

Meeting of the Working Group Asylum and Immigration
8. and 9. September 2022 | Berlin

Subsequent Asylum Applications acc. to Art. 40 APD

Presiding Judge
Dr. Barbara Schulz-Bredemeier
(Admin Court Berlin)

Agenda

1. What's it all about?
2. What is a subsequent application?
3. Procedural rules
4. Preliminary examination
5. Literature

DIRECTIVES

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 (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(d) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution.

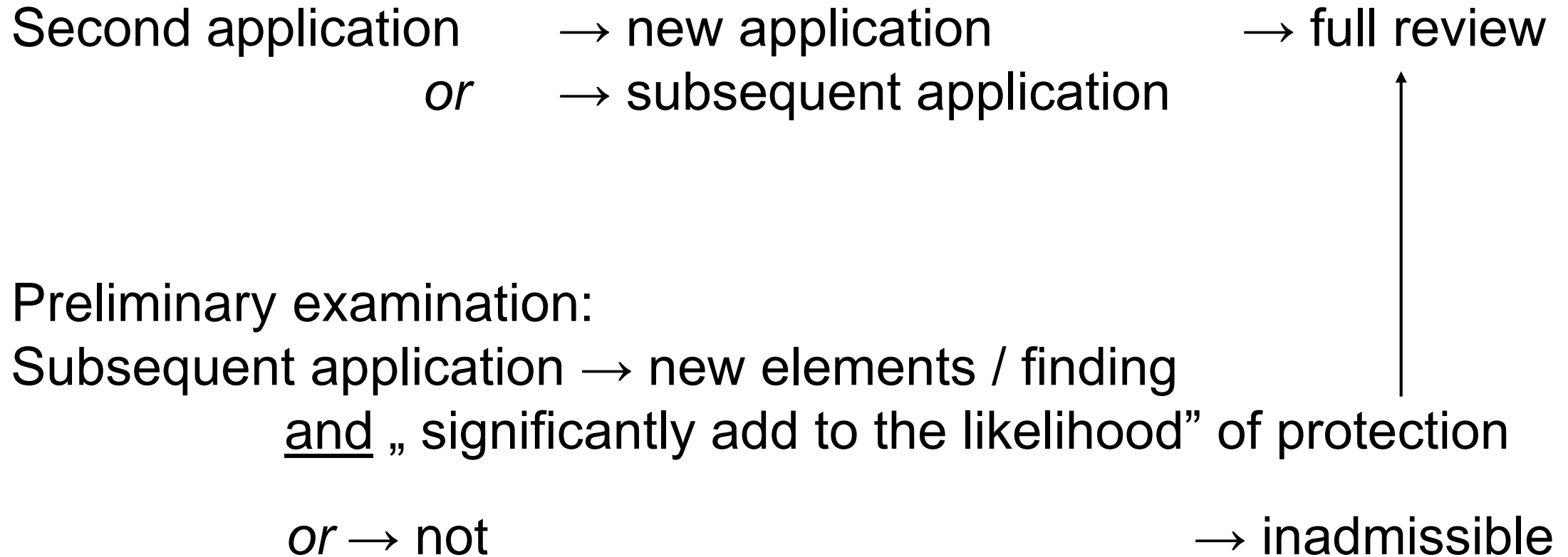
(4) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Union rules leading to a common asylum procedure in the Union.

(5) The first phase of a Common European Asylum System was achieved through the adoption of relevant legal instruments provided for in the Treaties, including Directive 2005/85/EC, which was a first measure on asylum procedures.

1. What's it all about?

- Necessary safeguards against refoulment if circumstances changed after rejection
- Rules to prevent the potential abuse of the possibility of subsequent applications

1. What's it all about?



2. What is a subsequent application?

- a) What is a “final decision” on a previous application – Art. 1 lit. q)?

- b) What if the applicant had returned to his country of origin in the meantime?

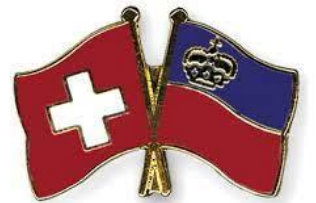
(–) Advocate General, Opinion of 18th March 2021 – C-8/20 –, ECLI:EU:C:2021:221, para 34ff.

