# THE HIGH COURT

**JUDICIAL REVIEW**

**[2013 No. 209 J.R.]**

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT 1999, EU COUNCIL DIRECTIVE 2005/85, S.I. 51 OF 2011 EUROPEAN COMMUNITIES (ASYLUM PROCEDURES) REGULATIONS 2011 AND SECTION 5 OF ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000**

**BETWEEN/**

**N.M.**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**JUDGMENT of Mr. Justice Barr delivered on the 18th day of December 2014**

## Background

**1.** The applicant is a national of Democratic Republic of Congo ("DRC"). She applied for asylum in the State on 25th April, 2008. Her claim was based on her alleged Rwandan parentage and an allegation that she was a spy and therefore at risk from the authorities in the DRC. Her claim was unsuccessful before the Refugee Applications Commissioner ("RAC"). The Refugee Appeals Tribunal ("RAT") in a decision dated 18th February, 2011, rejected her claim. Detailed credibility findings were made against the applicant. This decision was not challenged.

**2.** The Minister then refused her a declaration of refugee status pursuant to s. 17 of the Refugee Act 1996 (as amended). By an application dated 30th March, 2011, the applicant applied for subsidiary protection. She claimed that she was at risk of torture

or inhuman or degrading treatment or punishment in her country of origin. She relied on the details provided in her asylum claim. On 8th August, 2011, the Minister refused her application for subsidiary protection. That decision has not been challenged.

**3.** On 7th September, 2011, a deportation order was made in respect of the applicant. Subsequent to that, the applicant through her current solicitors, made an application pursuant to s. 3(11) of the Immigration Act 1999, seeking revocation of the deportation order made in respect of her. That application still remains outstanding.

**4.** By letter dated 24th October, 2012, an application pursuant to s. 17(7) of the Refugee Act 1996 (as amended) was submitted on behalf of the applicant, seeking the consent of the Minister to her readmission to the asylum process. This application was the subject of a first instance refusal by the Minister. This was notified to the applicant by letter dated 23rd November, 2012. This letter advised the applicant that she was entitled to a review of the negative first instance decision.

**5.** The applicant applied for a review of the first instance decision. This review was carried out by a more senior officer in the Ministerial Decisions Unit of the respondent. By letter dated 4th January, 2014, the applicant's solicitor wrote to the MDU advising that the review process proposed by the Minister did not accord with the provisions of the Council Directive 2005/85/EC of 1st December, 2005, on minimum standards on procedures in Members States for granting and withdrawing refugee status ("the Procedures Directive"), and Article 39 thereof, which entitled the applicant to an effective remedy before a court or tribunal against a decision not to further examine a subsequent application for asylum and the letter outlined that the

review should be conducted by an independent court or tribunal. Enclosed with that letter were detailed grounds of review in respect of the first instance refusal decision.

**6.** Within the body of the grounds of review at para. 1 thereof, the issue raised in the letter of 4th January, 2014, regarding entitlement to a review of a decision not to further examine the subsequent application for asylum by an independent court or tribunal was further expanded. By separate letter dated 4th January, 2013, to the MDU, the applicant's solicitors sought disclosure of any relevant guidelines/criteria for the assessment conducted in relation to s. 17(7) applications and/or policy documents in respect of same including any guidelines, criteria or policy documents considered or applied in respect of the first instance decision and the grounds of review submitted further expanded material in respect of this point at para. 2 thereof. The detailed grounds of review also expressly requested that the applicant's solicitor be provided in advance of a determination (by the independent court or tribunal assigned to adjudicate on the review) with copies of information not previously furnished on which it was proposed to rely.

**7.** Following the submission by the plaintiff's solicitor of the letters of 4th January, 2013, and the detailed grounds of review, he received further correspondence of 9th and 10th January, 2013, regarding the review. The letter of 10th January, 2013, acknowledged receipt of the grounds of review and correspondence of 4th January, 2013 and advised that a representative of the Minister would be in contact concerning the case in due course. By letter dated 7th February, 2013, the applicant's solicitor was notified of the decision to refuse on review the applicant's application for readmission to the asylum process and enclosed with that was an analysis of file document in respect of that refusal.

**8.** The basis of the applicant's s. 17(7) application seeking readmission to the asylum process and to be permitted to have a further application for asylum fully investigated was the presentation of fresh information post dating the prior asylum application and process in respect of her (and the subsidiary protection and deportation order) concerning the risk of persecution to her as a failed asylum seeker for reasons of the political opinion imputed to her in that regard and/or by reason of her membership of the particular social group comprising failed asylum seekers deported to DRC. A further discrete element of the s. 17(7) application concerned the applicant's deteriorating medical condition with particular reference, in the light of same, to the risk to her of inhuman and degrading treatment for reasons of imputed political opinion and/or membership of a particular social group in the context of detention if returned as a failed asylum seeker to DRC given her very fragile medical condition and in light of the appalling prison conditions in DRC and the country conditions reports demonstrating detention by the authorities of returning asylum seekers. Country reports and other supporting documentation including previous relevant decisions of the RAT and the medical reports from the applicant's doctors were submitted to the respondent with the application pursuant to s. 17(7) as made by letter of 24th October, 2012. The application contained in the letter of 24th October, 2012, also contained relevant extracts from up to date country reports.

**9.** The key issue raised in the proceedings is whether the procedure set out in the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51 of 2011) ("the statutory instrument") is lawful having regard to the provisions of the Procedures Directive and in particular Article 39 thereof.

**10.** It is necessary to set out the relevant portions of the 1996 Act, as amended, and the relevant articles from the Procedures Directive.

**Section 17(7) of the Refugee Act 1996 (As Amended)**

**11.** Amendment of s. 17 of the Act of 1996:-

*"8. Section 17 of the Act of 1996 is amended by—*

*(a) substituting the following for subsection (7):*

*'(7) A person to whom the Minister has refused to give a declaration may not make a subsequent application for a declaration under this Act without the consent of the Minister.'*

*And*

*(b) inserting the following after subsection (7):*

*"(7A) The consent of the Minister referred to in subsection (7)—*

*(a) may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and*

*(b) shall be given if, following the preliminary examination referred to in paragraph (a), new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee.*

*(7B) An application for the consent referred to in subsection (7) shall be accompanied by—*

*(a) a written statement of the reasons why the person concerned considers that the Minister should consent to a subsequent application for a declaration being made,*

*(b) where the previous application or appeal was withdrawn or deemed to be withdrawn, a written explanation of the circumstances giving rise to the withdrawal or deemed withdrawal of the application or appeal,*

*(c) all relevant information being relied upon by the person concerned to demonstrate that he or she is entitled to protection in the State, and*

