OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 September 2012 (1)

Case C-175/11

HID,
BA
v
Refugee Applications Commissioner,
Refugee Appeals Tribunal,
Minister for Justice, Equality and Law Reform,
Ireland,
Attorney General

(Reference for a preliminary ruling from the High Court (Ireland))

(Application of a national of a third country seeking to obtain refugee status – National procedure applying an accelerated or prioritised procedure for examining applications by persons belonging to a certain category defined on the basis of nationality or country of origin)

1. In the present case, the Court is requested by the High Court (Ireland) to interpret two provisions of Directive 2005/85/EC, (2) which establishes a minimum framework for the procedure for granting and withdrawing refugee status. The first of those provisions, Article 23(3) and (4), enables Member States to examine an application for asylum by the prioritised or accelerated procedure. The second, Article 39, requires that Member States ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against, in particular, the decision taken on their application for asylum.

2. The applicants in the main proceedings, who are Nigerian nationals, maintain that those two provisions preclude the system for granting and withdrawing refugee status put in place in Ireland, in so far as the Minister for Justice, Equality and Law Reform may decide that certain categories of applications for asylum, defined on the basis of the nationality of the applicant, must be subject to a prioritised or accelerated procedure. They further contend that the possibility of lodging an appeal before the Refugee Appeals Tribunal (Ireland) does not ensure that they have the right to an effective remedy.

3. It is therefore on those two points that the Court is requested by the referring court to give a ruling.

4. In this Opinion I shall set out the reasons why I consider that Article 23(3) and (4) of Directive 2005/85 must be interpreted as meaning that it does not preclude a Member State

from subjecting certain applications for asylum defined on the basis of the nationality or country of origin of the applicant to an accelerated or prioritised procedure.

5. I shall then explain why, in my view, Article 39 of that directive and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') must be interpreted as meaning that they do not preclude national rules such as those at issue in the main proceedings, under which an appeal against the decision of the determining authority may be brought before the Refugee Appeals Tribunal and before the High Court.

I – Legal framework

A – *International law*

6. The Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, (3) entered into force on 22 April 1954 and was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967.

7. Article 3 of the Geneva Convention states that the Contracting States are to apply the provisions of that Convention to refugees without discrimination as to race, religion or country of origin.

B – *European Union law*

8. The main objective of Directive 2005/85 is to introduce a minimum framework on procedures for granting or withdrawing refugee status (4) in order to reduce the disparities between the procedures for examining applications for asylum in the Member States.

9. That common European asylum system is based on the full and inclusive application of the Geneva Convention. (5)

10. According to recital 8 in the preamble to Directive 2005/85, the directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Moreover, recital 9, states that, with respect to the treatment of persons falling within the scope of the directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

11. Recital 27 in the preamble to that directive states that it reflects a basic principle of EU 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 267 TFEU. 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.

12. In accordance with the first subparagraph of Article 4(1) of Directive 2005/85, Member States are to designate a determining authority which will be responsible for an appropriate examination of applications for asylum. That authority means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance on those applications. (6)

13. The examination carried out by the determining authority must comply with a number of basic principles and fundamental guarantees.

14. Thus, Article 8(2) of the directive reads as follows:

'Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.'

15. Furthermore, Article 9(1) and the first paragraph of Article 9(2) of Directive 2005/85 provides that decisions are to be given in writing, that where an application is rejected the reasons in fact and in law are to be stated in the decision and that information on how to challenge a negative decision is also to be given in writing.

16. Likewise, applicants for asylum must benefit from a minimum of guarantees, such as being informed in a language which they understand, access to an interpreter, the opportunity to communicate with the UNHCR, to be given notice in reasonable time of the decision taken on their application for asylum or to be informed of the result of the decision. (7) They are also to be given the opportunity of a personal interview on their application for asylum with a competent person before the determining authority takes a decision. (8)

17. Under Chapter III of Directive 2005/85, entitled 'Procedures at first instance', Article 23, which deals with the examination procedure, provides in the first subparagraph of paragraph 2 that Member States are to ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

18. Article 23(3) of that directive provides as follows:

'Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.'

