OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 27 June 2018 (1)

Case C-380/17

Staatssecretaris van Veiligheid en Justitie,
K,
B
joined party
H. Y., (2)
Staatssecretaris van Veiligheid en Justitie

(Request for a preliminary ruling
from the Raad van State (Council of State, Netherlands))

(Reference for a preliminary ruling — Exclusion from the scope of Directive 2003/86/EC — Provisions of EU law made directly and unconditionally applicable by national law — Jurisdiction of the Court — Right to family reunification — More favourable scheme for refugees — Third subparagraph of Article 12(1) — Rejection of an application — Failure to comply with the period of three months after the granting of the subsidiary protection status — Indicative period)

I. Introduction

1. In the present reference for a preliminary ruling, made by the Raad van State (Council of State, Netherlands), the Court is, first, called upon to give a ruling on its own jurisdiction to interpret Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, (3) in a context in which, although the situation at issue in the case in the main proceedings is expressly excluded from the scope of that measure, the national law transposing that directive has unilaterally sought to extend the scope of the directive with a view to covering a situation of that kind. This question is also raised in Case C-257/17, *C and A*, in which I also deliver my Opinion today.

2. Second, the Court is asked to rule on the nature of the period of three months provided for in the third subparagraph of Article 12(1) of Directive 2003/86, in particular on whether the national authorities are entitled to reject the application for family reunification simply because that period is exceeded.

II. Legal and factual context

A. International law

3. Article 3(1) of the United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 states that, 'in all actions concerning children, ... the best interests of the child shall be a primary consideration'.

4. According to Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, 'the ECHR', entitled 'Right to respect for private and family life':

'Everyone has the right to respect for his private and family life, his home and his correspondence.'

B. EU law

5. Article 7 of the Charter of Fundamental Rights of the European Union (4) ('the Charter'), entitled 'Respect for private and family life', provides that:

'Everyone has the right to respect for his or her private and family life, home and communications.'

6. Article 24(2) and (3) of the Charter states:

'(2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

(3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her best interests.'

7. Directive 2003/86 determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. According to recital 2 thereof, that directive respects the fundamental rights, inter alia the right to respect for family life, enshrined in a number of instruments of international law, including, in particular, Article 8 of the ECHR and Article 7 of the Charter, to which reference is made above.

8. Under recital 8 of Directive 2003/86, 'special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification'.

9. Pursuant to Article 2(b) of Directive 2003/86:

'For the purposes of this Directive:

(b) "refugee" means any third-country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967'.

10. Article 3(2)(c) of Directive 2003/86 provides that 'this Directive shall not apply where the sponsor is:

(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.'

11. Article 5(5) of Directive 2003/86 provides that, 'when examining an application, the Member States shall have due regard to the best interests of minor children'.

12. Article 7(1) of Directive 2003/86 states:

‘When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.’

13. Under the first and third subparagraphs of Article 12(1) of Directive 2003/86, which appears in Chapter V thereof, entitled ‘Family reunification of refugees’:

‘By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members …, the evidence that the refugee fulfils the requirements set out in Article 7.

…

Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.’

14. Article 17 of Directive 2003/86 states:

‘Member States shall take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.’

15. Article 2(f) 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 (5) states:

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

(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.’

C. Netherlands law

16. According to the Raad van State (Council of State, Netherlands), an application for the issue of a visa for a stay of more than three months, such as that at issue in the case in the main proceedings, is an application for entry and residence for the purposes of family reunification made by a refugee or a beneficiary of subsidiary protection. Such an application is made on behalf of a family member living in another country or where the family member entered the Netherlands at the same time as the

sponsor. Following the submission of that application, the State Secretary may grant, ex officio, to that family member a residence permit for asylum purposes.

17. Article 29(4) of the wet tot algehele herziening van de Vreemdelingenwet, Vreemdelingenwet 2000 (Law providing for a comprehensive review of the Law on Foreign Nationals, 'the Vw 2000') of 23 November 2000 provides that: 'the fixed-term residence permit provided for in Article 28 may also be granted to a family member within the meaning of paragraph 2 who has simply not joined the foreign national referred to in paragraph 1 within three months of that national being granted a residence permit as referred to in Article 28, if, within that three-month period, an application for a visa for a stay of more than three months has been made by or on behalf of that family member'.

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

18. Appellants K and B ('K and B' or 'appellants K and B') are nationals of a third country (Eritrea). They are, respectively, the spouse and the daughter, a minor born on 1 July 2014, of a third-country national residing in the Netherlands ('the sponsor FG'). Sponsor FG has held a fixed-term residence permit for asylum purposes ('the residence permit for asylum purposes') since 23 September 2014. That residence permit for asylum purposes affords him subsidiary protection.

