JUDGMENT OF THE COURT (Second Chamber)

13 March 2019 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Immigration policy — Right to family reunification — Directive 2003/86/EC — Exclusions from the scope of the directive — Article 3(2)(c) — Exclusion of persons benefiting from subsidiary protection — Extension of the right to family reunification to those persons under national law — Jurisdiction of the Court — Article 11(2) — Lack of official documentary evidence of the family relationship — Explanations regarded as insufficiently plausible — Obligations on the authorities of the Member States to take additional steps — Limits)

In Case C-635/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Den Haag zittingsplaats Haarlem (District Court, The Hague, sitting in Haarlem, Netherlands), made by decision of 14 November 2017, received at the Court on the same day, in the proceedings

E.

v

Staatssecretaris van Veiligheid en Justitie,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, T. von Danwitz, M. Berger, C. Vajda and P.G. Xuereb, Judges,

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2018,

after considering the observations submitted on behalf of:

– E., by M.L. van Riel and C.J. Ullersma, advocaten,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the European Commission, by G. Wils and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(2)(c) and Article 11(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

2 The request has been made in proceedings between E., a minor of Eritrean nationality residing in Sudan, and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands; 'the State Secretary') concerning the State Secretary's rejection of the application for family reunification lodged, on behalf of E., by A., an Eritrean national benefiting from subsidiary protection in the Netherlands and claiming to be E.'s aunt and guardian.

Legal context

EU law

Directive 2003/86

3 Recital 8 of Directive 2003/86 states:

'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.'

4 Article 2 of Directive 2003/86, which is in Chapter I of that directive, entitled 'General provisions', provides:

'For the purposes of this Directive:

(a) "third country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

(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;

(c) "sponsor" means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;

(d) "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;

(e) "residence permit" means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally on its territory, …

…'

5 Article 3 of that directive, which is also in Chapter I thereof, states:

'1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

2. 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.

…

5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.'

6 Article 4 of Directive 2003/86, which appears in Chapter II thereof, entitled 'Family members', provides, in paragraph 1:

‘The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

…

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. …

…

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

…’

7 Article 5 of that directive, which is in Chapter III thereof, entitled ‘Submission and examination of the application’, reads as follows:

‘1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)’ travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

…

4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for

in the first subparagraph shall be determined by the national legislation of the relevant Member State.

5. When examining an application, the Member States shall have due regard to the best interests of minor children.'

8 Article 10 of that directive, which is in Chapter V thereof, entitled 'Family reunification of refugees', states, in paragraph 2:

'The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.'

9 Article 11 of Directive 2003/86, which is also in Chapter V, states:

'1. Article 5 shall apply to the submission and examination of the application, subject to paragraph 2 of this Article.

2. Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.'

10 Chapter VII of that directive, relating to 'Penalties and redress', includes Articles 16 to 18 thereof.

11 Article 16(2) of Directive 2003/86 provides:

'Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:

(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;

…'

12 Article 17 of that directive 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.'

The Guidelines for the application of Directive 2003/86

13 The Communication from the Commission to the Council and the European Parliament of 3 April 2014 on guidance for the application of Directive 2003/86 (COM(2014) 210; 'the Guidelines') contains the following passages:

'…

3. Submission and examination of the application

…

3.2. Accompanying evidence

In accordance with Article 5(2), an application for family reunification shall be accompanied by:

(a) documentary evidence to prove the family relationship;

…

Member States have a certain margin of appreciation in deciding whether it is appropriate and necessary to verify evidence of the family relationship through interviews or other investigations, including DNA testing. The appropriateness and necessity criteria imply that such investigations are not allowed if there are other suitable and less restrictive means to establish the existence of a family relationship. Every application, its accompanying documentary evidence and the "appropriateness" and "necessity" of interviews and other investigations need to be assessed on a case-by-case basis.

