the country of origin, that the family members of the beneficiary of international protection are present in the same Member State in relation to the application for international protection and that the beneficiary of international protection is an unmarried minor. The third indent of Article 2(j) of Directive 2011/95 does not require the resumption between the family members in question of family life within the meaning of Article 7 of the Charter of Fundamental Rights of the European Union. If an unmarried minor pursuant to the third indent of Article 2(j) of Directive 2011/95 on reaching the age of majority expressly indicates in writing that he or she does not wish to maintain family unity, then the purpose of Article 23 of Directive 2011/95 cannot be achieved and the competent national authorities are not required to grant to family members the corresponding benefits under Articles 24 to 35 of that directive.

The rights of family members pursuant to the third indent of Article 2(j) and Article 23(2) of Directive 2011/95 do not persist for an unlimited period of time. The right of family members pursuant to the third indent of Article 2(j) and Article 23(2) of Directive 2011/95 to claim the benefits referred to in Articles 24 to 35 of that directive persists after the beneficiary of subsidiary protection reaches the age of majority, for the duration of the period of validity of the residence permit granted to them in accordance with Article 24(2) of that directive.

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1 Original language: English.

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2 OJ 2011 L 337, p. 9.

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3 This criterion is not in question in the present proceedings.

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4 OJ 2013 L 180, p. 60.

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5 BGB1. 2008 I, p. 1798, in the version indicated by the referring court.

6 The date of 21 August 2012 appears in the national file lodged by the referring court at the Registry of the Court. It does not appear in the request for a preliminary ruling and must thus be verified by the referring court.

7 According to the referring court 'the applicant's application to be granted subsidiary protection as a parent would therefore be successful if, at the time which is decisive for the assessment, the son was a minor within the meaning of the first sentence of Paragraph 26(3) of the AsylG and the applicant was responsible for taking care of him within the meaning of point 5 of the first sentence of Paragraph 26(3) of the AsylG. Paragraph 26(3) of the AsylG is intended as a means of implementing Article 23(2) of Directive [2011/95] …'. See paragraphs 12 and 13 of the request for a preliminary ruling.

8 See, to that effect, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 73).

9 In paragraph 13 of the request for a preliminary ruling the referring court stated that Paragraph 26(3) of the AsylG is intended as a means of implementing Article 23(2) of Directive 2011/95. In my view, it would appear, subject to verification by the referring court, that the scope of that provision of national law is broader than Article 23(2) of Directive 2011/95 and that the national provision extends, in certain circumstances, international protection to family members.

10 Judgment of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraphs 34 to 36 and the case-law referred to). See also, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraphs 35 to 37).

11 The file before the Court indicates that SE's son was a minor when SE entered Germany in January 2016 and applied for asylum in February 2016. However, SE's son ceased to be a minor on 20 April 2016, one day before SE filed a formal application for international protection on 21 April 2016. Moreover, on 13 May 2016, SE's son was no longer a minor when he was granted subsidiary protection status. The referring court notes that in relation to the 'minor' status of the beneficiary of protection, the national case-law has in some cases also taken account – in line with the principle under Paragraph 77 of the AsylG – of the date on which the decision on the parent's asylum application was taken. In other cases, however, it has been deemed sufficient that the beneficiary of protection was still a minor at the time when the parent made the asylum application. In this respect, the reasons provided are generally based on provisions of EU law, and the explicit fixing of the time in the case of derived international protection for children (see Paragraph 26(2) of the AsylG) is transferred to international protection for parents, despite the lack of legislation in this regard. See paragraph 16 of the request for a preliminary ruling.

12 The Court may not rule on the implications of its answer under national law, in particular, with regard to Paragraph 26(5), in conjunction with the first sentence of Paragraph 26(3), of the AsylG. That is a matter for the referring court.

13 See paragraph 18 of the request for a preliminary ruling.

14 That provision provides that an '"unaccompanied minor" means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States'.

15 OJ 2003 L 251, p. 12.

16 That provision provides, in essence, that if the refugee is an unaccompanied minor, the Member States are to authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line.