2. What is a subsequent application?



c) What if the previous application was in an associated third State?

(–) CJEU, Judgment of 20th May 2022 – C-8/20 –, EU:C:2021:404, para 40ff.



Art. 33 Abs. 2 lit. b.) RL 2013/32/EU ist in Verbindung mit deren Art. 2 lit. q dahin auszulegen, dass er einer Regelung eines Mitgliedstaats entgegensteht, nach der ein Antrag auf internationalen Schutz ... als unzulässig abgelehnt werden kann, wenn er im betreffenden Mitgliedstaat von einem Drittstaatsangehörigen gestellt worden ist, der zuvor in einem Drittstaat, der die Dublin III – VO gemäß dem Übereinkommen zwischen der Europäischen Gemeinschaft und der Republik Island und dem Königreich ... umsetzt, einen erfolglosen Antrag auf Zuerkennung der Flüchtlingseigenschaft gestellt hatte.

Article 33(2)(d) of Directive 2013/32/EU, read in conjunction with Article 2(q) thereof, must be interpreted as precluding legislation of a Member State which provides for the possibility of rejecting as inadmissible an application for international protection ... made to that Member State by a third-country national ... whose previous application ... made to a third State implementing Regulation (EU) No 604/2013 in accordance with the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway ... had been rejected by that third State.

2. What is a subsequent application?



d) What if the previous application was in a different EU Member State?

- (–) European Commission,
Stellungnahme im Verfahren C-8/20 vom 20. Mai 2020 /
Observation écrites le 20. Mai 2020, Sj.g(2020)3057937
- (–) Advocate General,
Opinion of 18th March 2021 – C-8/20 –, ECLI:EU:C:2021:221, para 49ff.
- (?) CJEU, Judgment of 20th May 2022 – C-8/20 –, EU:C:2021:404, para 40;
Request for a preliminary ruling of 16th August 2021 – C-497/21 –
judgment announced for the 22nd September 2022 (Denmark)



2. What is a subsequent application?



d) What if the previous application was in a different EU Member State?

Follow-up questions I:

- What if there are systemic flaws in the asylum procedure in the other Member State?
- Is a withdrawal / revocation of an awarding status equivalent to a rejection?

2. What is a subsequent application?



d) What if the previous application was in a different EU Member State?

Follow-up questions II:

- Which point in time is decisive?
A final decision before the new application?
Or before the new decision?

Practical problem:

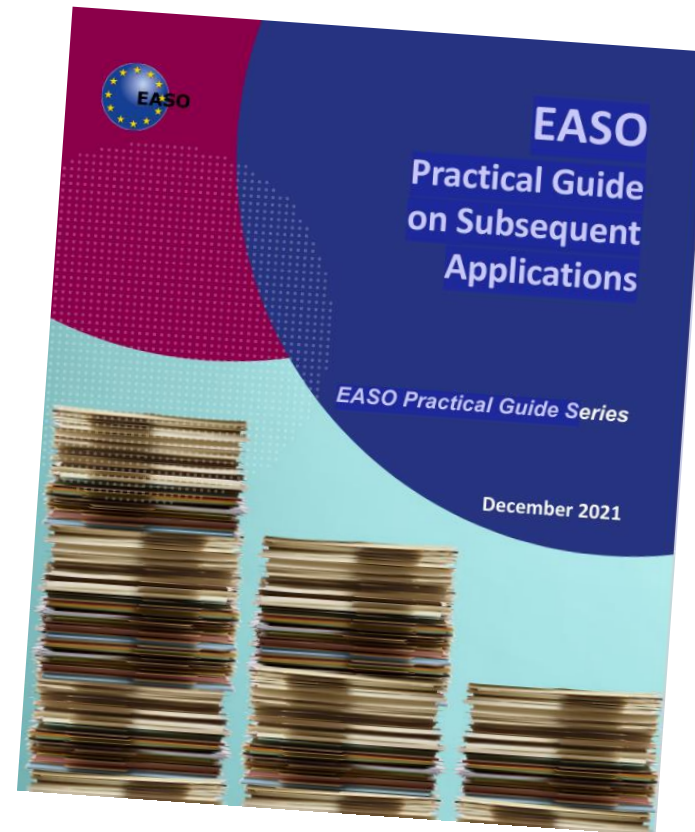
- information about the other asylum procedure / decision