19. Following an interview with a third-party body, VluchtelingenWerk Nederland, (6) sponsor FG had initially understood that no purpose would be served by submitting an application for family reunification. However, sponsor FG finally submitted such an application, on the basis of Article 29(2) and (4) of the Vw 2000, on behalf of K and B, but outside the prescribed period. (7)

20. By two decisions of 20 April 2015 and 8 November 2015, the State Secretary upheld the rejection of the application for family reunification submitted by sponsor FG on behalf of appellants K and B, on the ground that the application had not been submitted within the three-month period and the delay was not excusable pursuant to Article 29(2) and (4) of the Vw 2000.

21. By judgment of 24 June 2016, the rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, 'the court of first instance') found the appeal lodged by K and B against the decision rejecting their application for family reunification to be unfounded.

22. Appellants K and B lodged an appeal against the judgment of the court of first instance before the referring court. They claim, firstly, that the court of first instance failed to acknowledge that the assessment of whether the three-month period being exceeded is excusable must be conducted in the light of the objective and rationale of that period. Secondly, according to K and B, the court of first instance wrongly based its judgment on the fact that sponsor FG was aware that he had to submit the application within the period of three months and that he should have made further, detailed inquiries about the possibility of submitting an application for family reunification before that period expired. Thirdly, K and B criticise the court of first instance for having failed to acknowledge that the period referred to in the third subparagraph of Article 12(1) of Directive 2003/86 cannot be relied on as a ground for exclusion, and that the State Secretary ought to have taken account of the principle of proportionality in his assessment. In addition, in accordance with Article 5(5) and Article 17 of Directive 2003/86, that assessment also had to factor in the best interests of the child. Fourthly, K and B submit that the court of first instance was wrong not to find that the reference to a regular application for a visa for a stay of more than three months for the purposes of family reunification runs counter to the objective pursued by Directive 2003/86 and to the effectiveness of that directive.

23. First, the referring court raises the question of the jurisdiction of the Court in so far as Directive 2003/86 excludes beneficiaries of subsidiary protection from its scope. Although the Netherlands legislature made a reference to the content of that directive, it is in the interest of the European Union that provisions taken from EU law should be interpreted uniformly. (8) The referring court states that, according to the judgment of 18 October 2012, *Nolan* (C-583/10, 'the judgment in *Nolan*', EU:C:2012:638), the European Union has no interest in a uniform interpretation of a measure

concerning a domestic situation which is expressly excluded from that measure. (9) It is unclear to the referring court whether the judgment in *Nolan* still applies, since that judgment does not concern a situation in respect of which EU law has been made directly and unconditionally applicable. (10) However, that judgment is no longer cited by the Court, in particular in the Grand Chamber judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874); it is for this reason that the referring court asks whether the judgment in *Nolan* could prompt the Court to find that it lacks jurisdiction to reply to the present reference for a preliminary ruling.

24. Second, the referring court raises the issue of the interpretation of the third subparagraph of Article 12(1) of Directive 2003/86. According to the referring court, where the application for family reunification is submitted after the prescribed period and exceeding the three-month period cannot be excused because the reason for it having been exceeded may be attributed to sponsor FG, the merits of that application are not examined; the State Secretary therefore takes no account of the provisions of Article 5(5) (account to be taken of the child's best interests) or those of Article 17 (account to be taken of individual circumstances) of Directive 2003/86. Nevertheless, the referring court is of the view that a more precise interpretation of the third subparagraph of Article 12(1) of that directive is necessary in order to assess the complaints of appellants K and B.

25. In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to Article 3(2)(c) of ... Directive [2003/86] and to the [judgment in *Nolan*], does the Court of Justice have jurisdiction to answer questions referred for a preliminary ruling by courts in the Netherlands on the interpretation of provisions of that directive in proceedings concerning the right of residence of a member of the family of a person with subsidiary protection status, if that directive has, under Netherlands law, been declared directly and unconditionally applicable to persons with subsidiary protection status?

(2) Does the system provided for by ... Directive [2003/86] ... preclude a national rule, such as that at issue in the main proceedings, under which an application for consideration for family reunification on the basis of the more favourable provisions of Chapter V of that directive can be rejected for the sole reason that it was not submitted within the period laid down in the third subparagraph of Article 12(1)?

For the purpose of answering this question, is it relevant that it is possible, in the event of the aforementioned period being exceeded, to submit an application for family reunification, whether or not after a rejection, in which an assessment is made as to whether the requirements laid down in Article 7 of Directive 2003/86 have been met and in which the interests and circumstances indicated in Articles 5(5) and 17 of that directive are taken into account?'

26. Written observations were submitted in this case by appellants K and B, the Netherlands Government, and the European Commission.

27. At the joint hearing with Case C-257/17, *C and A*, which was held before the Court on 19 March 2018, appellants C and A, and then appellants K and B, the Netherlands Government and the Commission presented their oral observations.

IV. Analysis

A. The jurisdiction of the Court

28. Sponsor FG has a residence permit for asylum purposes which affords him subsidiary protection. He made an application for family reunification on behalf of appellants K and B under Directive 2003/86.