19. The same possibility of prioritising or accelerating an examination procedure is given to Member States in a range of situations set out in Article 23(4)(a) to (o) of that directive, which provides:

'Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

(a) the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC; [(9)] or

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83…; or

(c) the application for asylum is considered to be unfounded:

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or

(ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or

(e) the applicant has filed another application for asylum stating other personal data; or

(f) the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or

(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/…; or

(h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or

(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or

(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

(k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83… or in Articles11(2)(a) and (b) and 20(1) of this Directive; or

(l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry; or

(m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or

(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant [EU] and/or national legislation; or

(o) the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.'

20. Furthermore, under Article 39(1)(a) of Directive 2005/85 Member States are to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against, in particular, a decision taken on their application for asylum. In order to do so, they are to provide for time-limits and other necessary rules for the applicant to exercise his right to an effective remedy. (10) Member States may also lay down time-limits for the court or tribunal to examine the decision of the determining authority. (11)

21. The EU legislature also took care to define a number of concepts. Thus, under Article 2(d) of Directive 2005/85 'final decision' is to mean a decision on whether the third country national or Stateless person be granted refugee status by virtue of Directive 2004/83 and which is no longer subject to a remedy within the framework of Chapter V of Directive 2005/85. According to Article 2(e) of the latter directive, 'determining authority' is to mean any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I to that directive.

22. That annex provides that, when implementing the provisions of Directive 2005/85, Ireland may consider that the 'determining authority' provided for in Article 2(e) of the directive is, in so far as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, to mean the Office of the Refugee Applications Commissioner ('the ORAC') and that 'decisions at first instance' provided for in the same provision are to include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

C – *Irish law*

23. The Refugee Act 1996, as amended by section 11(1) of the Immigration Act 1999, section 9 of the Illegal Immigrants (Trafficking) Act 2000 and section 7 of the Immigration Act 2003 ('the Refugee Act 1996'), lays down, inter alia, the procedural rules applicable to applications for asylum.

24. It is apparent from the judgment of the High Court of 9 February 2011, (12) supplied by the referring court, that the procedure for examination of an application for asylum is as follows.

25. Under section 8 of the Refugee Act 1996 the application for asylum is made to the Refugee Applications Commissioner. Section 11 of the Act provides that that member of the ORAC is required to interview the applicant and carry out such investigation and inquiry as is needed. He then compiles a report in which he makes a positive or negative recommendation as to whether refugee status should be granted to the applicant concerned and submits that report to the Minister for Justice, Equality and Law Reform. (13)

26. Under section 17(1) of the Refugee Act 1996, if the recommendation is positive, the Minister for Justice, Equality and Law Reform is obliged to grant the status of refugee to the applicant concerned. Where it is recommended that refugee status should not be granted to the applicant, the applicant may, pursuant to section 16 of the Act, appeal against the Refugee Applications Commissioner's decision to the Refugee Appeals Tribunal (Ireland).

27. The appeal before the Refugee Appeals Tribunal may involve an oral hearing before a member of the Tribunal. Following that hearing the Refugee Appeals Tribunal will confirm or reject the recommendation of the Refugee Applications Commissioner. Where the Refugee Appeals Tribunal allows the appeal and considers that the recommendation must be positive, the Minister for Justice, Equality and Law Reform must grant refugee status under section 17(1) of the Act. Conversely, where the Refugee Appeals Tribunal considers that the recommendation must be negative, the Minister for Justice, Equality and Law Reform retains a discretion and decides whether or not to grant refugee status.

28. Under section 5 of the Illegal Immigrants (Trafficking) Act 2000 an applicant for asylum may question the validity of a recommendation of the Refugee Applications Commissioner or a decision of the Refugee Appeals Tribunal before the High Court, subject to special conditions applied to asylum cases. It was under that provision that the main actions were brought before the referring court.