*(d) a written statement drawing to the Ministers attention any new elements or findings relating to the investigation of whether he or she is entitled to protection in the State which have arisen since his or her previous application for a declaration was the subject of a notice under subsection (5).*

*(7C) The Minister shall, as soon as practicable after receipt by him or her of an application under subsection (7B), give or cause to be given to the person concerned a statement in writing specifying, in a language that the person may reasonably be supposed to understand—*

*(a) the procedures that are to be followed for the purposes of subsections (7) to (7H),*

*(b) the entitlement of the person to communicate with the High Commissioner,*

*(c) the entitlement of the person to make submissions in writing to the Minister,*

*(d) the duty of the person to co-operate with the Minister and to furnish information relevant to his or her application, and*

*(e) such other information as the Minister considers necessary to inform the person of the effect of subsections (7) to (7H), and of any other relevant provision of this Act or of the Regulations of 2006.*

*(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that—*

*(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and*

*(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16).*

*(7E) Pursuant to an application under subsection (7B) by or on behalf of a person who the Minister has, under Regulation 4(5) of the Regulations of 2006, determined not to be a person eligible for subsidiary protection, the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that-*

*(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for protection in the State, and*

*(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16) or, as the case may be, for the purposes of his or her*

*application for subsidiary protection under Regulation 4 of the Regulations of 2006.*

*(7F) Where the Minister consents to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact.*

*(7G) Where the Minister refuses to consent to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact and of the reasons for it and of how a review of that decision may be sought.*

*(7H) In this section, 'protection' has the same meaning as it has in the Regulations of 2006.'"*

**Council Directive 2005/85/EC**

*"Section IV*

*Article 32*

***Subsequent application***

*1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal,*

*insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.*

2. *Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:*

   *(a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;*

   *(b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.*

3. *A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.*

4. *If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II...*

*Article 34*

*Procedural rules*

1. *Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).*

2. *Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:*

   *(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;*

   *(b) [...]*

   *(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.*

   *The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.*

3. *Member States shall ensure that:*

   *(a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision;*

   *(b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.*

*CHAPTER V*

*APPEALS PROCEDURES*

*Article 39*

*The right to an effective remedy*

1. *Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:*

   *...(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;...*

2. *Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.*

3. *Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:*

   *(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;*

   *(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and*

   *(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).*"

**The Central Issue**

**12.** The applicant's case is that the procedures implemented in Irish law in the statutory instrument, which provide for an application for readmission to the asylum process being determined by an official in the Ministerial Decisions Unit of the respondent, with a review thereof by a higher official from the same department, with the possibility of further review within the context of a judicial review application, is not an adequate transposition of the provisions mandated by Article 39(1)(c) of the Procedures Directive, which provides that Member States will ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a number of decisions, including a decision not to further examine the subsequent application pursuant to Articles 32 and 34 of the Directive.

**13.** In her submissions, the respondent accepted that a review by a more senior officer of the same department would not be regarded as a decision by a court or tribunal which is independent of the first instance decision maker. It was pointed out that as a matter of Irish law, both the more junior officer and the more senior officer are in fact acting as the alter ego of the Minister pursuant to the Carltona Doctrine. They are, in law, the same person. It is, in law, the Minister herself who is making the decision. In effect, she makes the decision twice.

**14.** The respondent submitted that while it has been pleaded in the intended statement of opposition that the availability of judicial review combined with the internal review procedure constitutes an *"effective remedy"*, the respondent contends that it is the availability of judicial review which constitutes the provisions of an effective remedy for the purposes of Article 39.

**The Applicant's Case**

**15.** The applicant submitted that there were a number of EU law principles which come into play in this case. Firstly, Member States are obliged to respect the fundamental right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union when operating and implementing EU law. They are also obliged to respect the right to good administration within the terms and meaning of Article 41(2) of the Charter. The right to good administration includes the right of every person to be heard before an individual measure which could affect him or her adversely is taken and the right of every person to have access to his or her file. (see *M.M. v. Minister for Justice, Equality and Law Reform* Case C-277/11).

**16.** It was submitted that the right to be heard requires the relevant authorities to pay due attention to the observations submitted by the person concerned/affected and to examine carefully and impartially all relevant aspects of the individual case being made and to give a detailed statement of the reasons for the decision. (See *M.M. v. Minister for Justice, Equality and Law Reform* (supra) at para. 88)

**17.** It was submitted that Member States are required to adopt measures in their national legislation which are sufficiently effective to achieve the objective of a Directive and to ensure that those measures may be relied on before the national courts by persons affected. Member States are obliged, deriving from the obligation to achieve the result envisaged by the Directive, to take all appropriate measures whether general or particular, to ensure the fulfilment of that obligation. The national courts in Member States are required to interpret the national law in the light of the wording and purpose of the Directive in order to achieve the results envisaged in the Directive. (See *Voncolsen v. Land Nordrhein – West Falen* [1984] ECR 1891)

**18.** The provisions of a Directive *"must be implemented with unquestionable binding force and with a specificity precision and clarity required in order to establish the requirement of legal certainty"*. In the case of a Directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights. When national legislation is incompatible with community provisions, such incompatibility must be remedied by means of national provisions of a binding nature. Mere administrative practices which, by their nature, and being alterable at the will of the authorities, should not be regarded as constituting the proper fulfilment of obligations under community law.

**19.** In terms of the right to an effective remedy before a *"court or tribunal"*, the applicant submitted that the adjudicating body in order to qualify as a *"court or tribunal"*, must carry certain features and characteristics. Independence is a key feature and element in this regard. The CJEU in the *M.M.* case at para. 83, outlined that it was settled case law of the court that when determining whether an adjudicating body was a *"court or tribunal"* for the purposes of Article 267 TFEU, the following factors have to be considered – whether the body as established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes,* whether it applies rules of law and whether it is independent. The applicant submitted that the concept of independence was inherent in the task of adjudication. That concept had two aspects. The adjudicating body in question must be protected against external intervention or pressure liable to jeopardise independent judgment and there must be a level playing field for the respective parties in respect of the adjudication and this required objectivity and *"the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law"*. (See *Wilson* Case 506/04)

**20.** The authority before which an appeal or review can be brought against a first instance decision will not be regarded as a third party independent court or tribunal where it has an organisational link with the administrative authority that made the first instance decision.