29. The unambiguous wording of Article 3(2)(c) of Directive 2003/86 makes clear '[that it] shall not

apply where the sponsor is: … authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States'. (11) Sponsor FG is therefore not covered ratione materiae by Directive 2003/86. (12)

30. However, the Netherlands legislature unilaterally decided to apply the more favourable provisions relating to the family reunification of refugees, contained in Chapter V of Directive 2003/86, Article 12 of which — the subject matter of the second question submitted by the referring court — concerns the beneficiaries of subsidiary protection and their family members. (13) The present case is a situation governed by national law. In other words, this is a case of an extension of the scope ratione materiae of the Netherlands rules, the Vw 2000, to cover beneficiaries of subsidiary protection. In those circumstances, it is necessary to examine whether an interpretation by the Court of the provisions mentioned in the questions referred is justified, and therefore whether the jurisdiction of the Court is established, as is claimed by the referring court, the Netherlands Government and the appellants in the main proceedings but is disputed by the Commission.

31. Under Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and acts of the institutions of the Union. It follows that it is for the national courts alone to assess, in view of the special features of each case, both the necessity of a preliminary ruling in order to enable them to give their judgment and the relevance of the questions they put to the Court. (14) Consequently, when questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling. (15)

32. In this regard, it should be observed that the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the main proceedings fell outside the scope of EU law. It is in fact in the interest of the European Union to ensure that a provision of an act of the Union and those provisions of national law transposing it and making it applicable beyond the scope of that act are interpreted uniformly.

33. In that context, the Court has clarified that an interpretation by it of provisions of EU law in situations which do not fall within the scope of EU law is justified where those provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that such situations and situations falling within the scope of EU law are treated in the same way. (16) Accordingly, the Court is called upon to ascertain whether there are sufficiently precise indications to be able to establish whether the national law makes a direct and unconditional reference to EU law. It is essentially on the sole basis of the information provided by the referring court in its order for reference that the Court can ascertain whether it has jurisdiction to answer the questions raised before it. (17)

34. It is true that, according to the judgment in *Nolan*, it cannot be stated or presumed that there is an interest of the European Union that, in an area excluded by the EU legislature from the scope of the measure which it adopted, there should be a uniform interpretation of the provisions of that measure. (18) Under that approach, 'if the EU legislature states unequivocally that the measure which it has adopted does not apply to a precise area, it renounces, …, the objective seeking uniform interpretation and application of the rules of law in that excluded area'. (19)

35. The judgment of 19 October 2017, *Solar Electric Martinique* (C-303/16, 'the judgment in *Solar Electric Martinique*', EU:C:2017:773), which also concerned a case of express exclusion from the scope of an EU directive, (20) has however, in my view, modified some of the grounds of the judgment in *Nolan*. The Court made clear in paragraph 29 of the judgment in *Solar Electric Martinique* that 'an EU interest in the uniform interpretation of [the concepts of the directive in question], in order to forestall future difficulties in interpretation, *is indeed conceivable*'. (21) Although the judgment in *Nolan* suggested that such an interest disappeared in a case of express exclusion by the EU legislature, the judgment in *Solar Electric Martinique* did not therefore confirm that reading. Once again with regard to a case of express exclusion from the scope of a directive, the judgment of 27 June 2018, *SGI and Valériane* (C-459/17 and C-460/17, EU:C:2018:501), rejects, seemingly definitively, the approach previously adopted in the judgment in *Nolan*, by stating that, despite that express exclusion, it *is*

clearly in the interest of the European Union (22) that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, regardless of the conditions in which they are meant to be applied, where the national law makes a direct and unconditional reference to the provision of the directive the interpretation of which is sought by the Court. (23)

36. This is also the case here.

37. The information provided by the referring court is sufficiently precise and demonstrates that the national law, which is consistent with EU law, makes a direct and unconditional reference to EU law. The referring court thus states that the Netherlands primary and secondary legislation establish a common legal system applicable to family reunifications of refugees and family reunifications of beneficiaries of subsidiary protection. According to the State Secretary, that choice is motivated by the fact that the Kingdom of the Netherlands attaches the same legal effects to a residence permit for asylum purposes resulting from subsidiary protection as to a residence permit for asylum purposes resulting from refugee status. The referring court, the Netherlands Government, and appellants K and B are of the view that the Netherlands legislature made Chapter V of Directive 2003/86 directly and unconditionally applicable to the situations which, according to Article 3(2)(c) of that directive, did not fall within the scope of EU law. It concludes that Directive 2003/86 applies by analogy to beneficiaries of subsidiary protection.

38. Finally, if the Court were to lack jurisdiction in the present case to interpret the third subparagraph of Article 12(1) of Directive 2003/86, the referring court would be forced to interpret it itself in order to give final judgment in the matter. In practice, the interpretation of a provision of EU law by the national court could have an impact on the content of that law and give rise to an approach which is markedly different from that which the Court might adopt. In addition, it could discourage the national courts of the Member State in question from raising such a question before the Court in the future. In any event, the concept in respect of which the referring court seeks interpretation does indeed come within the ambit of EU law and may indeed be applied in a situation falling within the scope of that directive.