29. An appeal against the decision of the High Court lies to the Supreme Court, in accordance with that provision, only where the High Court issues a certificate of leave to appeal. To that end, section 46(3) of the Courts and Courts Officers Act 2002, as amended at the time of the facts of the main proceedings, provides that the High Court is to decide whether to certify leave to appeal within two months of the hearing. That period may, however, be extended.

30. It should also be noted that section 12 of the Refugee Act 1996 provides that the Minister for Justice, Equality and Law Reform may, where he considers it necessary or expedient to do so, give a direction in writing to the Refugee Applications Commissioner and/or to the Refugee Appeals Tribunal requiring either or both of them, as the case may be, to accord priority to certain classes of applications. This priority may be determined, as in the present case, by reference to the country of origin or habitual residence of the

applicants, or by reference to any family relationship between applicants or to the ages of applicants, in particular minors.

31. In that regard, on 11 December 2003 the Minister for Justice, Equality and Law Reform, acting on the basis of that provision, directed the Refugee Applications Commissioner and the Refugee Appeals Tribunal to accord priority to asylum applications made on or after 15 December 2003 by nationals of Nigeria.

32. The second schedule to the Refugee Act 1996 provides that the Refugee Appeals Tribunal is to consist of a chairperson and ordinary members whom the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance, considers necessary for the rapid disposal of the cases of the Refugee Appeals Tribunal; each member must have at least five years' experience as a practising barrister or practising solicitor before appointment. The members of the Refugee Appeals Tribunal are appointed by the Minister for Justice, Equality and Law Reform. Each ordinary member is appointed for a term of three years and, subject to the provisions of that schedule, upon such terms and conditions as the Minister for Justice, Equality and Law Reform may determine. The chairperson of the Refugee Appeals Tribunal carries out his duties under a written contract of service which sets out the terms and conditions, which may be determined from time to time by the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance. Each ordinary member receives remuneration and allowances for expenses as may be determined from time to time by the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance.

33. That schedule also specifies that an ordinary member of the Refugee Appeals Tribunal may be removed from office by the Minister for Justice, Equality and Law Reform, for stated reasons.

34. Members of the staff of the Refugee Appeals Tribunal are civil servants within the meaning of the Civil Service Regulation Act 1956.

II – The facts of the main proceedings

35. The facts of the main proceedings, as described in the abovementioned judgment of the High Court of 9 February 2011, supplied by the referring court, are as follows.

36. The *HID* case concerns a minor, aged 10 at the material time in the main proceedings, who arrived in Ireland with her mother in 2008, and is of Nigerian nationality. The mother applied to the ORAC for asylum on behalf of her minor daughter on the ground that the daughter faced threats of circumcision and death from her father's family. The mother claimed that another daughter of the couple had been killed in 2007 after being subject to such treatment.

37. The Refugee Applications Commissioner considered, in a report dated 15 August 2008, that the minor's claim should be rejected, on the grounds that the mother's declarations lacked credibility and that the local police would provide sufficient protection. The minor's mother appealed to the Refugee Appeals Tribunal against that decision. That appeal was postponed pending the judgment of the referring court in the present proceedings.

38. The *BA* case also concerns a Nigerian national, who entered Irish territory in August 2008 and applied to the ORAC for asylum on the ground that he had been ill-treated in his country of origin because of his sexual orientation.

39. In his report of 25 August 2008 the Refugee Applications Commissioner gave a negative opinion on BA's application, being of the view that BA's declarations lacked credibility. BA appealed to the Refugee Appeals Tribunal against that opinion. By decision of 25 November 2008 the Refugee Appeals Tribunal dismissed the appeal, on the ground that the evidence adduced by the applicant lacked credibility.