**21.** A further feature of the right to effective remedy is that the adjudicating body providing such a remedy should be in a position to determine, in respect of the EU rights raised, both the law and the facts at issue. In the *Wilson* case, the court found with respect to Article 9 of Directive 98/5/EC, a Directive designed to facilitate the practice of the profession of lawyer across Member States, that an appeal procedure refusing a lawyer registration which had to be challenged at first instance before a body composed exclusively of lawyers practicing in the host Member State and on appeal, before a body composed for the most part of such lawyers and where an onward appeal from that appeal before the Supreme Court of the Member State in question permitted judicial review of the law only and not the facts, did not amount to an effective remedy before a court or tribunal. The court in *Wilson* at para. 60 emphasised that although the Directive in question did not preclude an appeal procedure to a body which was not a court or tribunal (in the context of the remedy that had to be provided in accordance with Article 9 of Directive 98/5) it did not allow for a legal remedy that was only open to a person after all other remedies had been exhausted and that the remedy required was to a court or tribunal as defined by community law *"which is competent to give a ruling on both fact and law"*.

**22.** The applicant submitted that Article 39 which is entitled *"appeals procedures"*, expressly provides that Member States shall ensure applicants for asylum (which include applicants in respect of a subsequent application/application to be readmitted to the asylum process) *"have the right to an effective remedy before a*

*court or tribunal"* in respect of certain specified decisions. One of those specified decisions as provided for in Article 39(1)(c) is *"a decision not to further examine the subsequent application pursuant to Article 32 and 34".*

**23.** It was submitted that in terms of an understanding of the nature and type of remedy that is envisaged in Article 39(1) against a first instance asylum refusal decision (including under Article 39(1)(c)) the Directive at Article 8(3) provides with regard to the exercise of an effective remedy against the asylum decision listed and specified in Chapter V (Article 39(1)) that the authorities adjudicating in the context of the effective remedy shall have access to the information referred to in Article 8(2)(b) such as is necessary for that authority (the effective remedy authority) to fulfil their task. The information in question as provided for in Article 8(2)(b) is precise, up to date information obtained from various sources such as the UNHCR with respect to country conditions in the country of origin (such information in the Chapter V phase is to be obtained from the body adjudicating the appeal under Chapter V from the determining authority, the applicant or otherwise). The Directive clearly envisages that the decision making body/court or tribunal adjudicating in an appeal (effective remedy court or tribunal) against a first instance asylum decision (which includes a decision on a subsequent application within the terms and meaning of Article 32 – 34) shall have access to precise up to date country information.

**24.** The applicant further stated that Article 15 in Chapter II which addresses the issue of legal aid, expressly provides that Article 15(3)(a), that Member States may confine the provision of legal aid to procedures before a court or tribunal in accordance with Chapter V (the size of effective remedy) and not for any onward appeals or reviews provided for under national law including any rehearing of an appeal following an onward appeal or review. It was submitted that these provisions

clearly connote and indicate that the effective remedy envisaged in Chapter V is an appeal type remedy capable of considering up to date country information obtained of its own motion, if necessary against a first instance decision rather than an onward review or further appeal or a rehearing following a quashing and remitting.

**25.** Cooke J. in his judgment in *S.U.N. (South Africa) v. ORAC* (Unreported, High Court, 30th March, 2012) at para. 30 noted in the context of an effective remedy against the first instance asylum refusal decision (in that case a decision by ORAC on an original application) the import of the wording of Article 15(3)(a). He concluded that the provision:-

> *"appears to countenance the possibility that the 'final decision' given on appeal under Article 39 against the decision at first instance may be the subject of a further second level appeal or judicial review which may result in the quashing of the final decision and the remitting of the asylum application for 'a rehearing of the appeal', that is, a rehearing of the Article 39 appeal. On the face of it, this would appear to suggest that the Article 39 remedy is one by way of an appeal which involves some form of hearing or at least the reopening of all aspects of the first instance decision capable of appeal."*

**26.** In relation to the contention of the respondent that the review procedures provided for in s. 17 coupled with the remedy of judicial review, constitutes the *"effective remedy"* as provided for under Article 39, the applicant states that it was only in the context of this application that the respondent first indicated that the remedy of judicial review was the effective remedy under the statutory instrument.

**27.** The purpose of S.I. 51 of 2011 is to give further effect to Council Directive 2005/85 in national law. Section 17(7G) inserted by that statutory instrument sets out in national law that when the Minister refuses consent to the making of a subsequent

application and is notifying the person concerned of that fact and of the reasons for it, he should also notify the person of how a review of the decision may be sought. The Minister has introduced *"Guidelines for Applicants Seeking Re-Admittance and/or Subsequent Review of an Application for Re-Admittance to the Asylum Process under Section 17 of the Refugee Act 1996 (as amended)"*, (*"the guidelines"*). These guidelines provide at para. 4 thereof that if the first instance application pursuant to s. 17(7) is refused, the applicant has a right to seek a review, that to seek a review, the applicant should communicate with the Assistant Principal Officer of the Ministerial Decisions Unit, INIS, that the review will be conducted *"by an officer of a more senior level than the officer who decided on the original application for re-admittance to the asylum process"* and that if the review is successful, the file will be returned to ORAC for substantive examination and if unsuccessful in the review, the file is returned to the repatriation division for resumption of processing from the stage it had reached prior to the s. 17(7) application having been made.

**28.** The applicant submitted that the provisions of Article 34(3)(a) which expressly required Member States to ensure that an applicant who has a negative outcome of a preliminary examination pursuant to Article 32(3) in respect of the subsequent application for asylum, is informed with regard to seeking an appeal or review of that first instance asylum decision strongly support the view that s. 17(7G) and the internal review procedure outlined in the *"guidelines"* were designed to provide a remedy within the terms and meaning of Article 39(1)(c) to applicants whose application to be permitted to make a subsequent application for asylum is refused. It was submitted that any other approach as to the rational behind the putting in place by statutory instrument and the guidelines of the review procedure would mean that the review procedure and machinery installed had no purpose whatsoever in

the context of the Directive or by way of provision of a remedy against a first instance refusal.

**29.** The applicant submitted that it was only when the deficiencies in the internal review procedure as an effective remedy mechanism were pointed out to the State, that it then wished to adopt the position that the internal review procedure was never intended to provide an effective remedy and that judicial review of the first instance or internal review decision (and/or judicial review combined with the internal review procedure) constituted the effective remedy. With the requisite degree of specificity, precision and clarity required to satisfy the requirements of legal certainty.

**30.** If it was never intended that the review referred to in s. 17(7G) as supplemented in detail in the guidelines issued by the respondents setting out the details and procedure for the internal review, was designed to comply with Article 39(1)(c), then the position is clearly one where there has been a failure by the State in its national law to implement the Directive with unquestionable binding force and with the degree of precision and clarity necessary to ensure legal certainty. It is of note with regard to the above that Cooke J. at para. 32 in *S.U.N. (South Africa)* when considering the issue of whether a non-oral appeal for a South African national pursuant to the provisions of s. 13(6) of the Refugee Act 1996, to the RAT was an effective remedy within the terms and meaning of Article 39 pointed out that the effectiveness of the remedy depended upon *"the actual competence accorded to the specific Tribunal designated for the purpose of Article 39 in each Member State and on the scope, limitations and powers of redress governing the exercise of its appeal jurisdiction"*.

