GERMANY - FEDERAL ADMINISTRATIVE COURT – 1 C 17.16, 1 C 18.16, 1 C 20.16, JUDGEMENT DATED 23 March 2017

Secondary migration of asylum seekers

The plaintiffs are stateless Palestinians from Syria. They took subsidiary protection in Bulgaria, came to Germany from there in 2013 via Hungary and Austria and submitted new applications for asylum. The Federal Office for Migration and Refugees decided that they are not entitled to a right of asylum since they have arrived from Bulgaria, which is a safe third country, and ordered their deportation. The Higher Administrative Court has reversed the deportation orders and confirmed the first-instance judgements. Among other things, this decision is based on the fact that the plaintiffs could not demand German protection since they have arrived via Austria which is a safe third country. The plaintiffs requested judicial review of this.

The senate of the Federal Administrative Court holds that the inadmissibility of an asylum application regulated as per the current law in § 29, paragraph 1, no. 3 of AsylG (Asylum Law) owing to the arrival from a safe third country does not represent a legal basis as safe third countries are only non-EU member states as per the interpretation in compliance with Union law.

Thus, the revisions depend on whether the decisions of not executing any asylum procedures can be interpreted as regards the inadmissibility as per § 29, paragraph 1, no. 2 of the AsylG (Asylum Law).

The Federal Administrative Court requested the Court of Justice to take a decision regarding the submitted questions as per article 105 of the procedural rules of the ECJ as these questions are applicable in numerous cases. The Federal Administrative Court has suspended the review process until the Court of Justice gives its ruling regarding the following questions.

1. Is the provisional regulation in article 52, paragraph 1 of Directive 2013/32/EU against the application of a national regulation, according to which an application for international protection is not allowed in the implementation of the authorisation extended against the previous regulation in article 33, paragraph 2, point a of Directive 2013/32/EU if the applicant was granted a subsidiary protection in another member state as long as the national regulation needs to be applied owing to the lack of a national provisional regulation even for the applications submitted before 20 July 2015?

Does the provisional regulation in article 52, paragraph 1 of Directive 2013/32/EU allow the member states a retroactive implementation of the extended authorisation in article 33, paragraph 2, point a of Directive 2013/32/EU with the consequence that even the asylum applications that have been submitted before the national implementation of this extended authorisation, but that have not yet been enforced at the time of implementation, are admissible?

2. Does article 33 of Directive 2013/32/EU grant a right of option to the member states to reject an asylum application as inadmissible owing to a different international jurisdiction (Dublin Regulation) or in accordance with article 33, paragraphs 2, point a of Directive 2013/32/EU?

3. If question 2 is answered in the affirmative: Is a member state prohibited by Union Law to reject an application for international protection as inadmissible owing to the granting of subsidiary protection in another member state in the implementation of the authorisation in article 33, paragraph 2, point a of Directive 2013/32/EU if

a) the applicant desires an upgrade in the subsidiary protection granted to him/her in another member state (granting of refugee status) and the asylum procedure in the member state was, and is still, fraught with systematic deficiencies, or

b) the structure of international protection, namely the living conditions for the beneficiaries of subsidiary protection, in the other member state that has already granted the subsidiary protection to the applicant,

- violates article 4 of GRC and/or article 3 of the ECHR, or

- are the requirements of article 20 ff. of Directive 2011/95/EU not enough without violating article 4 of GRC and/or article 3 of the ECHR?

4. If question 3 b) is answered in the affirmative: Is this also applicable when the beneficiaries of subsidiary protection have been provided with no existence-securing services or provided with such services only in considerably restricted scope as compared to other member states, but not treated differently than the citizens of this member state?

5. If question 2 is answered in the negative:

a) Is the Dublin III Regulation applicable for a procedure for granting international protection if the asylum application has been submitted before 1 January 2014, but the request for revival has been submitted only after 1 January 2014 and the applicant (in February 2013) has already obtained the subsidiary protection in the requested member state?

b) Can an unwritten transfer of responsibility to the member state requesting the revival of an applicant’s request be derived from the Dublin Regulations if the requested, responsible member state rejects the revival request submitted within the stipulated period in accordance with the Dublin Regulations and has instead referred to an inter-governmental readmission agreement?