40. HID and BA each appealed to the High Court, seeking annulment of the Refugee Applications Commissioner's reports of 15 and 25 August respectively, and also annulment of the direction of the Minister for Justice, Equality and Law Reform of 11 December 2003 that priority be given to applications for asylum by nationals of Nigeria.

41. In its judgment of 9 February 2011 the High Court dismissed the actions and refused to grant the applicants' claims.

42. The High Court is now required to determine an application by those applicants for leave to appeal to the Supreme Court. Under section 5 of the Illegal Immigrants (Trafficking) Act 2000, such an appeal can be lodged only if the High Court delivers a judgment in that regard authorising the appeal and certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken (in which case the High Court grants a 'certificate of leave to appeal').

III – The questions referred to the Court

43. Being uncertain of the interpretation of certain provisions of Directive 2005/85, and being of the view that it was necessary to obtain a preliminary ruling from the Court in order to determine whether a certificate of leave to appeal to the Supreme Court should be granted, the High Court decided to stay proceedings and to refer the following questions to the Court:

'(1) Is a Member State precluded by the provisions of … Directive [2005/85], or by general principles of European Union Law from adopting administrative measures which require that a class of asylum applications defined on the basis of the nationality or country of origin of the asylum applicant be examined and determined according to an accelerated or prioritised procedure?

(2) Is Article 39 of … Directive [2005/85] when read in conjunction with its Recital (27) and Article 267 TFEU to be interpreted to the effect that the effective remedy thereby required is provided for in national law when the function of review or appeal in respect of the first instance determination of applications is assigned by law to an appeal to the Tribunal established under Act of Parliament with competence to give binding decisions in favour of the asylum applicant on all matters of law and fact relevant to the application notwithstanding the existence of administrative or organisational arrangements which involve some or all of the following:

- The retention by a Government Minister of residual discretion to override a negative decision on an application;

- The existence of organisational or administrative links between the bodies responsible for first instance determination and the determination of appeals;

- The fact that the decision-making members of the Tribunal are appointed by the Minister and serve on a part-time basis for a period of three years and are remunerated on a case by case basis;

- The retention by the Minister of powers to give directions of the kind specified in sections 12, 16(2B)(b) and 16(11) of the [Refugee Act 1996]?'

IV – My analysis

44. By its first question, the referring court asks the Court, in substance, whether Article 23(3) and (4) of Directive 2005/85 is to be interpreted as meaning that it precludes a Member State from subjecting to an accelerated or prioritised examination certain classes of applications for asylum defined on the basis of the nationality or country of origin of the applicant.

45. Next, by its second question the referring court asks, in substance, whether Article 39 of that directive and the principle of effective judicial protection enshrined in Article 47 of the Charter preclude rules such as those at issue in the main proceedings which provide for an appeal against the decisions of the determining authority to the Refugee Appeals Tribunal, whose status as an independent court or tribunal is disputed by the applicants.

A – *The establishment of an accelerated or prioritised procedure on the basis of the nationality or country of origin of the applicant for asylum*

46. It would appear helpful, at the outset, to recall the spirit of Directive 2005/85.

47. The purpose of Directive 2005/85, according to Article 1, is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status, on the basis of two essential principles corresponding to the desire expressed in the conclusions of the Presidency of the European Council meeting in Tampere on 15 and 16 October 1999: (14) fairness and efficiency. (15)

48. In order to satisfy the principle of fairness, the procedure is based on observance of the rights and fundamental principles recognised, in particular, in the Charter. (16) The provisions set out above and included in Chapter II of Directive 2005/85, entitled 'Basic principles and guarantees', are concerned with that principle.

49. The requirement for efficiency is enshrined in Article 23(2) of that directive, which states that Member States are to ensure that the procedure for examination of an asylum application is concluded as soon as possible, without prejudice to an adequate and complete examination.

50. The possibility for Member States to apply an accelerated or prioritised procedure to asylum applications, in accordance with Article 23(3) and (4), derives from that requirement.