**31.** It is clear that Cooke J. in his judgment interpreted the Directive insofar as it pertained to the Article 39 effective remedy against the decisions specified in Article

39(1) as requiring Member States to expressly designate the specific court or tribunal for the purposes of the Article 39 effective remedy against the decisions at first instance listed in Article 39. The dicta of Cooke J. in both *S.U.N.* and in his judgment in *H.I.D. v. ORAC* (Unreported, Cooke J. High Court, 9th February, 2011 and 22nd March, 2013), clearly support the view that the Article 39 effective remedy envisaged in the Directive is one by way of appeal which involves some form of hearing capable of reopening all aspects of the first instance decision and not a review of a judicial review type nature confined in jurisdiction to an annulling role and unable to reverse the decision at first instance and without capacity to determine and make findings on issues of both fact and law.

**32.** The applicant submitted that it was important to note that on the basis of the respondent's contentions as to what amounts to the effective remedy against the first instance decision in this case, an applicant in respect of an application pursuant to s. 17(7) to be readmitted to the full asylum process is afforded a first instance decision of a wholly administrative nature (from the MDU) followed by an internal review by a higher officer of that department again of a wholly administrative nature and judicial review option in respect of either of those decisions where the judicial review court can only annul but can never reverse either decision and where the judicial review courts jurisdiction is limited to determining issues of law and as far as it has any capacity to examine issues of fact at all, that capacity is limited to an examination of same solely for the purposes of determining whether, as a matter of law, the decision under review was valid and should be annulled or not. If the decision is annulled it can only ever be remitted to a wholly administrative decision making process and clearly not a court or tribunal, which administrative process clearly does not meet any

of the recognised criteria under EU law regarding independence and standing as a court or tribunal.

**33.** In terms of judicial review being capable of amounting to an effective remedy for the purposes of Article 39 when the CJEU considered and determined the preliminary reference points in *H.I.D. & B.A. v. ORAC* (Case – 1754/11), the court addressed the issue of the availability of judicial review in the High Court to annul a decision of the RAT only in the context of such a judicial review being a safeguard and protection against potential temptations by the RAT to give in to external intervention or pressure liable to jeopardise the independence of its members (the applicants had contended that the organisational links between the RAT and the Minister for Justice and the lack of clear provisions regarding removal of an RAT member of office jeopardised the independence of the RAT). When the case returned to the High Court and an application for a certificate to appeal to the Supreme Court pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 was considered, Cooke J. in his judgment of 22nd March, 2013, refusing the certificate to appeal held that insofar as the CJEU had referred to judicial review in its judgment at paras. 102 – 105, the observations of the CJEU in that regard concerned a consideration of the effectiveness of the RAT appeal remedy in light of the nature and extent of the jurisdiction available in the Irish judicial system as a whole. He stated at paras. 14 and 15 of his judgment:-

> *"14. Contrary to the submission made on behalf of the applicants to this Court, the Court of Justice is not therefore treating the availability of an application for judicial review before the High Court as an integral part of the asylum process as if it were a further appeal against the decision of the Tribunal and therefore a part of the "effective remedy"*

*for the purpose of Article 39. Quite clearly, what the Court is addressing in those paragraphs is the argument that the Tribunal could not be considered to be 'independent' so long as the Minister had an entitlement to remove individual members thereby exposing the membership to the threat of external interference or influence."*

*15. In the judgment of the court, the intention and effect of the ruling of the Court of Justice is that it is the nature and extent of the jurisdiction available in the judicial system as a whole, including the availability of remedies by way of administrative law review, that renders the remedy "effective" because members of the Tribunal are protected against external interference (including improper influence on the part of the Minister or the State) by the availability of judicial review of any removal decision. Equally, the availability of judicial review of individual asylum decisions of the RAT rejecting appeals operates as an assurance that such decisions can, if necessary, be protected from external interference.*

**34.** The applicant submitted that it was clear from Cooke J's dicta as set out above clarifying the CJEU judgment that the CJEU when considering the Irish judicial system as a whole, was not considering the availability of judicial review of an asylum decision specified in Article 39 as the provision of an effective remedy, rather they were considering the capacity for onward or further review (as envisaged, for example under Article 15(3)(a) of the Directive) of an RAT decision which did amount to the provision of an effective remedy within the terms and meaning of Article 39 as a deterrent against any perceived lack of independence or subjection to outside influence in respect of the RAT and/or removal of its members. In terms of

the capacity of judicial review to provide an effective remedy within the terms and meaning of Article 39(1)(c) where the judicial review court simply cannot reverse the decision being reviewed and can only remit it back and where the judicial review court has no jurisdiction to make findings of fact or to examine material and documentation (including up to date country of origin information) outside of the material which was before the decision maker, it is submitted that judicial review does not provide an effective remedy as envisaged by Article 39 and does not meet the criteria in terms of effective protection by way of remedy established under the principles of EU law and in keeping with Article 47 of the Charter.

**35.** The applicant submitted that the situation was compounded in the case of a judicial review of a s. 17(7) refusal (whether at first instance or on internal review) as neither the first instance decision maker nor the internal review decision maker is a court or tribunal and therefore the combination of remedies even taken as a whole in respect of s. 17(7) do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal. The first instance and internal review procedure do not meet the criteria with respect to a court or tribunal and of independence and the judicial review remedy does not permit of a jurisdiction capable of reversing the decision challenged or of making findings of both fact and law and is not a remedy of an appeal style nature against a first instance asylum refusal involving or permitting *"reopening of all aspects of the first instance decision"*.

**36.** The position in relation to a Member State's obligation to provide an effective remedy is in a general way and in terms of Article 47 of the Charter in a freestanding sense can be contrasted with the obligation on a Member State to provide an effective remedy within the terms and meaning of Article 39 and in this case Article 39(1)(c). Where the first instance refusal in question against which there must be an effective

remedy is one listed and specified in Article 39, the remedy against that decision to be provided must, in order to be effective, carry features of being a remedy which is to a court or tribunal and a remedy which can reverse the decision and make findings on both facts and law.

**37.** The applicant submitted that the situation of the applicant herein with regard to the provision to her of an effective remedy against a first instance asylum refusal decision pursuant to Article 39(1)(c) can also be contrasted with the situation pertaining in the case of *Diouf v. Ministre de Travail de Umploi et de L'immigration* (Case C-69/10). In that case, the applicant who had sought asylum in Luxembourg was subject to a decision to examine his application under an accelerated procedure pursuant to Article 23 of the Directive 2005/85 with his asylum application being rejected as unfounded in this accelerated procedure. The relevant national law in Luxembourg with respect to asylum applications, provided that the initial application for asylum be made to the Minister and that a decision rejecting an application could be challenged before the Administrative Court in an action for reversal.