39. I am therefore of the view that the European Union has an interest in a uniform interpretation, first, in order to prevent a discrepancy in the application of EU law and, second, on account of the need to avoid different treatment of situations that a Member State has chosen to align with EU law. In the light of those considerations, it is in the interest of the European Union for the provisions at issue to be interpreted uniformly. Furthermore, the information provided by the referring court is sufficiently precise and demonstrates that the national law, which is consistent with EU law, makes a direct and unconditional reference to EU law.

40. In those circumstances, I propose that the Court hold that it has jurisdiction to answer the questions referred.

B. The interpretation of the three-month period provided for in the third subparagraph of Article 12(1) of Directive 2003/86

1. Preliminary observations

41. It should be observed, as a preliminary point, that the right to family reunification, which is conferred and governed by Directive 2003/86, constitutes a specific aspect of the right to respect for family life which, in turn, constitutes a fundamental right enshrined in Article 8 of the ECHR and Article 7 of the Charter, and which, as such, is protected in EU law. (24) The direct link between the fundamental right to respect for family life and the right to family reunification is specifically recognised in recital 2 of Directive 2003/86. (25)

42. In that context, the Court has therefore expressly held that the provisions of Directive 2003/86 must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. (26) Article 7 of the

Charter must also 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), for a child to maintain on a regular basis a personal relationship with both parents. (27) The Court has likewise held that applications by a child or his or her legal representatives to enter or leave a Member State for the purpose of family reunification must be dealt with by the Member States in a positive, humane and expeditious manner. (28)

43. It is true that Articles 7 and 24 of the Charter, while emphasising the importance for children of family life, cannot be interpreted as depriving the Member States of their margin of appreciation when examining applications for family reunification. (29) However, in the course of such an examination and when determining whether the conditions laid down in Directive 2003/86 are satisfied, the provisions of that directive must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the Charter, as is moreover apparent from recital 2 and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life. (30)

44. I observe that the Court has confirmed the importance of certain international instruments, in particular the International Covenant on Civil and Political Rights (31) and the Convention of the Rights of the Child, with regard to the protection of human rights, of which it takes account in applying the general principles of Community law. In the same way as the other international instruments cited, the Convention on the Rights of the Child binds each of the Member States. (32)

45. The Court has, in addition, observed that any margin of discretion which Directive 2003/86 may allow the Member States must not be used by them in a manner which would undermine either the objective of the directive, which is to promote family reunification, or the effectiveness thereof. (33)

46. Furthermore, the Court has held that it is clear from Article 17 of Directive 2003/86, which provides that 'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin' where they reject an application for family reunification, that the Member States are required to examine individually applications for family reunification. (34)

47. The second question submitted by the referring court must be addressed in the light of the abovementioned principles deriving from case-law.

2. The second question referred for a preliminary ruling

48. It is established that, in the present case, an application for family reunification on behalf of appellants K and B was submitted after the period of three months following the granting of the refugee status ('the three-month period') provided for in Article 29(2) and (4) of the Vw 2000 and transposing the third subparagraph of Article 12(1) of Directive 2003/86. (35)

49. In national law, compliance with the three-month period for the submission of an application for family reunification under the third subparagraph of Article 12(1) of Directive 2003/86 is regarded as a condition of admissibility for that application. The referring court explains that, when conducting that examination, the application for family reunification is not considered in the light of Article 5(5) (meaning no consideration of the child's best interests) and Article 17 (meaning, in essence, no account is taken of individual circumstances) of Directive 2003/86. (36) According to the referring court, Article 29(2) and (4) of the Vw 2000 does not offer any possibility, by way of derogation, of weighing up the relevant interests or of relaxing the condition in some other way.

50. However, the State Secretary does assess whether, in a spirit of humanity, exceeding the three-month period may be excused, but he does not weigh up the relevant interests and examine whether the reason for exceeding that period may reasonably be attributed to the sponsor concerned or to his family member. Nevertheless, where the application is not submitted within the prescribed

period and the State Secretary does not consider the exceeding of the period to be excusable, he rejects that application without examining its merits. Nor does the State Secretary take account of the provisions of Article 5(5) or Article 17 of Directive 2003/86.

51. However, according to the referring court, it is possible for a refugee to submit a regular application for a visa for a stay of more than three months for the purpose of family reunification under the ordinary procedure laid down in Directive 2003/86, regardless of any refusal for exceeding the three-month period deemed non-excusable in the view of the State Secretary. According to the State Secretary, having exceeded the three-month period, sponsor FG can no longer rely on the more favourable provisions of Chapter V of Directive 2003/86. In such circumstances, the State Secretary assesses whether the conditions laid down in Article 7(1) of Directive 2003/86 are met; however, he can exempt the refugee/sponsor concerned from the requirement to have stable and regular resources and the obligation to pay contributions, whilst at the same time considering the application in the light of Article 8 of the ECHR.