51. As stated at recital 11 in the preamble to Directive 2005/85, it is in the interests of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. That, to my mind, is explained by the fact that it is important that applicants should be made aware of their fate promptly and that if the process were too long they might be discouraged and prefer clandestine methods.

52. In the light of the foregoing, it is appropriate to consider here whether the prioritised or accelerated examination of certain asylum applications classified as such on the basis of the nationality of the applicant is a practice compatible with the balance required by Directive 2005/85.

53. It was thus suggested at the hearing that an asylum application can be processed by an accelerated or prioritised procedure under Article 23(3) of that directive only where it is well founded or on one of the 16 grounds set out in paragraph 4 of that article, when there is every indication that it is unfounded. Member States are therefore not entitled to apply an accelerated or prioritised procedure to the examination of an asylum application on the sole basis of the applicant's nationality.

54. The applicants maintain, moreover, that the choice of the accelerated or prioritised procedure can apply only to an individual application and not to a category of applications. They observe, in particular, that Article 3 of the Geneva Convention states that the Contracting States are to apply the provisions of that Convention to refugees without discrimination as to race, religion or country of origin. The applicants therefore maintain that the introduction of an accelerated or prioritised procedure for a category of persons defined on such a criterion is contrary to the principle of non-discrimination on the ground of nationality.

55. I do not agree with that argument, for the following reasons.

56. When drafting Directive 2005/85, the EU legislature stated on a number of occasions that Member States have a discretion when implementing the procedure for granting and withdrawing refugee status. Thus, in the abovementioned proposal for a directive, the European Commission made clear that all standards for operating a fair and efficient procedure are laid down without prejudice to Member States' discretionary power to prioritise cases on the basis of national policies. (17)

57. The same intention on the part of the EU legislature to leave a discretion to the Member States may be found in the actual wording of that directive dealing with the examination procedure. Thus, recital 11 in the preamble to that directive states that the organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in the directive.

58. The wording of Article 23(3) of Directive 2005/85 also seems to me to demonstrate the same intention. Under that provision, Member States 'may' prioritise an application or accelerate its examination, 'including' where the application is likely to be well founded or where the applicant has special needs. Likewise, paragraph 4 of that article gives Member States the possibility of applying the accelerated or prioritised procedure on the basis of 16 specific grounds that would justify the application of such a procedure by also using the verb 'may'.

59. The EU legislature therefore did indeed intend to leave to Member States the choice of opting for an accelerated or prioritised procedure in processing applications for asylum, (18) while the use of the word 'including' in Article 23(3) of Directive 2005/85 demonstrates, in my view, that such a procedure may be applied both to applications that are well founded and to those that are unfounded.

60. Moreover, at paragraph 29 of its judgment in *Samba Diouf*, (19) the Court emphasised that the procedures put in place by that directive are minimum standards and that the Member States have, in a number of respects, a margin of assessment with regard to the implementation of those provisions in the light of the particular features of national law. That margin of assessment enjoyed by the Member States forms an integral part of the common European asylum system introduced by the EU legislature. (20)

61. It must not be forgotten that that directive marks the first stage in the creation of a common European asylum system (21) and that the extent to which it harmonises the rules is minimal; Member States are not required to apply uniform procedures and thus retain their national systems.

62. In that regard, national requirements may vary significantly from one Member State to another, as the numbers of migrants received may be very different. In order to deal with a massive influx of applicants for asylum, as seems in all likelihood to be the case for Ireland so far as Nigerian nationals are concerned, (22) Member States must be able to organise themselves in the best way in order to process applications for asylum in the most efficient manner possible, in accordance with the objective of promptness pursued by Directive 2005/85, while ensuring that the minimum requirements laid down in that directive are observed.