**38.** Where, in Luxembourg, a decision was taken to reject the application for asylum under an accelerated procedure, that decision (rejecting the asylum application when adopting an accelerated procedure) could be challenged in an action for reversal before the administrative Tribunal. Under the national law of Luxembourg, the decision to process the application under an accelerated procedure could not be appealed or challenged at all. The administrative Tribunal in Luxembourg sought a preliminary ruling from the CJEU on the element of the procedure in relation to Mr. Diouf which precluded him from independently appealing the specific decision to treat and determine his application for asylum under an accelerated procedure and which denied the capacity to appeal that specific decision.

**39.** A decision to process an application under Article 23 in an accelerated procedure, is not a decision listed in Article 39(1) and the applicant in *Diouf* clearly had capacity to challenge and seek reversal of the actual asylum refusal decision reached in the accelerated process and was not precluded under national law from seeking reversal of that decision even though the decision to accelerate the application was not the subject of an independent remedy. The key point in respect of the Luxembourg process was that the relevant decision expressly provided for under Article 39( the actual first instance asylum refusal decision) could, in accordance with Luxembourg national law, be challenged by an action before the administrative court, a court which had power to reverse the actual asylum decision whether or not it was an asylum decision made in an accelerated process.

**40.** The CJEU in its judgment emphasised that the decision to process an asylum application under an accelerated procedure under the Directive and Article 23 thereof, was a preparatory decision in the asylum process and not the decision granting or refusing asylum. The CJEU found at para. 45 of its judgment that Article 39(1) of the Directive must be interpreted as *"not requiring national law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure"*. It was in these circumstances where the national law in Luxembourg did not allow for challenge or appeal against the decision per se to adopt an accelerated procedure but did allow for an action for reversal to the administrative court against the actual asylum refusal decision taken under the accelerated procedure that the national law was found not to offend Article 39. The court went on to find that even in circumstances where the first instance asylum refusal decision under the accelerated procedure could be subject of an appeal/action to reverse it, but where the decision to adopt an accelerated procedure could not in itself and of its own right be

appealed that Article 47 of the Charter and the right to an effective remedy still required the Member State to ensure that the legality of the final decision adopted under the accelerated procedure had to be subject to an effective remedy as regards both facts and law. The decision to adopt an accelerated procedure should not be exempt from examination or thorough review by a national court within the framework of an action against the decision rejecting the asylum application.

**41.** The court also further elaborated in *Diouf* on the interpretation of Article 39(1). The court stated at para. 42 of its judgment:-

> *"Accordingly, the decisions against which an applicant for asylum must have a remedy under Article 39(1) of Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance."*

**42.** In this regard, the decision in respect of the subsequent application pursuant to Articles 32 and 34 can be classified as a first instance asylum decision precluding any decision on the substance for formal or procedural reasons.

**43.** The applicant submitted that *Diouf* is not authority for the proposition that Article 39 will be satisfied in terms of the provision of an effective remedy by way of judicial review. The key point in relation to *Diouf* is that the Article 39(1) requirement to provide an effective remedy in national law against a first instance asylum refusal decision, should be a remedy before a court or tribunal which has capacity to reverse the decision and reopen all aspects of the first instance decision and this was satisfied under the relevant national law of Luxembourg, as the asylum decision taken at first instance (one taken in an accelerated procedure) refusing the actual asylum application, could be reversed by a court or tribunal (the Administrative

Court) and therefore community law did not preclude a provision in national law which did not provide an express remedy against the decision to adopt an accelerated procedure in determining the asylum application.

**44.** It is important to note in relation to the situation of the applicant herein and the effective remedy which must be provided to her against the first instance s. 17(7) refusal, that it is the applicant's contention that where Article 39(1) makes it obligatory for a Member State to provide an effective remedy against a particular first instance asylum decision under the Directive (as it does in this case pursuant to Article 39(1)(c)) that the remedy to be effective within the terms and meaning of Article 39, must carry certain essential features and characteristics precisely because it is an effective remedy expressly catered for and mandated in the Directive. The applicant does not contend that pursuant to Article 47 of the Charter and in a general sense that judicial review could never provide an effective remedy, rather that the effective remedy to which he has entitlement because it is one contained in Article 39 against a first instance asylum decision, must be a remedy which meets the purpose and objective of the Directive and the effective remedy provisions in Article 39. On the basis of the respondent's contention that judicial review provides an effective remedy against a s. 17(7) refusal (a decision pursuant to Articles 32 and 34 of the Directive) and adopting the dicta of Cooke J. in *S.U.N.* and *H.I.D.*, the judicial review court would have to be cast in the role of making a final decision on an asylum application (a subsequent application for asylum) and the judicial review court clearly has no jurisdiction to act in this role and capacity.

**45.** It was submitted that having regard to all of the above outlined, a purposive approach to the interpretation of the dicta of Cooke J. in *H.I.D.* and *S.U.N.* and of the CJEU in *Diouf*, that the effective remedy against the first instance asylum refusal

decision must be provided by an independent court or tribunal, which has capacity and jurisdiction to consider and make findings not just concerning the law, but also concerning the facts and with capacity to overturn/reverse the decision at first instance.

**46.** The applicant submitted that where the decision on an asylum application is one listed and expressly provided for in Article 39(1) and where the respondent has also put in place a review mechanism (albeit clearly one that does not meet the criteria in terms of an effective remedy) an onward or further review to the High Court with the inherent limitations on the judicial review jurisdiction, does not provide an effective remedy to satisfy Article 39.

**47.** It is now appropriate to have regard to the case put forward on behalf of the respondent.

**The Respondent's Case**

**48.** The respondent noted that the applicant contends that the review of the initial decision to refuse an application pursuant to s. 17(7) which is made by a more senior officer within the Department of Justice, does not constitute an effective remedy within the meaning of Article 39 of the Procedures Directive and, in particular, the provisions of Article 39(1)(c) and/or Article 39(3). This is not disputed by the Minister, who relies on the availability of judicial review which he submits is itself an effective remedy for the purposes of Article 39.

**49.** Article 32.1 of the Procedures Directive provides that where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, these may be examined in the context of the examination of the application for asylum or in the appeal procedure. However,

Article 32.2 provides that Member States may apply specific procedures if the previous application for asylum has been withdrawn, or abandoned, or if a decision has already been taken on the previous application. Clearly, a decision was taken on the applicant's previous application in this case, as she had already been refused both a declaration pursuant to s. 17 and her application for subsidiary protection had also failed. In those circumstances, Article 32.3 permits Member States to subject the subsequent application for asylum to a preliminary examination as to whether, after the final decision taken on the previous application for asylum, new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or have been presented by the applicant.