…

6. Family reunification of beneficiaries of international protection

6.1. Refugees

…

The Commission underlines that the provisions of Chapter V must be read in the light of the principles set out in Article 5(5) and Article 17. Therefore, when examining applications for family reunification by refugees, Member States must make a balanced and reasonable assessment in every individual case of all the interests at play, while having due regard to the best interests of minor children … No factor taken separately may automatically lead to a decision; each must enter the equation only as one of the relevant factors …

…

6.1.2. Absence of official documentary evidence

Article 11 states that Article 5 shall apply to the submission and examination of the application, subject to the derogation with regard to official documentary evidence in Article 11(2). Thus, in line with Article 5(2), Member States may consider documentary evidence to establish the family relationship, and interviews and other investigations may be carried out if appropriate and necessary.

However, the particular situation of refugees who were forced to flee their country implies that it is often impossible or dangerous for refugees or their family members to produce official documents, or to get in touch with diplomatic or consular authorities of their country of origin.

Article 11(2) is explicit, without leaving a margin of appreciation, in stating that the fact that documentary evidence is lacking cannot be the sole reason for rejecting an application and in obliging Member States, in such cases, to "take into account other evidence" of the existence of the family relationship. Since such "other evidence" is to be assessed in accordance with national law, Member States have a certain margin of appreciation, yet they should adopt clear rules governing these evidentiary requirements. Examples of "other evidence" to establish family links may be written and/or oral statements from the applicants, interviews with family members, or investigations carried out on the situation abroad. These statements can then, for instance, be corroborated by supporting evidence such as documents, audio-visual materials, any documents or physical exhibits (e.g. diplomas, proof of money transfers…) or knowledge of specific facts.

The individual assessment of Article 17 requires that Member States take all relevant factors into account while examining the evidence provided by the applicant, including age, gender, education, background and social status as well as specific cultural aspects. The Commission considers that where serious doubts remain after other types of proof have been examined, or where there are strong indications of fraudulent intent, DNA testing can be used as a last resort … In such cases, the Commission considers that Member States should observe the [United Nations High Commissioner for Refugees (UNHCR)] principles on DNA testing …

…'

Netherlands law

14 It is apparent from the order for reference that Directive 2003/86 was transposed into the legal order of the Netherlands by the Vreemdelingenwet 2000 (2000 Law on Foreign Nationals), the Vreemdelingencirculaire 2000 (2000 Circular on Foreign Nationals) and the Werkinstructie 2014/9 (Work Instruction 2014/9).

15 The referring court, the rechtbank Den Haag zittingsplaats Haarlem (District Court, The Hague, sitting in Haarlem, Netherlands), states that the Kingdom of the Netherlands transposed the more favourable provisions of Chapter V of that directive, relating to the family reunification of refugees, including the optional provisions contained therein. In particular, the Kingdom of the Netherlands chose to apply that directive to beneficiaries of subsidiary protection, even though, in accordance with Article 3(2)(c) of that directive, it is not applicable to them. The Netherlands legislature thus made that Chapter V directly and unconditionally applicable to their situation.

16 The 2000 Circular on Foreign Nationals and Work Instruction 2014/9 relate, inter alia, to the assessment of the evidence that a family relationship exists between the sponsor and the third country national for whom the application for family reunification was lodged. It follows that the State Secretary is to grant that application where it is established that the third country national is actually part of the sponsor's family.

17 In that regard, the sponsor must demonstrate, according to the referring court, that the third country national concerned was actually part of his family before the sponsor's arrival in the Netherlands and that that actual family relationship has not broken down. Although the sponsor must, in principle, provide that evidence by means of documents, it is, however, possible for him, failing any such documents, to provide supplementary information or plausible, credible and coherent explanations on the fact that the third country national concerned actually belongs to his family. In particular, for the purpose of assessing whether a ward is actually part of the sponsor's family, account is taken, inter alia, of the reason for which the ward was fostered by that family.