63. As regards the organisation of procedures and the determination of the relevant time-limits, it is therefore the procedural law of the Member States that must be applied, in accordance with the principle of the procedural autonomy of the Member States. (23)

64. As for the principle of non-discrimination, on which the applicants rely, it will be recalled that that principle requires not only that comparable situations are not treated differently, but also that different situations are not treated in the same way. (24)

65. In asylum matters, and in particular in the system introduced by Directive 2005/85, the nationality of the applicant must be considered to play a decisive role. (25) It is the country of origin of the applicant for asylum that will inform the decision of the determining

authority, since the latter is required to obtain information as to the general situation prevailing in that country (26) in order to determine whether or not the applicant for asylum is in danger and, where appropriate, in need of protection.

66. That, moreover, is the reason why the EU legislature introduced the concept of safe country of origin, according to which, where a third country may be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant. (27) Thus, Member States should be able to rely on the minimum common list of safe countries of origin drawn up by the Council of the European Union (28) and examine the application for asylum on the basis of the rebuttable presumption of the safety of those countries. (29) Member States themselves may, under Article 30 of Directive 2005/85, designate as safe countries of origin third countries other than those on that common list for the purposes of examining applications for asylum.

67. In that respect, and in order to facilitate the examination of applications for asylum, the EU legislature has itself provided that Member States may decide that a procedure be prioritised or accelerated where the application for asylum is considered unfounded because the applicant is from a safe country of origin within the meaning of Articles 29 to 31 of that directive or where the country which is not a Member State is considered to be a safe third country for the applicant. (30) It is therefore here necessarily nationality that will be the factor that justifies the prioritised or accelerated processing of applications. Consequently, the application of that criterion is not in any event contrary, by its nature, to Directive 2005/85.

68. Furthermore, where there is a massive influx of applications for asylum from the same country, it would appear to be consistent with the objective of efficiency pursued by that directive to wish to examine those applications as a matter of priority, as the personnel responsible for examining the applications are then more familiar with the dangers to which the nationals of that country may be exposed, as they are deemed to have precise up-to-date information about the general situation prevailing in that country. The processing of applications is thus made easier and can be carried out more rapidly, which is also in the interest of applicants.

69. As the objective of Directive 2005/85 is to introduce a minimum framework for granting and withdrawing refugee status, while ensuring that Member States respect the minimum requirements which it lays down, in particular in Chapter II, examination of the absence of discrimination must in my view be approached from a different angle.

70. To my mind, the situations of applicants for asylum, who are all in a comparable situation since they all seek international protection, must be compared by reference to their treatment during the procedure for the grant of refugee status. The risk of discrimination may lie not, as has just been said, in the use of nationality as a criterion serving as the basis of a prioritised or accelerated procedure, but in the effects of the latter procedure if, by its structure and the applicable time-limits, it were to deprive those subject to it of the guarantees required by Article 23 of Directive 2005/85, which makes clear that those guarantees apply to any form of procedure.

71. Consequently, the introduction of a prioritised procedure such as that in the main proceedings must not have the effect of making the exercise of the rights which that directive confers on Nigerian nationals impossible or ineffective in practice. In particular, those nationals must be given sufficient time to gather and submit the elements necessary to support their application, (31) thus enabling the determining authority to carry out a fair and complete examination of those applications and to ensure that the applicants are not exposed to danger in their country of origin.

72. In the present case, it does not appear to me that the situation of Nigerian nationals, owing to the fact that their applications for asylum are subject to a prioritised procedure, is treated differently from those of applicants for asylum from other third countries. (32) In any event, it will be for the national court to ascertain whether all the basic principles and fundamental guarantees set out in Chapter II of Directive 2005/85 were in fact respected

within the framework of the prioritised processing of the applications for asylum submitted by HID and BA.

73. In the light of all the foregoing considerations, I am of the view that Article 23(3) and (4) of Directive 2005/85 is to be interpreted as meaning that it does not preclude a Member State from subjecting to an accelerated or prioritised procedure the examination of certain categories of applications for asylum defined on the basis of the nationality or country of origin of the applicant.