**50.** It is submitted that it is clear that the Minister is conducting a preliminary examination under s. 17(7) and that the State has implemented Article 32.2.3. It is well established that Member States may regard pre-existing national law as implementing European Union law. Mechanical transposition of a Directive by legislative action at national level is not always necessary if existing laws already provide for the objectives sought to be achieved (see Cooke J. in *H.I.D.*)

**51.** Furthermore, Article 32.6 provides Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the new elements or findings in the previous procedure, in particular by exercising the right to an effective remedy pursuant to Article 39 (in the context of a substantive consideration of an asylum application, this would mean before the Refugee Appeals Tribunal). Clearly the State has opted to implement Article 32.6 and has done so by virtue of s. 17(7D) and (7E).

**52.** The respondent submitted that the provisions in relation to consideration of an application to re-enter the asylum system were somewhat restrictive. Article 34,

which is headed *"Procedural Rules"* provides that, where the preliminary examination procedure pursuant to Article 32 is employed by Member States, applicants shall enjoy the guarantees provided for in Article 10(1). The guarantees in Article 10(1) are quite minimal and refer *inter alia* to the right to an interpreter, the right to be informed of the procedures, the right to be given a decision within a reasonable time and the right to communicate with the UNHCR.

**53.** Furthermore, Article 34.2 provides, *inter alia*, that the preliminary examination may be conducted on the sole basis of written submissions without a personal interview. Section 17(7) and the statutory instrument clearly provide for this. Furthermore, the guidelines issued by the Minister in compliance with his obligation to inform an applicant pursuant to s. 17(7) of his or her procedural rights, make it clear that the procedure is based on written submissions only.

**54.** Turning to the right to an effective remedy, the respondent stated that Article 39 of the Procedures Directive must be read in conjunction with recital 27 to the Directive which provides:-

> *"It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole."*

**55.** The respondent submitted that it therefore seemed clear that the reference to *"a court or tribunal"* in Article 39 means a *"court or tribunal within the meaning of Article 267 TFEU (ex Article 234 TEC)"*.

**56.** The respondent submitted that there was a considerable body of case law on the question of what is a *"court or tribunal"* within the meaning of Article 267 (ex Article 234 TEC) and in fact it would appear that the most recent decision on the issue is that of the Court of Justice in the Irish reference, *H.I.D. v. Refugee Applications Commissioner* (Case C-175/11), in which judgment was delivered on 31st January, 2013, by the Second Chamber of the Court.

**57.** The general principles which define as a matter of Union law *"court or tribunal"* are summarised in that case at para. 83 as follows:-

> *"according to settled case-law of the Court, in order to determine whether a body making a reference is 'a court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent..."*

**58.** The requirement that the procedure be *inter partes* is not an absolute criteria and the concept of *"independence"* has both external and internal aspects. The external aspect requires that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them and the second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interest in relation to the subject matter of the proceedings.

**59.** The respondent accepted that review by a more senior officer of the same department would not be regarded as a decision by a court or tribunal which is independent of the first instance decision maker. The respondent contends that it is the

availability of judicial review which constitutes the provision of an effective remedy for the purposes of Article 39.

**60.** The respondent submitted that in *Diouf* (Case C-69/10), the CJEU upheld a national law which provided that, in the event that the determining authority found that the application for asylum should be dealt with under an accelerated procedure, there was no administrative appeal, and the only remedy was to bring an action for annulment before the Tribunal Administratif (an action which appears to be roughly equivalent to an action for judicial review in this jurisdiction). Furthermore, that action for annulment could only be brought as a single proceeding with any action for annulment against an order to leave the jurisdiction and any action for reversal of the substantive decision to refuse the application for international protection both of which were also to be heard by the Tribunal Administratif.

**61.** The Court of Justice found that this was not in breach of Article 39 citing case C-13/01, *Safalero*, where it had been held that the principle of effective judicial protection of the rights which the European legal order confers on individuals is to be construed as not precluding national legislation under which an individual cannot bring court proceedings to challenge a decision taken by the public authorities where there is available to that individual a legal remedy which ensures respect for the rights conferred on him by Union law and which enables him to obtain a judicial decision finding the provision in question to be incompatible with Union law. The court was satisfied that the absence of a remedy by way of appeal against the decision to apply an accelerated procedure did not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a

thorough review by the national court within the framework of an action against the decision rejecting the application.

**62.** The respondent submitted that the court reiterated at para. 61 of *Diouf* that in order for the right to an effective remedy to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.

**63.** The respondent submitted that it should be noted that in *Diouf* not only was the Tribunal Administratif not in a position to substitute its views, but there was no mention of that Tribunal having the power to substitute findings of fact for those of the initial decision maker. The entire emphasis of that decision and its ratio was that provided the reasons were legally valid, the application of annulment to the Tribunal Administratif was an effective remedy.

**64.** The respondent submitted that in *P.M. (Botswana) v. Minister for Justice* [2012] IEHC 34, Hogan J. found that the law on the effectiveness of judicial review as a remedy for the purpose of Article 39 of the Procedures Directive was so clear that he refused to grant a certificate to permit the applicant in that case to appeal to the Supreme Court. He stated at para 22:-

> *"Nevertheless, in the light of Diouf, the implications of Article 39 have been fully clarified by the Court of Justice. It is now clear that Article 39 merely requires that an effective remedy is available before a court or tribunal in respect of any decision to refuse international protection and that the reasons for that decision can be challenged."*

**65.** It was submitted that in the circumstances, Hogan J. found that the law was clearly beyond any real argument, such that it would not be in the public interest that the point should be referred to the Supreme Court. It is clear that Hogan J. regarded *Diouf* as being to the effect that once the legality of the reasons could be thoroughly reviewed, the effectiveness of European Union law rights was protected and therefore an effective remedy for the purposes of Article 39 was provided.

**66.** It would therefore appear that the mere absence of an appeal to a court or tribunal within the meaning of Article 267 does not breach Article 39. Indeed, in *H.I.D.*, where an appeal (to the Refugee Appeals Tribunal) was available, Cooke J. specifically stated that the availability of access to judicial review was relevant. He stated at para. 47:-

> *"It is important to point out nevertheless, that the availability of access to judicial review is not wholly irrelevant to the concept of an effective remedy when the State's compliance with the Procedures Directive is considered. Both the 'decision' of the ORAC and the adjudication of the RAT on appeal are susceptible to challenge by way of judicial review and it is the combined efficacy of all remedies available within the administrative and judicial systems of a Member State which falls to be assessed when compliance with Article 39 is under scrutiny. As already cited above, recital 27 of the Procedures Directive explains: 'The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.' This corresponds closely to the position of the European Court of Human Rights in relation to the right to an effective remedy under Article 13 of the Convention."*

**67.** The learned judge then recited *C.G. & R.S. v. Bulgaria* [2008] 47 EHRR 51 at para. 55 to the following effect:-

> *"The effect of [Article 13] is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. In certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13."*

**68.** The respondent submitted that it was well established as a matter of European law that European secondary legislation must be read in a teleological manner. It is clear from the Directive as a whole that its main purpose is to ensure that certain minimum standards are adhered to, practically during the first instance examination of an asylum application.

