Granting asylum to family members with multiple nationalities – the choice-of-law implications of the CJEU-Judgment of 9th November 2021, Case C-91/20

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From a PIL-perspective, granting asylum to the family members of a recognised asylum-seeker or refugee is relevant regarding the determination of an individual's personal status and, more specifically, concerning the question of the relation between the individual's political status (*status politicus*) and his or her personal status (*status privatus*). Whereas the personal status of an individual is ususally determined according to her or his own protection status, it is disputed with regard to *personae coniunctae* – meaning relatives of a protected person who do not (yet) possess a protection status of their own –, whether their personal status may be derived from the status of the already protected family member or whether it has to be determined by the person's individual status. This is decisive as to the applicability of Art. 12(1) of the Convention relating to the Status of Refugees signed in Geneva on 28th July 1951 (Geneva Convention), according to which all conflict rules leading to the law of the persecuting state are modified by substituting habitual residence for nationality.

In Germany, § 26 of the Asylum Act (Asylgesetz) – with only few exemptions made in its para. 4 – grants family asylum to people who themselves do not satisfy the conditions for receiving asylum (Art. 16a of the German Basic Law), but whose spouse or parent has been granted this status. According to § 26(5) Asylgesetz, this also comprises international protection within the meaning of the refugee

status as defined by the Geneva Convention as well as the EU-specific subsidiary protection status (§ 4 Asylgesetz, implementing Art. 15 et seq of the EU-Directive No. 2004/83). The close relative's protection is thus a derived right from the family member's political status. However, by this – even though the opposite might be implied by the misleading terminology of "derived" – the spouse or child of the protected person acquire a protection status of their own. § 26 Asylgesetz is meant to support the unity of the family and aims to simplify the asylum process by liberating family members from the burdensome task of proving that they individually satisfy the conditions (e.g. individual religious or political persecution) for benefitting from international protection or asylum.

While the exemptions made in § 26(4), (5) and § 4(2) Asylgesetz correspond to Art. 1D of the Geneva Convention as well as to Art. 12(2) of the EU-Directive No. 2011/95 (Qualification Directive), the non-exemption of people with multiple nationalities, who could also be granted protection in one of the states of which they are nationals, goes further than the Geneva Convention and the Qualification Directive (see Art. 1A(no. 2) of the Geneva Convention and Art. 4(3)(e) of the Qualification Directive).

This discrepancy was the subject of a preliminary question asked by the German Federal Administrative Court (*Bundesverwaltungsgericht*) and was decided upon by the CJEU on 9th November 2021 (Case C-91/20). The underlying question was whether the more favourable rule of § 26 Asylgesetz is compatible with EU law.

The CJEU in general affirmed this question. For doctrinal justification, it referred to Art. 3 of the Qualification Directive, which allows more favourable rules for granting international protection as long as they do "not undermine the general scheme or objectives of that directive" (at [40]). According to the CJEU, Art. 23(2) of the Qualification Directive leads to the conclusion that the line is to be drawn where the family member is "through his or her nationality or any other element characterising his or her personal legal status, entitled to better treatment in […] [the host] Member State than that resulting from the grant of refugee status" (at [54]). For example, this could be the case if the close relative is a national of their spouse's or parent's host country or one of their nationalities entitles them to a better treatment there (like a Union citizenship). This interpretation also corresponds to the UNHCR's guidelines in respect to the Geneva Convention (see [56] et seq.).

The CJEU's judgment strengthens the right to family life guaranteed by human rights, namely Art. 8 ECHR as well as Art. 7 and Art. 24 of the Charter of Fundamental Rights of the EU (see [55]). Disrupting a family unit can have a negative impact on the individual integration process (see *Corneloup et al.*, study PE 583.157, p. 11), which should be neither in the interest of the individual nor the host state. This right to family unity, according to the CJEU, exists irrespective of the fact that the concerned families could alternatively take residence in one of the family member's home states, because otherwise the person who had already been granted a protection status in a different country could not make use of his or her own protection (see [59] et seq.). In so far, the judgment is to be welcomed. On the other hand, opening the doors to more favourable domestic laws on a derivative protection of family members will lead to more situations where the law applicable to a family relationship between a person applying for family asylum and the person who had already been granted international protection must be determined under prior consideration of domestic PIL rules. However, PIL rules in this regard are frequently inconsistent among the EU Member States.

In practice, the CJEU's judgment discussed here is particularly relevant in the overall picture that is characterised by the CJEU's recent judgment of 19th November 2020 (C-238/19), according to which – contrary to the previous German Federal Administrative Court's practice – the refugee status according to the Geneva Convention may be granted to individuals who are eligible to be drafted for military service in Syria, which potentially means all Syrian men of a certain age. However, the precise implementation of this judgment in current German judicial and administrative practice remains controversial (see here). In cases where Syrian men actually are granted a protective status, their spouses and children are entitled to receive family asylum as well. In Germany, this is the case even if they possess multiple nationalities, but, according to the CJEU judgment discussed here, only as long as they are not entitled to a better treatment in the host Member State through a different legal status in this country, e.g. nationality or Union citizenship. As a matter of fact, there will be most probably very few people among those seeking protection in a Member State who have a Union

citizenship, so that the CJEU’s restriction to the scope of § 26 Asylgesetz will only be practically relevant in very few cases.