17 See paragraph 58 of the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), and paragraphs 36 and 37 of the judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577). In paragraph 49 of the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), the Court noted that neither Article 2(f) nor Article 10(3)(a) of Directive 2003/86 in itself enables an answer to be given to the question referred in that case. It therefore also looked at the general scheme and objective of that directive. In that regard, the Court considered that to make the right to family reunification under Article 10(3)(a) of Directive 2003/86 depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision and would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty. See paragraph 55 of the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248).

18 In paragraph 50 of the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), the Court recalled, in essence, that Article 10(3)(a) of Directive 2003/86 applies only to the family reunification of refugees recognised as such by the Member States.

19 OJ 2004 L 304, p. 12.

20 See also Directive 2013/32.

21 See Article 3(2)(c) of Directive 2003/86.

22 Judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 55 and the case-law cited).

23 Main body of Question 1.

24 Question 1(a).

25 While there is no equivalent recital 21 in respect of subsidiary protection, I consider that after an application for international protection is submitted, any third-country national or stateless person who fulfils the material conditions laid down in Chapter V of Directive 2011/95 for qualification for subsidiary protection has a subjective right to be recognised as having subsidiary protection status, even before the formal decision is adopted in that regard. Moreover, in paragraph 32 of the judgment of 1 March 2016, *Kreis Warendorf and Osso* (C-443/14 and C-444/14, EU:C:2016:127), the Court noted that recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified. In that regard, no derogation is provided concerning the beneficiaries of subsidiary protection under Article 23(2) of Directive 2011/95. That provision specifically refers to the beneficiary of international protection.

26 In my view, the question of the declaratory status of refugees arose, inter alia, as Article 3(2)(a) of Directive 2003/86 specifically provides that that directive shall not apply where the sponsor is ‘applying for recognition of refugee status whose application has not yet given rise to a final decision’. See, judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 50). There is no equivalent provision in Directive 2011/95.

27 In paragraph 60 of the judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248), the Court stated that ‘taking the date on which the application for international protection was submitted as that by reference to which it is appropriate to assess the age of a refugee for the purposes of Article 10(3)(a) of Directive 2003/86 enables identical treatment and foreseeability to be guaranteed for all applicants who are in the same situation chronologically,

by ensuring that the success of the application for family reunification depends principally upon facts attributable to the applicant and not to the administration such as the time taken processing the application for international protection or the application for family reunification'.

28 Judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 43). Moreover, the authorisation of entry and residence pursuant to point (c) of the first subparagraph of Article 4(1) of Directive 2003/86 which was in question in that case is not, as indicated by the Commission, a declaratory act.

29 See also Opinion of Advocate General Hogan in *B. M. M. and B. S. (Family reunification – minor child* (C-133/19, EU:C:2020:222, point 43).

30 See, by analogy, judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraphs 53 to 55).

31 The German Government considers that, as regards the condition that the beneficiary of protection is a 'minor' within the meaning of the third indent of Article 2(j) of Directive 2011/95, what matters is the date of the decision ruling on the application of the family member who wishes to assert a right, derived from that of the beneficiary of protection. That government notes in particular that given that Article 46(3) of Directive 2011/95 requires a full *ex nunc* review, EU law is therefore based on the principle that what is decisive is the factual and legal situation at the date of the review. This argues against bringing forward the relevant moment, prior to the date on which the decision is taken, at which the factual conditions must exist to qualify a relative as a family member within the meaning of the definition given in Article 2(j) of Directive 2011/95. The Hungarian Government considers that the findings of the Court in its judgment of 16 July 2020, *État belge (Family reunification – minor child)* (C-133/19, C-136/19 and C-137/19, EU:C:2020:577) are not applicable *mutatis mutandis* to the present case, in particular in view of the requirement laid down in Article 46(3) of Directive 2013/32 as confirmed by the Court in its judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584) – that both the facts and the legal points of the asylum application must be the subject of a full and *ex nunc* examination. According to that government, the passage of the minor to adulthood after the filing of the application is a circumstance that, given the requirement of an *ex nunc* examination, the court cannot ignore when making a decision. The Hungarian Government considers that the same principle applies in the administrative procedure. It thus reaffirms that the date of the decision on the request (by SE) for international protection based on a family situation is the point in time to assess 'minor' status.