18 Finally, where it is not possible to establish that there is an actual family relationship by means of official documents or DNA analysis, it is possible to have recourse to an interview including questions on identification. The referring court states that that is particularly the case where wards are involved in the family reunification procedure.

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

19 A. and her daughter have resided lawfully in the Netherlands since 11 March 2015 as beneficiaries of subsidiary protection within the meaning of Article 3(2)(c) of Directive 2003/86. On 16 April 2015, A. lodged, on behalf of E., an application for family reunification with the competent Netherlands authorities.

20 In support of that application, she submitted a statement from the Eritrean Liberation Front of 6 April 2015 (‘the ELF statement’), according to which she is E.’s aunt and his guardian since the death of his biological parents, which occurred when he was five years old. She also claimed that, after they fled Eritrea, which occurred in 2013 when E. was ten, he had lived with her in Sudan until she left for the Netherlands. Currently, E. is still residing in Sudan and has been placed in a foster family.

21 By decision of 12 May 2016, the State Secretary rejected the application for family reunification.

22 The State Secretary based that decision, first of all, on the fact that no official documentary evidence had been provided to substantiate the family relationship between E. and A., the sole document provided to that effect, namely the ELF statement, having been issued in an unauthorised way. Next, the State Secretary found that no plausible explanation had been given for the impossibility of providing official documentary evidence, since Eritrea issues documents of that kind, such as death certificates, guardianship certificates, identity cards or even school or student cards. Lastly, the State Secretary added that, in the light of the circumstances, the application for family reunification could be rejected without it being necessary to organise an interview with E. or with A. for the purposes of substantiating their family relationship.

23 The complaint lodged against that decision was rejected by a confirmatory decision of 27 October 2016.

24 As an action for annulment was brought before the referring court against the rejection of the application for family reunification at issue in the main proceedings, a hearing was held on 18 May 2017. Thereafter, the case was reassigned to a collegiate formation and a second hearing was held on 13 September 2017.

25 The referring court states that, during the latter hearing, the State Secretary abandoned his objections relating to the identity of E. and A. and the existence of a biological relationship between those two persons. Likewise, the State Secretary chose no longer to plead the lack of official documentary evidence in respect of A.’s guardianship of E., since, under Eritrean law, such guardianship is conferred automatically. It follows, in that court’s view, that the only elements still in dispute in the main proceedings are those relating to the lack of death certificates for E.’s biological parents and the plausibility of the explanations provided in that regard by A.

26 The referring court harbours doubts as to the interpretation to be given to Article 11(2) of Directive 2003/86 and, in particular, asks whether the

Member State concerned is required to 'take into account other evidence [of the existence of the family relationship]' in the event that the refugee does not give any plausible explanation for his inability to provide official documentary evidence.

27 Nevertheless, the referring court is uncertain, in the light of the judgment of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraphs 53 to 56), whether the Court of Justice has jurisdiction to answer such a question in the case in the main proceedings, observing that, although the situation of A., in so far as she is merely the beneficiary of subsidiary protection, does not fall within the scope of the provisions of that directive, those provisions have been made directly and unconditionally applicable to such a situation by Netherlands law.

28 In those circumstances, the rechtbank Den Haag, zittingsplaats Haarlem (District Court, The Hague, sitting in Haarlem) decided to stay the proceedings and to 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 of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638), 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) Must Article 11(2) of Directive [2003/86] be interpreted as precluding the rejection of a refugee's application for family reunification solely because of the fact that that refugee has not provided any official documentary evidence of the family relationship with his application,

or

must Article 11(2) of Directive [2003/86] be interpreted as precluding the rejection of a refugee's application for family reunification on the sole ground of a lack of any official documentary evidence of the family relationship only if that refugee has given a plausible explanation for the fact that he has not provided such documentary evidence and for his statement that he is not yet able to provide such documentary evidence?'