2. What is a subsequent application?

e) other particular Situations

read:

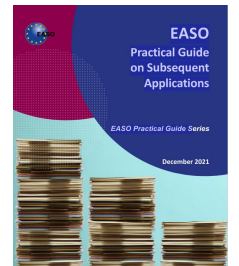
EASO,
Practical Guide on
Subsequent Applications,
p. 37-55



3. Procedural rules – Art. 42

- Guarantees for the applicant / Obligations of the applicant
- Personal interview – presenting new elements in writing
- Access to information

read: EASO, Practical Guide on Subsequent Applications, p. 9-24



4. Preliminary examination – Art. 40(2, 3)

CJEU, Judgment of 10th June 2021 – C-921/19 –,
ECLI:EU:C:2021:478

CJEU, Judgment of 9th September 2021 – C-18/20 –,
ECLI:EU:C:2021:710

Lars Bay Larsen, Vice President of the
European Court of Justice (Luxembourg):
Subsequent Applications in the light of the
CJEU Judgment of 9 Sep. 2021, C-18/20 X.Y.



4. Preliminary examination – Art. 40(2, 3)

a) What are new elements or findings – Art. 40(2)?

- “New” compared to which point in time?
- “New” to whom?
... to the court? ... to the applicant? ... to everyone?
- How long is "new"? Time limit?
- Is a "change of jurisprudence" a new element or finding?

4. Preliminary examination – Art. 40(2, 3)

a) What are new elements or findings – Art. 40(2)?

CJEU, Judgment of 9th September 2021 – C-18/20 –, ECLI:EU:C:2021:710

Art. 40 Abs. 2 und 3 Richtlinie ist dahin auszulegen, dass die Wendung „neue Elemente oder Erkenntnisse“, die „zutage getreten oder vom Antragsteller vorgebracht worden sind“, ... sowohl Elemente oder Erkenntnisse, die nach rechtskräftigem Abschluss des Verfahrens über den früheren Antrag auf internationalen Schutz eingetreten sind, als auch Elemente oder Erkenntnisse umfasst, die bereits vor Abschluss dieses Verfahrens existierten, aber vom Antragsteller nicht geltend gemacht wurden.

Art. 40 Abs. 3 der Richtlinie 2013/32 ist dahin auszulegen, dass ... für die Stellung dieses [Folge-] Antrags keine Ausschlussfristen gelten.

Art. 40 Abs. 4 der Richtlinie 2013/32 ist dahin auszulegen, dass er es einem Mitgliedstaat, der keine Sondernormen zur Umsetzung dieser Bestimmung erlassen hat, nicht gestattet, in Anwendung der allgemeinen Vorschriften über das nationale Verwaltungsverfahren die Prüfung eines Folgeantrags in der Sache abzulehnen, wenn die neuen Elemente oder Erkenntnisse, auf die dieser Antrag gestützt wird, zur Zeit des Verfahrens über den früheren Antrag existierten und in diesem Verfahren durch Verschulden des Antragstellers nicht vorgebracht wurden.

Article 40(2) and (3) of Directive 2013/32/EU must be interpreted as meaning that the concept of ‘new elements or findings’ which ‘have arisen or have been presented by the applicant’ ... includes elements or findings which arose after the procedure relating to a previous application for international protection was definitively concluded and elements or findings which already existed before the procedure was concluded, but which were not relied on by the applicant.

Article 40(3) of Directive 2013/32 must be interpreted as meaning ... that the lodging of that application is not subject to compliance with time limits.

Article 40(4) of Directive 2013/32 must be interpreted as not permitting a Member State which has not adopted specific measures transposing that provision to refuse, in accordance with the general rules of national administrative procedure, to examine the substance of a subsequent application, where the new elements or findings relied on in support of that application existed at the time of the procedure concerning the previous application and were not presented in the context of that procedure through the fault of the applicant.