32 See also, by analogy, in respect of the administrative procedure, Article 10(3)(b) and Article 45(2)(a) of Directive 2013/32. In the national judicial context, see Paragraph 77 of AsylG.

33 That provision also requires that 'the family already existed in the country of origin'.

34 Emphasis added.

35 SE's son made his asylum application in 2012.

36 In paragraph 3 of the request for a preliminary ruling, the referring court indicated that SE applied for asylum in February 2016 and filed a formal application for international protection on 21 April 2016. That court also noted in paragraphs 20 and 21 of its request that Paragraph 13(1) of the AsylG does not require a specific form, whereas the asylum application pursuant to the first sentence of Paragraph 14(1) of the AsylG must, in principle, be formally lodged at the competent local branch of the Federal Office. According to the referring court, the fact that Article 6 of Directive 2013/32 authorises the Member States to provide for the formal lodging of an application and only requires them to make it possible to do this as soon as possible, without specifying any specific time limits in that regard, could militate in favour of an assessment of 'minor' status at the time when the application is formally lodged. Although no minimum, indicative or maximum time limits are prescribed here, it must be possible for the application to be formally lodged immediately, that is to say, without undue delay. The referring court noted, however, that it has not been established beyond doubt whether taking the formal lodging of an application into account is in line with the principles of equal treatment, legal certainty and *effet utile*.

37 The German Government considers that the definition in Article 2(j) of Directive 2011/95 cannot be examined independently of Article 23(2) of that directive, which is aimed at the maintenance of family unity. It is therefore necessary that the family life referred to in Article 7 of the Charter has resumed between the beneficiary of protection and the asylum seeker in the host Member State. Moreover, entry into the territory must have been done with a view to exercising (again) parental authority. The Hungarian Government considers that the third indent of Article 2(j) of Directive 2011/95 requires that in order to claim the status of family member, it is not sufficient that the family members are simultaneously present in the territory of a Member State, it is also necessary that family ties truly exist between them, which implies that family life between the parent and the minor child have effectively resumed in the Member State in question.

38 That provision refers to 'the father, mother or another adult *responsible* for the beneficiary of international protection'. Emphasis added. While a family relationship between a parent and unmarried minor child is assumed provided all the conditions of Article 2(j) of Directive 2011/95 are met, a 'parental' relationship with another adult must, in my view, also be proven by law or by the practice of the Member State concerned.

39 In my view, family members may be required to submit documentary evidence to prove that the family already existed in the country of origin. See, by analogy, Article 5(2) of Directive 2003/86 which requires an application for entry and residence submitted to the competent authorities of a Member State to be accompanied by documentary evidence of the family relationship.

40 Unless in certain cases where compelling reasons of national security or public order otherwise require. See, for example, Articles 24 and 25 of Directive 2011/95.

41 Save in respect of the specific exceptions to those obligations provided by Article 23(3) and (4) of Directive 2011/95. Thus, a family member may not benefit from Article 23(1) and (2) of Directive 2011/95 if he or she is or would be excluded from international protection pursuant to Chapters III and V of that directive. See Article 23(3) of Directive 2011/95. In addition, Member States may refuse, reduce or withdraw the benefits in question for reasons of national security or public order. See Article 23(4) of Directive 2011/95. There is no indication in the file before the Court that these exceptions are of any relevance in the present case.

42 The German and Hungarian Governments consider that, in accordance with the third indent of Article 2(j) of Directive 2011/95, the status of family member requires that the reference person is a minor and unmarried. It follows accordingly that the status of family member ceases when the reference person reaches the age of majority or marries. The Commission considers that in accordance with the third indent of Article 2(j) and Article 23(2) of Directive 2011/95, the rights of family members persist after the beneficiary of protection reaches the age of majority, for the duration of the period of validity of the residence permit granted to them in accordance with Article 24(2) of that directive.

43 Emphasis added.