Procedure before the Court

29 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

30 On 23 November 2017, the First Chamber of the Court decided, after hearing the Advocate General, that there was no need to grant that request.

31 Nevertheless, by decision of 27 November 2017, the President of the Court ordered that the present case should be accorded priority treatment in accordance with Article 53(3) of the Rules of Procedure.

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether the Court has jurisdiction, on the basis of Article 267 TFEU, to interpret Article 11(2) of Directive 2003/86 in a situation such as that at issue in the main proceedings, where a national court is called upon to rule on an application for family reunification lodged by a beneficiary of subsidiary protection, if that provision was made directly and unconditionally applicable to such a situation under national law.

33 Article 3(2)(c) of Directive 2003/86 states, in particular, that that directive is not to apply where the sponsor is a third country national 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.

34 It follows that Directive 2003/86 must be interpreted as not applying to third country national family members of a beneficiary of subsidiary protection, such as A. (judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 33).

35 It is clear, however, from the Court's 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 reference made by that law to the content of those provisions (judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 34 and the case-law cited).

36 In such a situation, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from

EU law should be interpreted uniformly (judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 35 and the case-law cited).

37 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 (judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 36 and the case-law cited).

38 In the present case, the referring court, with exclusive jurisdiction to interpret national law under the framework of the system of judicial cooperation enshrined in Article 267 TFEU (see, by analogy, judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 37 and the case-law cited), has made clear that the Netherlands legislature has chosen to ensure that beneficiaries of subsidiary protection are treated more favourably than provided for in Directive 2003/86 by applying the rules applicable to refugees under that directive to beneficiaries of subsidiary protection. The referring court infers that it was, under Netherlands law, required to apply Article 11(2) of that directive to the case in the main proceedings.

39 In those circumstances, it must be held that in Dutch law that provision is directly and unconditionally applicable to situations such as that at issue in the main proceedings and that it is therefore clearly in the interest of the European Union that the Court rule on the request for a preliminary ruling (see, by analogy, judgment of 7 November 2018, *K and B*, C-380/17, EU:C:2018:877, paragraph 38).

40 The Court has previously held that, where the condition stated in paragraph 37 above is satisfied, it may also have jurisdiction in situations covered by an express exclusion from the scope of EU legislation (judgment of 7 November 2018, *C and A*, C-257/17, EU:C:2018:876, paragraph 37 and the case-law cited).

41 In that context, it cannot be justified for the Court's jurisdiction to vary depending on whether the scope of the relevant provision was limited by a definition of the cases to which it refers or by means of certain exclusions from its scope, since both legislative techniques may be used interchangeably (judgment of 7 November 2018, *C and A*, C-257/17, EU:C:2018:876, paragraph 39).

42 In addition, although the referring court has expressed doubts as to the jurisdiction of the Court according to the judgment of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638), it should be noted that the case

which gave rise to that judgment was characterised by particularities which do not apply to the case in the main proceedings (see, by analogy, judgment of 7 November 2018, *C and A*, C-257/17, EU:C:2018:876, paragraphs 41 to 43).

43 In the light of the foregoing, the answer to the first question is that the Court has jurisdiction, on the basis of Article 267 TFEU, to interpret Article 11(2) of Directive 2003/86 in a situation such as that at issue in the main proceedings, where a national court is called upon to rule on an application for family reunification lodged by a beneficiary of subsidiary protection, if that provision was made directly and unconditionally applicable to such a situation under national law.

The second question

44 By its second question, the referring court asks, in essence, whether Article 11(2) of Directive 2003/86 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.

The objective pursued by Directive 2003/86

45 In that regard, it must be recalled that the objective pursued by Directive 2003/86 is to promote family reunification and that that directive also aims to give protection to third country nationals, in particular minors (see, to that effect, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 69).

46 In that context, Article 4(1) of that directive imposes on the Member States precise positive obligations, with corresponding clearly defined individual rights. It requires them, in the cases determined by that directive, to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation (judgments of 27 June

2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 60, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 70).