B – *The guarantee of an effective remedy within the meaning of Article 39 of Directive 2005/85*

74. By its second question, the referring court seeks to ascertain, in substance, whether the system put in place by the Irish rules relating to the procedure for granting and withdrawing refugee status is consistent with the guarantee of an effective remedy as set out in Article 39 of Directive 2005/85 and Article 47 of the Charter.

75. Article 39(1)(a) of that directive, it will be recalled, states that Member States are to ensure that applicants for asylum are to have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum, while Article 47 of the Charter enshrines the principle of effective judicial protection. (33)

76. Recital 27 in the preamble to Directive 2005/85 states that, in accordance with a fundamental principle of European Union law, the decisions taken on an application for asylum and on the withdrawal of refugee status are to be subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.

77. The applicants maintain, in particular, that the Refugee Appeals Tribunal is not a court or tribunal within the meaning of that provision.

78. According to the settled case law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU 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 procedures are inter parties, whether it applies rules of law and whether it is independent.(34)

79. The criteria relating to establishment by law, permanence and the application of rules of law raise no doubts so far as the Refugee Appeals Tribunal is concerned. (35) On the other hand, the applicants dispute that is has the nature of a mandatory court or tribunal, that the proceedings before it are adversarial and that it is independent. It is those three points that I shall examine in turn.

80. In the first place, it should be noted that sections 15 and 16(1) of the Refugee Act 1996 establish the Refugee Appeals Tribunal as the tribunal with jurisdiction to consider and determine appeals against the recommendations of the Refugee Applications Commissioner, which, it will be recalled, are the decisions at first instance on applications for asylum. (36) Furthermore, where the action before the Refugee Appeals Tribunal is upheld, the Minister for Justice, Equality and Law Reform is required, under section 17(1) of that Act, to grant refugee status. It is only where the Refugee Appeals Tribunal does not allow the action of the applicant for asylum that the Minister for Justice, Equality and Law Reform can none the less decide to grant refugee status. That Minister therefore has no discretion when the decision is taken in favour of the applicant for asylum. The positive decisions of the Refugee Appeals Tribunal therefore have mandatory force and are binding on the authorities of the State.

81. In the second place, it will be recalled that the requirement that the procedure be adversarial is not an absolute criterion. (37) I therefore consider it unimportant that the ORAC is not required to be represented before the Refugee Appeals Tribunal. On the contrary, I note that section 16(5) of the Refugee Act 1996 provides that the Refugee Applications Commissioner is to furnish the Refugee Appeals Tribunal with copies of any

reports, documents or representations in writing submitted to him under section 11 of that Act and also an indication in writing of the nature and source of any other information relating to the application which has come to his notice in the course of his investigation. Under section 16(8) of that Act, the Refugee Appeals Tribunal is to furnish the applicant and his solicitor, and the United Nations High Commissioner for Refugees, at the latter's request, with the same copies. Furthermore, the Refugee Appeals Tribunal may also hold an oral hearing during which it may direct any person whose evidence is required to attend and enable the applicant and the Refugee Applications Commissioner to present their case. (38) Accordingly, each party is given the opportunity to make the Refugee Appeals Tribunal aware of everything that is necessary for the success of the application or for the defence.

82. I would also point out that section 16(16) of that Act states that, before deciding the appeal, the Refugee Appeals Tribunal is to consider, inter alia, the report of the Refugee Applications Commissioner, any observations made by the latter or the United Nations High Commissioner for Refugees, the evidence adduced and any representations made at the hearing and any documents, representations in writing or other information furnished to the Refugee Applications Commissioner.

83. The Refugee Appeals Tribunal therefore has a wide discretion, since it takes cognisance of both questions of fact and questions of law and evaluates the evidence adduced before it.

84. Finally, in the third and last place, the applicants contend that the Refugee Appeals Tribunal is not independent. They claim, in particular, that there are organisational links between it, the ORAC and the Minister for Justice, Equality and Law Reform and that its members are subject to outside pressure. In particular, the appointment and fixing of the conditions of appointment, remuneration and other aspects of its members' terms of office deprive it of its independence.