**69.** Given that the Directive itself provides for substantial derogation from the minimum guarantees contained in Chapter II in circumstances where an application for readmission to the asylum process is in question, it would appear strange if a full oral appeal or review was required from what is clearly anticipated by Article 32 to be a written procedure confined to certain minimum considerations and with minimal procedural guarantees.

**70.** In relation to the applicant's reliance on the judgment of Cooke J. in *S.U.N. (South Africa) v. Refugee Applications Commissioner* [2012] IEHC 338, the statement of Cooke J. in that case at para. 30 that: *"On the face of it, this would appear to suggest that the Article 39 remedy is one by way of an appeal which involves some form of hearing or at least the reopening of all aspects of the first instance decision*

*capable of appeal"* is clearly obiter as the learned judge was there considering the effectiveness of a non-oral appeal to the Refugee Appeals Tribunal which has full jurisdiction to consider all issues raised by the Commissioner at first instance and the power to substitute a positive recommendation for a negative recommendation of the Commissioner. The issue in this case, therefore, did not arise.

**71.** It is further notable that the learned judge accepted (even though the concern in *S.U.N.* was the adequacy of the procedures where the first instance decision was one based on credibility) that the nature of an effective remedy pursuant to Article 39 of the Directive did not automatically require the presence of the applicant in the State pending determination of the appeals, see para. 31. The effect of the *S.U.N. (South Africa)* decision, therefore, is to accept that the nature of the Article 39 remedy will vary according to the nature of the decision in respect of which the remedy is required, a factor which, it is submitted, supports the respondent's contention that an excessively liberal reading of the Directive is not warranted and that the nature and purpose of the remedy required by Article 39 will vary according to the procedure in question.

**72.** The respondent submitted that in the context of a preliminary examination procedure, where a personal interview is not required at first instance, the effective remedy required is supplied by the provision of judicial review.

**73.** The respondent submitted that the decisions of the courts in Strasbourg were relevant to the issues in this hearing. She submitted that as stated by the court in *Diouf*, the principle of effective remedy, which is recognised by Article 39 is itself based on the general principle of Union law, now contained in Article 47 of the Charter. Article 47 of the Charter provides as follows:-

> *"'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."*

**74.** The respondent pointed out that the explanations to the Charter state that the first paragraph is based on Article 13 of the European Convention on Human Rights and the second paragraph *"corresponds to Article 6(1) of the ECHR"*.

**75.** The respondent referred to the decision in *Albert & LeCompte v. Belgium* [1982] 5 EHRR 533. In that case, the European Court of Human Rights stated (at para. 29) that the conferral of powers on a non-judicial body (in that case, a professional association regulating the practice of medicine) did not in itself contravene the Convention. Nonetheless where powers were conferred in this manner, the Convention calls for at least one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has *"full jurisdiction and does provide the guarantee"* of Article 6(1).

**76.** The respondent submitted that it was therefore necessary to consider whether the Minister has complied with Article 6(1) in his decision making process, and, if not, whether the High Court jurisdiction on an application for judicial review is

sufficient to cure any defects in the Minister's process. If it has, then the High Court potentially provides the *"effective remedy"* required by Article 47, which would itself inform the nature of the *"effective remedy"* required by Article 39 of the Directive.

**77.** The respondent submitted that there was no doubt that judicial review affords an applicant a *"public hearing"* before *"an independent and impartial Tribunal...established by law"*. The only issue is whether the jurisdiction of the High Court on judicial review is sufficient to afford a fair hearing to an applicant, i.e. whether it has *"full jurisdiction"* to rectify any defects in the Minister's procedure.

**78.** The net issue appears to be whether the exercise by the High Court of its supervisory jurisdiction by way of judicial review constitutes *"full jurisdiction"* within the meaning of the Strasbourg case law.

**79.** In this case, it was submitted that the decision which would be reviewed by the High Court is based on an entirely written procedure and therefore, the court is in a position to see exactly what was before the decision maker. Furthermore, the nature of the decision is one which is peculiarly capable of review by the courts, as it consists of an assessment of the facts of the claim as put forward in the application for re-admission and an application of the legal principles which are clearly set out in the statutory instrument (and in compliance with the Procedures Directive). The respondent submitted that the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, suggests that the nature of judicial review is such that there are limited restrictions on the High Court when reviewing written applications of this kind. This view has been accepted by the High Court in *Efe v. Minister for Justice* [2011] 2 I.R. 798, in finding that a remedy by way of judicial review is sufficient to vindicate personal rights under the Constitution as required by Article 40.3.2.

**80.** The respondent submitted that the decision pursuant to s. 17(7) is made wholly in writing on the basis of written representations made by an applicant and on the basis of written documentation sourced by both the applicant and the Minister. As a result, the High Court knows exactly the information which was before the Minister when he came to make his decision. While the High Court cannot substitute its decision for that of the Minister, it will be well able to assess whether the inferences drawn by the Minister were rational, or whether the country of origin information supports the conclusions drawn.

**81.** The respondents refer to the decision in *Lofinmakin v. Minister for Justice* [2011] IEHC 38, where Cooke J. stated as follows at para. 42:-

> *"It is not a necessary ingredient that the judicial authority charged with the review of... administrative decisions be empowered to substitute a new decision of its own, rather than be limited to annulment of an unlawful decision which is remitted for reconsideration by the administrative decision maker."*

**82.** In the course of his judgment, Cooke J. went on to approve the dictum of Clark J. in *J.B. v. Minister for Justice* [2010] IEHC 296, where it was stated:-

> *"The jurisdiction of the High Court in the review of administrative decisions including deportation orders is at least as ample by way of effective remedy as that of the administrative courts of the continental jurisdictions or, for that matter, the Court of Justice of the European Union under Article 263 of the Treaty on the Functioning of the European Union."*

**83.** The respondents pointed out that Cooke J. was discussing the provisions of Article 13 of the European Convention on Human Rights but the arguments would appear to be equally applicable to the notion of an effective remedy pursuant to

Article 47 of the Charter which will form the interpretation to be given to Article 39 of the Procedures Directive.