47 The family members of the sponsor for which the Member State concerned must authorise entry and residence include, in accordance with Article 4(1)(c) of Directive 2003/86, 'the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her'.

48 Furthermore, in accordance with Article 10(2) of Directive 2003/86, the Member States may authorise family reunification of other family members not referred to in Article 4 of that directive, if they are dependent on the refugee.

49 In that regard, the referring court has stated that Netherlands law authorises the family reunification of wards with whom the sponsor maintains an actual family relationship and that the Netherlands authorities are required to authorise the family reunification applied for if it is established that there is an actual family relationship between the sponsor and a ward.

50 In the present case, E. being, by A.'s account, her ward, it appears that the application for family reunification at issue in the main proceedings is liable to fall, at the very least, within the situation referred to in Article 10(2) of Directive 2003/86 and that, if that scenario were true, Netherlands law would require the Netherlands authorities to authorise the family reunification applied for.

51 Accordingly, for reasons similar to those set out in paragraph 38 of the present judgment, it must be held that Article 11 of that directive has been made applicable by Netherlands law to a situation such as that at issue in the main proceedings.

The examination of an application for family reunification to be carried out by the competent national authorities

52 As regards the examination to be carried out by the competent national authorities, it is apparent both from Article 5(2) and Article 11(2) of Directive 2003/86 that those authorities have a margin of discretion, inter alia, when examining whether there is a family relationship, that discretion being used in accordance with national law (see, to that effect, judgments of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 59, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 74).

53 Nevertheless, the margin of discretion afforded to the Member States must not be used by them in a manner which would undermine the objective of Directive 2003/86 or the effectiveness thereof. Moreover, as is apparent from recital 2 of that directive, it respects the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 74 and 75).

54 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 legal order of the European Union (see, to that effect, judgments of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 105; of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 34, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 78).

55 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 (judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 58).

56 It follows that 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, 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 (judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 80).

57 In that regard, it is for the competent national authorities to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned (judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 81).

58 Regard must also be had to Article 17 of Directive 2003/86, which requires applications for family reunification to be examined on a case-by-case basis (judgments of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraph 60, and of 21 April 2016, *Khachab*, C-558/14, EU:C:2016:285, paragraph 43), which must 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 country of origin (judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 64).

59 Consequently, it is for the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make, inter alia, a case-by-case assessment which takes account of all the relevant aspects of the particular case and, where appropriate, pays particular attention to the interests of the children concerned and with a view to promoting family life. In particular, circumstances such as the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives are liable to influence the extent and intensity of the examination required (see, to that effect, judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 56). In any event, as stated in paragraph 6.1 of the Guidelines, no factor taken separately may automatically lead to a decision.

The obligations on the sponsor and the member of her family concerned by the application for family reunification

60 As regards the obligations on the sponsor and the member of his family concerned by the application for family reunification, it should be recalled that, in accordance with the first subparagraph of Article 5(2) of Directive 2003/86, such an application must be accompanied, inter alia, by 'documentary evidence of the family relationship'. Article 11(2) of that directive provides that that documentary evidence must be 'official' and that, failing any such evidence, 'the Member States shall take into account other evidence … of the existence of such relationship'. As regards the second subparagraph of Article 5(2) of that directive, it provides that 'if appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary'.

61 As the Advocate General noted in points 57 and 71 of his Opinion, it follows from those provisions that the sponsor and the member of her family concerned by the application for family reunification are obliged to cooperate with the competent national authorities, in particular for the purpose of determining their identity, the existence of their family relationship and the grounds justifying their application, which amounts to supplying, as far as possible, the required supporting documents and, where appropriate, the explanations and information requested (see, by analogy, judgment of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 38).