52. By its question, the referring court is essentially seeking, first, to establish whether Directive 2003/86 precludes a national provision under which an application for family reunification submitted on the basis of the more favourable provisions of Chapter V of that directive can be rejected as inadmissible simply because it was submitted after the three-month period. Next, the referring court wishes to ascertain whether, where that period is exceeded, it is possible, regardless of whether or not a decision rejecting an application has been made, to submit an application for family reunification, in the context of which compliance with the conditions laid down in Article 7 of that directive is assessed and account is taken of the interests and circumstances referred to in Article 5(5) and Article 17 of the directive.

53. The referring court considers there to be two possible interpretations of the third subparagraph of Article 12(1) of Directive 2003/86. Under the first interpretation, the referring court takes the view that it could be inferred from the third subparagraph of Article 12(1) that that provision lays down the condition that the application for family reunification is to be submitted within a period of three months. Unlike Article 7 of the directive, the three-month period is not an open provision the content of which has to be clarified in national law, as is the case with the requirements laid down in that article, which have been interpreted by the Court in the judgments of 4 March 2010,*Chakroun* (C-578/08, EU:C:2010:117), and of 21 April 2016, *Khachab* (C-558/14, EU:C:2016:285). When assessing Article 7(1)(c) of that directive, the Court has taken account of the principle of proportionality and Article 17 of that directive. The third subparagraph of Article 12(1) does not appear to require the merits of an application to be examined or the relevant interests to be weighed up where that requirement is not satisfied. Conversely, the second interpretation envisaged by the referring court follows from a combined reading of Article 5(5) and Article 17 of Directive 2003/86. It suggests that, when an application is submitted and in the course of its examination, the Member States must take due account of the interests of minor children and, if that application is rejected, they must assess the individual circumstances of the sponsor or the beneficiary of the right to family reunification.

54. I fully concur with that second interpretation.

55. Before considering the questions concerning the scope and the very nature of the three-month period provided for in the third subparagraph of Article 12(1) of Directive 2003/86, it is necessary to recall the context of that article.

56. Directive 2003/86 draws a distinction between two family reunification schemes: the first is an ordinary scheme intended for third-country nationals, the substantive conditions for which are listed, inter alia, in Article 7 of the directive; the second is a ‘more favourable’ (37) or ‘preferential’ (38) scheme relating to family reunification for refugees, the conditions for which are contained in Chapter V of Directive 2003/86, and in particular in the third subparagraph of Article 12(1) of that directive, the interpretation of which is sought. The latter article is an integral part of Chapter V of the Directive and, in the light of recital 8 thereof, taking into account their situation, allows special attention to be paid to refugees and, on that basis, enables more favourable conditions to be laid

down in their regard for the exercise of their right to family reunification. The scheme of Directive 2003/86 confirms those more favourable arrangements afforded to refugees, since several provisions, in particular Article 10, Article 11(2) and Article 12(1) and (2) of the directive, (39) are derogations from the ordinary rules provided for in that same directive.

57. With this in mind, when a refugee/sponsor submits an application for family reunification on the basis of the first subparagraph of Article 12(1) of Directive 2003/86, he is exempt, 'by way of derogation from Article 7 [from providing] ... the evidence that [he] fulfils the requirements set out in Article 7'. The scheme applicable to refugees/sponsors is greatly simplified and therefore protects their right to family protection to a greater degree.

58. However, if the application for family reunification is not submitted within a period of three months, as laid down in the third subparagraph of Article 12(1) of Directive 2003/86, that article provides that 'Member States *may* require the refugee *to meet the conditions* (40) referred to in Article 7(1)' of that directive. The refugee/sponsor must thus provide evidence that he has accommodation regarded as normal, sickness insurance, and stable, regular and sufficient resources.

59. This does not mean that the application may be rejected *ipso jure* once the three-month period has passed, but simply that Member States may, once again when examining an application for family reunification submitted on the basis of the third subparagraph of Article 12(1) of Directive 2003/86, require the refugee/sponsor to meet the substantive conditions laid down in Article 7(1) of that directive. Exceeding the three-month period laid down in the third subparagraph of Article 12(1) of that directive does not therefore have procedural consequences, such as the inadmissibility of the application for family reunification and the need to submit a new application based on the provisions of the ordinary scheme established by Directive 2003/86, but rather potential material consequences, namely the mere possibility of the Member States requiring simply that the conditions laid down in Article 7(1) of the directive are met.

60. In other words, the application for family reunification and therefore the satisfaction of the conditions of application laid down in Article 7(1) of Directive 2003/86 are examined in the context of the application made under Chapter V of that directive.

61. That approach appears to me to be confirmed by the objectives pursued by Directive 2003/86, and particularly by the provisions on refugees.