**84.** It was submitted that on the facts of this particular case, it should be noted that the sole issue is the likely treatment of the applicant as a failed asylum seeker to be returned to DRC. Credibility does not arise, as there is no dispute that the applicant is in fact a failed asylum seeker. In those circumstances, it was submitted that the High Court is in an excellent position to exercise its jurisdiction by way of judicial review: if the review of the country of origin information is inadequate, the court can find a material error of fact leading to irrationality and remit the matter for a fresh decision.

**Conclusions**

**85.** The key issue in this case is whether the review procedure put in place in this jurisdiction, is in compliance with the *"effective remedy"* provisions in Article 39 of the Procedure Directive. The procedure under the amended s. 17(7) provides that a representative of the Ministerial Decisions Unit will carry out a preliminary examination to see if the applicant for readmission to the asylum process has provided new elements or findings relating to the examination of whether the person qualifies as a refugee. The Minister's consent shall be given if following the preliminary examination new elements or findings arise or are put forward by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee.

**86.** Section 17(7D) provides that the applicant must establish that she was, through no fault of her own incapable of presenting these elements or findings for the purpose of her previous application for a declaration.

**87.** The procedure under the amended s. 17(7) provides that the initial decision is to be taken by an official of the Ministerial Decisions Unit of the respondent. If this

decision is found against the applicant, there can be a review of the application carried out by a more senior official in the Ministerial Decisions Unit.

**88.** Article 39 of the Directive provides that Member State shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision not to further examine the subsequent application pursuant to Article 32 and 34 of the Directive.

**89.** The applicant maintains that the review provided for in the statutory instrument does not constitute an effective remedy before a court or tribunal. The respondent agrees in part with this contention. The respondent accepts that the review decision taken by the more senior official in the MDU does not constitute an effective remedy before a court or tribunal. However, the respondent states that the remedy of judicial review before the High Court constitutes the effective remedy for the purpose of Article 39 of the Directive.

**90.** The applicant has stated that the remedy of judicial review cannot be seen as an *"effective remedy"* due to the limitations on the jurisdiction of the court when considering a judicial review application. The jurisdiction of the court is limited in a number of ways. The court cannot reverse the earlier decision and substitute its own findings of fact on the substantive issues. The court can only annul the earlier decision and remit the matter back to a different decision maker for further consideration. The court cannot look at more up to date country information. It is confined to a consideration of the information that was before the decision maker at the time he made the decision under review.

**91.** There is no doubt that the court in exercising its judicial review jurisdiction is limited in the role that it plays. It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the

merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision maker.

**92.** Under the system put forward by the respondent, the applicant, if dissatisfied with the decision made by the higher official, can only apply to the court if she can point to some fault in the decision making process on the part of the decision maker. She cannot simply appeal to the High Court. She is only permitted to seek annulment of the decision on one of the grounds on which *certiorari* is granted by the court.

**93.** The present case can be distinguished from the decision in *H.I.D. & B.A. v. Refugee Appeals Tribunal* (Case C-175/11) where it was held that the initial asylum procedure under the Refugee Act 1996 (as amended), whereby the decision of ORAC could be appealed to the RAT, which is an independent Tribunal whose members are protected from interference due to the existence of the remedy of judicial review, is an effective remedy. In its judgment, the Court of Justice rejected the argument that this right of appeal did not constitute an effective remedy. The court held at paras. 103 – 105, as follows:-

> *"103. In the present case, under section 5 of the Illegal Immigrants (Trafficking) Act 2000, applicants for asylum may also question the validity of recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the*

*Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.*

*104. In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy.*

*105. Consequently, the answer to the second question is that Article 39 of Directive 2005/85 does not preclude national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal, and to bring an appeal against the decision of that tribunal before a higher court such as the High Court, or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court."*

**94.** Cooke J. subsequently explained the effect the judgment of the CJEU in his decision in *H.I.D. & Anor. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 146, where he held as follows at paras. 14-15:

*"14. In the concluding paras. 102 – 105, the Court of Justice deals with the question as to whether the independence of the Tribunal, which is otherwise clear, could be said to be jeopardised by the absence of statutory definition of*

*removal grounds by pointing out that the effectiveness of the remedy required by Article 39 "depends on the administrative and judicial system of each Member State considered as a whole". That system includes the availability of judicial review before the High Court both in respect of the recommendations of the ORAC and the decisions of the RAT together with the fact that the decisions may also be susceptible of being appealed to the Supreme Court. The Court finds, at para 103: "The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members". It then rules in the following paragraph: "In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy". Contrary to the submission made on behalf of the applicants to this Court, the Court of Justice is not therefore treating the availability of an application for judicial review before the High Court as an integral part of the asylum process as if it were a further appeal against the decision of the Tribunal and therefore a part of the "effective remedy" for the purpose of Article 39. Quite clearly, what the Court is addressing in those paragraphs is the argument that the Tribunal could not be considered to be "independent" so long as the Minister had an entitlement to remove individual members thereby exposing the membership to the threat of external interference or influence.*

*15. In the judgment of the Court, the intention and effect of the ruling of the Court of Justice is that it is the nature and extent of the jurisdiction available*

*in the judicial system as a whole, including the availability of remedies by way of administrative law review, that renders the remedy "effective" because members of the Tribunal are protected against external interference (including improper influence on the part of the Minister or the State) by the availability of judicial review of any removal decision. Equally, the availability of judicial review of individual asylum decisions of the RAT rejecting appeals operates as an assurance that such decisions can, if necessary, be protected from external interference."*

**95.** It seems to me, therefore, that the central point of the judgment of the CJEU in *H.I.D.* is that it was the combination of the power of the High Court by way of judicial review, together with the particular characteristics of the Refugee Appeals Tribunal, that led the court to find that the RAT was an independent court or tribunal for the purposes of Article 39 of the Procedures Directive, and that therefore the right of appeal to the RAT constituted an effective remedy, when looked at in the context of the administrative and judicial system as a whole.

**96.** I am of the view that the present case may be distinguished from the circumstances pertaining in *H.I.D.* In that case, having applied the relevant test, the CJEU found that the RAT was a court or tribunal for the purposes of Article 39 of the Procedures Directive and that its independence was safeguarded by the availability of judicial review. In other words, it was the combination of the right to an appeal to the RAT, and the availability of judicial review to quash the Tribunal's decision, that meant that the Tribunal was an effective remedy. In the present case, however, in the context of a s. 17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken

as a whole in respect of s. 17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal.

**97.** In the circumstances, the court is satisfied that the review procedure under the statutory instrument and the supervisory role of the High Court in exercising its judicial review jurisdiction does not constitute an *"effective remedy"* before a court or tribunal as required by Article 39 of the Directive.

**98.** As the parties had agreed that the review decision of Mr. Dennis Byrne dated 7th February, 2013, could not stand, I will hear the parties on the final form of the order to be made in this case.