62 Accordingly, that obligation to cooperate means that the sponsor or the member of his family concerned by the application for family reunification

are to provide all the evidence relevant to the assessment of whether their claimed family relationship is real, but also that they are to respond to questions and requests addressed to them in that regard by the competent national authorities, that they remain available to those authorities for interviews or other investigations and that they explain, where they cannot provide official documentary evidence of the family relationship, the reasons for which they are incapable of providing that evidence.

The examination of the evidence provided and the statements made

63 As regards the examination by the competent national authorities of the probative value or plausibility of the evidence, statements or explanations thus provided by the sponsor or the member of his family concerned by the application for family reunification, the necessary case-by-case assessment requires those authorities to take account of all the relevant aspects, including the age, gender, education, background and social status of the sponsor or the family member concerned as well as specific cultural aspects, as is also stated in paragraph 6.1.2 of the Guidelines.

64 As the Advocate General noted in points 65, 66, 77, 79 and 81 of his Opinion, it follows that those items of evidence, statements and explanations provided, first must be assessed objectively in the light of information, both general and specific, that is relevant, objective, reliable, specific and up-to-date on the situation in the country of origin including, inter alia, the state of the legislation and the way in which it is applied, the functioning of the administrative services and, where appropriate, the existence of deficiencies affecting certain regions or certain groups of people of that country.

65 Secondly, the national authorities must also take account of the personality of the sponsor or the member of his family concerned by the application for family reunification, the specific situation in which they find themselves and the particular difficulties they are facing, with the result that the requirements which may be set in respect of the probative value or plausibility of the evidence provided by the sponsor or family member, in particular for the purpose of establishing that it is not possible to provide official documentary evidence of the family relationship, must be proportionate and depend on the nature and level of the difficulties they are facing.

66 According to recital 8 of Directive 2003/86, special attention must 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. As paragraph 6.1.2 of the Guidelines also states, the particular situation of refugees implies that it is often impossible or dangerous for refugees or their family members to produce official documents, or to get in touch with diplomatic or consular authorities of their country of origin.

67 Moreover, it follows from the foregoing considerations that, if the sponsor flagrantly fails to fulfil his obligation to cooperate or if it is clearly apparent, on the basis of objective information which the competent national authorities have at their disposal, that the application for family reunification is fraudulent, those national authorities are entitled to reject that application.

68 Conversely, in the absence of such circumstances, the lack of official documentary evidence of the family relationship and the potential implausibility of the explanations provided in that regard must be regarded as mere elements to be taken into account in the case-by-case assessment of all the relevant elements of the specific case and do not free the competent national authorities from the obligation laid down by Article 11(2) of Directive 2003/86 to take other evidence into account.

69 As paragraph 6.1.2 of the Guidelines also makes clear, Article 11(2) of that directive is explicit, without leaving a margin of appreciation in that regard, in stating that the fact that documentary evidence is lacking cannot be the sole reason for rejecting an application and in obliging Member States, in such cases, to take into account other evidence of the existence of the family relationship.

The compatibility of the State Secretary's examination of the application at issue in the main proceedings with the requirements of Directive 2003/86

70 In the present case, in his decisions of 12 May 2016 and 27 October 2016, the State Secretary took the view, inter alia, that A. had neither provided any official documentary evidence relating to the death of E.'s parents and her guardianship over the minor nor given a plausible explanation as to her inability to provide that documentary evidence, even though, according to the State Secretary, it was possible, in Eritrea, to acquire that kind of document.

71 It is nevertheless undisputed that, at the hearing of 13 September 2017 before the referring court, the State Secretary abandoned his objection relating to the lack of official documentary evidence of A.'s guardianship over E., after finding that, under Eritrean law, such guardianship is conferred automatically.

72 It follows that the decision to reject the application for family reunification at issue in the main proceedings is now based solely on the lack of death certificates for E.'s biological parents and the implausibility of the explanations provided in that regard by A.

73 At the hearing before the Court, the Netherlands Government submitted that it was necessary to establish the death of E.'s biological parents in order to rule out the cases of child abduction or even human trafficking.