62. Indeed, firstly, it should be borne in mind that the purpose of Directive 2003/86 is that 'family reunification is a necessary way of making family life possible', in particular for refugees whose personal circumstances '... prevent them from leading a normal life'. (41)Thus, both the reasons linked to any exceeding of the prescribed period and the satisfaction of the conditions laid down in Article 7(1) of that directive must be examined having regard to the more favourable status conferred on refugees by the directive. That more favourable status is linked to the practical difficulties encountered by refugees which are of a different nature than those faced by other third-country nationals. (42)

63. The margin of discretion afforded to the Member States must not be used by them in a manner which would undermine either the objective of Directive 2003/86, which is to promote family reunification, or the effectiveness thereof. (43)

64. Requiring a refugee/sponsor who has exceeded the period of three months provided for in the third subparagraph of Article 12(1) of Directive 2003/86 to submit a new application for family reunification under the ordinary scheme laid down in the provisions of that directive would undermine the effectiveness of the right — initially a preferential right — of refugees to family reunification and would render redundant the more favourable provisions of Chapter V, the addresses of which are refugees, who by definition are more vulnerable sponsors.

65. Secondly, as I have observed in points 41 to 47 of this Opinion, the provisions of Directive 2003/86 must be interpreted and applied in the light of Article 7 and Article 24(2) and (3) of the

Charter, as is moreover apparent from recital 2 and Article 5(5) of that directive. The reasons linked to any exceeding of the three-month period provided for in the third subparagraph of Article 12(1) of the directive and the conditions laid down in Article 7(1) of Directive 2003/86 must therefore be examined in the light of Article 5(5) and Article 17 thereof.

66. Accordingly, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order. (44)

67. The third subparagraph of Article 12(1) of Directive 2003/86 cannot therefore be interpreted and applied in a way such that that application would violate the fundamental rights laid down in the abovementioned provisions of the Charter.

68. Thirdly, it follows from the systematic interpretation of Directive 2003/86 that Article 5(5) and Article 17 of that directive are 'horizontal' clauses which are mandatory. (45) They are applied, during any examination, both procedural and substantive, of an application for family reunification, as guiding principles, in the light of all the provisions of the directive, including compliance with the three-month period. Thus, the EU legislature requires Member States to 'have due regard to the best interests of minor children'. (46)That interpretation is confirmed by Article 11(1) of the directive on the conditions governing the submission and examination of the application for family reunification, which states that the national authorities are to comply with the provisions of Article 5 thereof, including the principle of the best interests of children contained in Article 5(5) of the directive, when examining the application.

69. In addition, the examination of the application for family reunification on the basis of the third subparagraph of Article 12(1) of Directive 2003/86, read in conjunction with recital 8 of that directive, must take account of their 'situation [to which] special attention should be paid'. When examining the application for family reunification, the national authorities are required to examine the applications for family reunification individually, that is to adopt a case-by-case approach, (47) a comprehensive assessment of all relevant factors in each individual case, (48) taking into account — where that application is rejected — 'the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin'. (49) (50) In particular, when conducting that examination, the national authorities must take into account all the circumstances surrounding the availability of the information concerning the three-month period in which the refugee/sponsor must submit his application for family reunification, such as the clarity, accessibility and timeliness (51) of that information, which may be a reason justifying the three-month period being exceeded. Such a short period which would not take account of the personal circumstances justifying a probable failure to comply with the period would have the effect of deterring refugees from submitting an application for family reunification and, therefore, of circumventing the directive's effectiveness. (52)

70. Accordingly, all the specific circumstances of a particular case must be identified and the individual interests and public interests must be weighed up in a manner similar to the approach taken in comparable cases. In addition, the weighing-up of the individual interests and public interests concerned must be reasonable and proportionate, whilst having due regard to the best interests of minor children. (53) No factor considered in isolation, such as exceeding the prescribed period, can automatically entail a decision rejecting the application for family reunification submitted in the context of the more favourable procedure provided for in Chapter V of Directive 2003/86.

71. It follows from those considerations that the period provided for in the third subparagraph of Article 12(1) of Directive 2003/86 cannot be regarded as a time bar, which would bring to an end the more favourable scheme for refugee/sponsors.

72. I am therefore of the view that the second question referred for a preliminary ruling should be answered to the effect that the system provided for by Directive 2003/86 precludes a national provision, such as that at issue in the main proceedings, under which an application for family reunification on the basis of the more favourable provisions of Chapter V of that directive can be

rejected for the sole reason that it was not submitted within the three-month period laid down in the third subparagraph of Article 12(1) of that directive, since that period cannot be regarded as a time bar and that application must be considered in the light of Article 7 and Article 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned, with a view to promoting family life and preventing both the objective and the effectiveness of Directive 2003/86 from being undermined. In addition, the failure to have regard to the guiding principles of that directive in the event of the rejection of an application for family reunification for the purposes of Article 12 thereof because the three-month period provided for in the third subparagraph of paragraph 1 of that article is exceeded cannot be justified by the fact that the examination of another application submitted under Article 7(1) of Directive 2003/86 would take account of those guiding principles.