4. Preliminary examination – Art. 40(2, 3)

b) Verification of the new elements or findings – Art. 40(2)?

CJEU, Judgment of 10th June 2021 – C-921/19 –, ECLI:EU:C:2021:478, para 54

Nach alledem ist auf die erste Frage zu antworten, dass Art. 40 Abs. 2 Richtlinie 2013/32 in Verbindung mit Art. 4 Abs. 2 Richtlinie 2011/95 dahin auszulegen ist, dass er nationalen Rechtsvorschriften entgegensteht, nach denen jedes Dokument, das von einem Antragsteller ... zur Stützung eines Folgeantrags vorgelegt wird, automatisch nicht als „neues Element oder neue Erkenntnis“ ... angesehen wird, wenn die Echtheit dieses Dokuments nicht feststellbar ist oder die Quelle eines solchen Dokuments nicht objektiv überprüfbar ist.

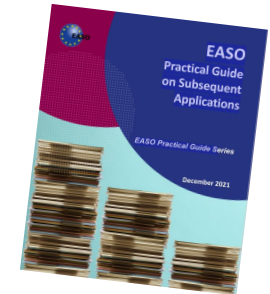
In the light of the foregoing considerations, the answer to the first question is that Article 40(2) of Directive 2013/32, read in conjunction with Article 4(2) of Directive 2011/95, must be interpreted as precluding national legislation under which any document submitted by an applicant ... in support of a subsequent application is automatically considered not to constitute a ‘new element or finding’ ... when the authenticity of that document cannot be established or its source objectively verified.

4. Preliminary examination – Art. 40(2, 3)

c) What does “significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection” – Art. 40(3)?

read: EASO, Practical Guide on Subsequent Applications, p. 29-36

- change in the legal situation
- change in the factual situation in the country of origin
- change of the individual circumstances



4. Preliminary examination – Art. 40(2, 3)

d) Interdependence of a) and c)

CJEU, Judgment of 10th June 2021 – C-921/19 –, ECLI:EU:C:2021:478, para 38

Diese Zulässigkeitsvoraussetzungen müssen folglich zwar beide erfüllt sein, damit der Folgeantrag gemäß Art. 40 Abs. 3 dieser Richtlinie weiter geprüft wird, sie unterscheiden sich jedoch und dürfen nicht miteinander vermengt werden.

Consequently, although those two conditions for admissibility must both be satisfied in order for the examination of a subsequent application to continue, in accordance with Article 40(3) of that directive, the fact remains that they are distinct and must not be conflated.

5. Literature

- **EASO, Practical Guide on Subsequent Applications** (EASO Practical Guide Series), December 2021
- *Vedsted-Hansen*, in: Thym/Hailbronner (eds.), **EU Immigration and Asylum Law, Article-by-Article Commentary**, 3rd edition (C.H. Beck/Hart/Nomos, 2022), Art. 40 Asylum Procedures Directive 2013/32/EU
- Deutschsprachige Literatur: *Kittenberger*, Asylrecht kompakt, 2021, S. 48ff., 175ff.; sowie *Broscheit*, Die Wiederaufgreifensgründe beim Folgeantrag nach § 71 I 1 AsylG, ZAR 2021, 190; *Dickten*, in: Kluth/Heusch, BeckOK-Ausländerrecht, 34. Edition, Stand: 01.04.2022, § 71a AsylG; *Hage*, Die Rechtsprechung des EuGH zu Folgeanträgen – ein Zwischenbericht, NVwZ 2022, 391; *Hage*, Die instanzgerichtliche Rechtsprechung zu flüchtlingsrechtlichen Unzulässigkeitsentscheidungen 2021, in: Berlit/Hope/Kluth, Jahrbuch des Migrationsrechts für die Bundesrepublik Deutschland 2021, S. 163 (184ff.); *Marx*, Kommentar zum Asylgesetz, 11. Aufl. 2022, § 71a AsylG; *Stern*, in: Huber/Mantel, AufenthG/AsylG, 3. Aufl. 2021, § 71a AsylG