74 Subject to verification by the referring court, it must be held, in the first place, that the file before the Court does not reveal any breach of A.'s obligation to cooperate. It is common ground that she responded to all the questions and requests addressed to her during the administrative procedure by the State Secretary and that, in particular, she set out the reasons for which she and E. found themselves, from her perspective, incapable of providing the official documentary evidence of the family relationship requested by those authorities.

75 In that regard, as is apparent from the file before the Court, A. claimed, first of all, that the issuing of death certificates in Eritrea does not fall within the competence of the civil registry services of Asmara (Eritrea), but that of the local authorities, with which, moreover, the issuing procedure varies strongly by region. Next, A. noted that she had never possessed such certificates because she came from a modestly sized village, that she left her home only when necessary and that the possession of death certificates was unusual. Finally, it would be impossible to obtain those certificates today, since E. left Eritrea illegally, with the result that requesting such certificates by means of local acquaintances would have exposed them to potential 'dealings with the diaspora' and would have engendered dangers for their family residing in Eritrea and a risk of having to pay a 'diaspora tax'.

76 In the second place, it is apparent from that file that, while the State Secretary has taken account, for the purpose of examining the plausibility of the explanations provided by A., of the general information available concerning the situation in Eritrea, it is not readily apparent that he took account of the way in which the relevant legislation is applied or the fact that the functioning of the civil registry services in that country depends, as the case may be, on different local contexts. Nor, moreover, does that file make it possible to verify whether and, where appropriate, to what extent he took into consideration the personality and specific circumstances of A. and E. and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.

77 In the third place, none of the information in the file before the Court reveals that the State Secretary took account of E.'s age, his situation as a refugee in Sudan, the country in which he was, according to the statements made by A., placed into a foster family without any family ties, or that child's best interests, as they appear in such circumstances. If A.'s claims were to prove truthful, granting the application for family reunification at issue in the main proceedings could be the only means of ensuring that E. has the opportunity to grow up in a family environment. As stated in paragraph 59 of the present judgment, such circumstances are liable to influence the extent and intensity of the examination required.

78 While the competent national authorities are permitted to take steps for the purpose of detecting fraudulent applications for family reunification, occurring in a context of child abduction or even human trafficking, as the Netherlands Government rightly contends, that fact does not free those authorities from the obligation to have regard to the best interests of a child potentially finding himself in conditions such as those described by A.

79 In addition, the absence of death certificates for the biological parents and the insufficient plausibility of the explanations provided to justify that absence do not warrant, in and of themselves, the conclusion that the application for family reunification in question was necessarily made in a context of child abduction or human trafficking. In that regard, it follows from Article 11(2) of Directive 2003/86, according to which the Member State concerned is to take into account other evidence of the existence of the family relationship and may not base its decision solely on the lack of documentary evidence, read in the light of Article 7 and Article 24(2) and (3) of the Charter, that the national authorities may, depending on the circumstances of the particular case, be required to carry out the necessary additional checks, such as holding an interview with the sponsor, in order to rule out the existence of such phenomena.

80 It is for the referring court, which alone has direct knowledge of the dispute before it, to ascertain, taking into account the factors set out in the preceding paragraphs, whether the State Secretary's examination of the application at issue in the main proceedings is compatible with the requirements of Directive 2003/86.

81 In the light of all the foregoing considerations, the answer to the second question is that Article 11(2) of Directive 2003/86 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The Court of Justice of the European Union has jurisdiction, on the basis of Article 267 TFEU, to interpret Article 11(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification in a situation such as that at issue in the main proceedings, where a national court is called upon to rule on an application for family reunification lodged by a beneficiary of subsidiary protection, if that provision was made directly and unconditionally applicable to such a situation under national law.**

2. **Article 11(2) of Directive 2003/86 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin.**

[Signatures]

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* Language of the case: Dutch.