V. Conclusion

73. Having regard to all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Raad van State (Council of State, Netherlands) as follows:

(1) The Court has jurisdiction to answer the questions referred for a preliminary ruling by the referring court which relate to the interpretation of the provisions of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification in a case concerning the right of residence of a member of the family of a beneficiary of subsidiary protection status, where the provisions of that directive have been declared directly and unconditionally applicable to the beneficiaries of subsidiary protection status in national law.

(2) The system provided for under Directive 2003/86 precludes a national provision, such as that at issue in the main proceedings, under which an application for family reunification on the basis of the more favourable provisions of Chapter V of that directive can be rejected for the sole reason that it was not submitted within the three-month period laid down in the third subparagraph of Article 12(1) of that directive, since that period cannot be regarded as a time bar and that application must be considered in the light of Article 7 and Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine applications for family reunification in the interests of the children concerned, with a view to promoting family life and preventing both the objective and the effectiveness of Directive 2003/86 from being undermined. In addition, the failure to have regard to the guiding principles of that directive in the event of the rejection of an application for family reunification for the purposes of Article 12 thereof because the three-month period provided for in the third subparagraph of paragraph 1 of that article is exceeded cannot be justified by the fact that the examination of another application submitted under Article 7(1) of Directive 2003/86 would take account of those guiding principles.

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1 Original language: French.

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2 On 11 December 2017, the referring court informed the Court that, following withdrawal by the Netherlands State Secretary for Security and Justice (‘the State Secretary’) of the case relating to appellant H. Y., it stated that it maintained all the questions relating to the cases involving K and B.

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3 OJ 2003 L 251, p. 12.

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4 OJ 2012 C 326, p. 391.

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5 OJ 2011 L 337, p. 9.

6 An independent body which defends the interests of refugees and beneficiaries of subsidiary protection in the Netherlands.

7 The application was made on 22 January 2015, that is one month after the three-month period provided for by Directive 2003/86.

8 The referring court mentions in this regard the judgments of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraph 46); of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraph 22); and of 16 June 2016, *Rodríguez Sánchez* (C-351/14, EU:C:2016:447, paragraphs 61 and 62).

9 See, to that effect, the judgment in *Nolan* (paragraphs 53 to 56).

10 See, to that effect, the judgment in *Nolan* (paragraph 52).

11 Originally, the proposal for a Council Directive on the right to family reunification of 1 December 1999 (COM(1999) 638 final) afforded to beneficiaries of subsidiary protection a right to family reunification for members of their family. By its opinion adopted in plenary session on 6 September 2000, the European Parliament supported the general thrust and main objectives of that proposal but sought a restriction of the scope of the proposal for a directive cited above with a view to excluding persons enjoying a subsidiary form of protection (Amendment 19). The Commission amended the proposal accordingly on the ground that there was not yet a harmonised concept of a 'beneficiary of subsidiary protection': see Amended proposal for a Council Directive on the right to family reunification (COM(2000) 624 final).

12 It must not, however, be inferred from the foregoing that Directive 2003/86 obliges the Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12) explicitly authorises the beneficiaries of temporary protection to have members of their family reunited with them. See also, to that effect, the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification of 3 April 2014 ('Commission Communication on guidance', COM(2014) 210 final, point 6.2, p. 25).

13 This case is not unique. According to the report from the Commission to the European Parliament and the Council of 8 October 2008 on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final, p. 5: the Czech Republic, the Republic of Estonia, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden apply the directive to beneficiaries of subsidiary protection despite the abovementioned exclusion. In the Communication of the Commission on guidance (see point 6.2, p. 25), the Commission encourages the Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection since their protection needs do not differ.

14 See, to that effect, the judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 33); of 7 July 2011, *Agafiţei and Others* (C-310/10, EU:C:2011:467, paragraphs 24 and 25); and of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868, paragraph 15).

15 See, to that effect, the judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 35); of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraph 15); of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraph 24); of 7 July 2011, *Agafiţei and Others* (C-310/10, EU:C:2011:467, paragraph 26); and of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868, paragraph 16).

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16 See, to that effect, the judgments of 28 March 1995, *Kleinwort Benson* (C-346/93, EU:C:1995:85, paragraph 16); of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868, paragraphs 17 and 19); *Nolan* (paragraphs 45 and 47); and of 19 October 2017, *Solar Electric Martinique* (C-303/16, EU:C:2017:773, paragraphs 25 and 27).

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17 See, to that effect, the order of 12 May 2016, *Sahyouni* (C-281/15, EU:C:2016:343, paragraphs 27 and 29), and my Opinion in *Solar Electric Martinique* (C-303/16, EU:C:2017:507, point 33).

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18 See, to that effect, the judgment in *Nolan* (paragraphs 53, 54 and 56).

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19 See, to that effect, the judgment in *Nolan* (paragraph 55).

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20 It concerned a case of exclusion ratione loci from the scope of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), but that difference from the exclusion ratione materiae in the judgment in *Nolan* is irrelevant: see my Opinion in *Solar Electric Martinique* (C-303/16, EU:C:2017:507, point 49).

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21 Emphasis added.

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22 Emphasis added.

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23 See, to that effect, the judgment of 27 June 2018, *SGI and Valériane* (C-459/17 and C-460/17, EU:C:2018:501, paragraphs 27 and 28). That judgment, like the judgment in *Solar Electric Martinique*, concerned a case of exclusion ratione loci from the scope of the VAT Directive.

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24 See, to that effect, the judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 52 and the case-law cited), and my Opinion in *Noorzia* (C-338/13, EU:C:2014:288, point 20).

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25 See point 7 of this Opinion.

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26 See, to that effect, the judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44), and my Opinion in *Noorzia* (C-338/13, EU:C:2014:288, point 22).

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27 See, to that effect, judgments of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:2006:429, paragraphs 57 and 58); of 23 December 2009, *Detiček* (C-403/09 PPU, EU:C:2009:810, paragraph 54); of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 76); and Article 9(1) of the Convention on the Rights of the Child.

28 See, to that effect, judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:2006:429, paragraph 57), and Article 10(1) of the Convention on the Rights of the Child.

29 See, to that effect, judgments of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:2006:429, paragraph 59), and of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 79).

30 See, to that effect, judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 80).

31 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

32 See, to that effect, judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraphs 35 to 38).

33 See, to that effect, judgments of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 43); of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 74); of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraph 50); and my Opinion in *Noorzia* (C-338/13, EU:C:2014:288, point 25).

34 See, by analogy, judgments of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 48); of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraphs 58 and 59); and my Opinions in *Noorzia* (C-338/13, EU:C:2014:288, point 26) and *Dogan* (C-138/13, EU:C:2014:287, point 57).

35 The application for family reunification was submitted four months after the residence permit for asylum purposes was obtained.

36 According to the referring court, the question of whether exceeding the prescribed period is excusable cannot be assessed having regard to the objective and rationale of the three-month period since, when conducting that examination, the assessment does not entail any weighing-up of interests.

37 See, to that effect, ECtHR, 10 July 2014, *Mugenzi v. France*, no. 52701/09, CE:ECHR:2014:0710JUD005270109, § 54; the ECtHR observes that the unity of the family is an essential right enjoyed by the refugee and that family reunification is a fundamental element in order to enable people who have fled persecution to resume a normal life. It also recalls that it has acknowledged that obtaining such international protection is evidence of the vulnerability of the persons concerned. The need for refugees to benefit from a more favourable procedure for family reunification than that reserved for other foreign nationals is the subject of international and European consensus, as is clear from the mandate of the High Commissioner for Refugees and the rules contained in Directive 2003/86.

38 Opinion of Advocate General Bot in *A and S* (C-550/16, EU:C:2017:824, point 29).

39 These articles derogate from Articles *4, 5, 7 and 8* of Directive 2003/86.

40 Emphasis added.

41 Recitals 4 and 8 of Directive 2003/86.

42 See, to that effect, the Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86) (COM(2011) 735 final), point 4.2, 'Other asylum related questions', p. 7.

43 See point 45 of this Opinion.

44 See, to that effect, judgments of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:2006:429, paragraph 105), and of 23 December 2009, *Detiček* (C-403/09 PPU, EU:C:2009:810, paragraph 34).

45 See, to that effect, the Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86) (COM(2011) 735 final), point 5.5, p. 9.

46 See Article 5(5) of Directive 2003/86.

47 See, to that effect, judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 64).

48 See, to that effect, the Commission Communication on guidance, points 7, 'General principles', and 7.4, 'Individual assessment', p. 29.

49 Article 17 of Directive 2003/86.

50 By way of example, refugees *face the loss of, or difficulties in maintaining, contact with the members of their family who remained in the country of origin, or they may even have difficulties locating family members or be unaware if they are still alive. Within a relatively short period of time following the granting of the residence permit for asylum purposes, it may be complicated to organise travel for members of their families who have to present themselves at an embassy or consulate or gather together the documents necessary for an application for family reunification (see, to that effect, the* Green Paper on the right to family reunification of third-country nationals living in the European Union*(Directive 2003/86) (COM(2011)735 final), point 5.5, p. 9).*

51 See, to that effect, Commission Communication on guidance, point 7.1, 'Availability of information', p. 26.

In addition, the beneficiary of the right to family reunification may not have all the facilities to handle the administrative formalities, and he does not understand all the nuances of the language of his host country and how the national authorities function.

52 See, to that effect, my Opinion in *Dogan* (C-138/13, EU:C:2014:287, point 57).

53 See, by analogy, judgments of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraphs 62 to 64), and of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 81).