85. In accordance with the case-law of the Court, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which has adopted the contested decision. (39) The Court has observed that that concept has two aspects. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. 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 interests with regard to the subject-matter of those proceedings. (40)

86. In the present case, section 15(2) of the Refugee Act 1996 states that the Refugee Appeals Tribunal is to be independent in the exercise of its functions. It will be recalled that, where it decides in favour of the applicant for asylum, the Minister for Justice, Equality and Law Reform is bound by that decision and therefore is not empowered to review it. As for the rules on appointment and remuneration, they are not in my view such as to undermine the independence of the Refugee Appeals Tribunal. Its members are appointed from among persons with at least five years' experience as a practising barrister or a practising solicitor, for a specific term, and their appointment by the Minister for Justice, Equality and Law Reform is no different from the practice in most national jurisdictions within the European Union.

87. A more delicate question is that of the removal of members of the Refugee Appeals Tribunal. It will be recalled that, according to consistent case-law, the guarantees of independence and impartiality require rules, particularly as regards the grounds for dismissal of members of the body, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (41) In that regard, in order to consider that the condition regarding the independence of the body making the reference has been met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions. (42)

88. In the present case, it follows from section 7 of the second schedule to the Refugee Act 1996 that the ordinary members of the Refugee Appeals Tribunal may be removed from office by the Minister for Justice, Equality and Law Reform for stated reasons. It is regrettable that the circumstances in which the members of the Refugee Appeals Tribunal may be removed from office are not defined more precisely. The Minister for Justice, Equality and Law Reform therefore appears to have a wide discretion. Nor is it made clear that the decision to remove a member of the Refugee Appeals Tribunal is amenable to judicial review.

89. It seems to me, however, that all doubt as to the imperviousness of the Refugee Appeals Tribunal to external factors can be dispelled, for the following reasons.

90. I believe that the Irish system for granting and withdrawing refugee status is capable of ensuring the right to an effective remedy. As we have seen, under section 5 of the Illegal Immigrants Act 2000 asylum applicants can also challenge the validity of the recommendations of the Refugee Applications Commissioner and the decisions of the Refugee Appeals Tribunal before the High Court, against whose decision an appeal lies to the Supreme Court. That, moreover, is precisely what has happened in the present case, as the applicants appealed to the referring court against a recommendation of the Refugee Applications Commissioner and a decision of the Refugee Appeals Tribunal.

91. I therefore consider it quite impossible that the High Court or the Supreme Court might uphold decisions delivered under pressure from the Irish Government. Conversely, the existence of those remedies is in itself likely to preclude any temptation to bring pressure to bear on the Refugee Appeals Tribunal.

92. In that regard, I would observe that recital 27 in the preamble to Directive 2005/85 states that 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. To my mind, the Member States therefore enjoy a certain discretion in their procedural organisation, provided that the national courts are able to ascertain the merits of the grounds on which the competent national authority considered that the application for international protection was unfounded or abusive, without those grounds having the benefit of an irrebuttable presumption of legality. (43)

93. The same approach has been expressed by the European Court of Human Rights on a number of occasions, most recently in *I.M. v. France*, (44) where it stated that its essential concern is whether there are effective guarantees to protect the applicant against arbitrary removal to the country from which he has fled. (45) The European Court of Human Rights also stated that the remedies offered by domestic law, taken together, may satisfy the requirements of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, on the right to an effective remedy, even if none of those remedies, taken individually, wholly satisfies that requirement. (46) Likewise, the European Court of Human Rights observed that Article 13 of the Convention does not go so far as to require a particular form of remedy and that the organisation of domestic remedies is within the margin of appreciation of the States. (47)

94. When viewed as a whole, the Irish system for granting and withdrawing refugee status therefore seems to me to be wholly consistent with the right to an effective remedy.

95. Consequently, in the light of all the foregoing elements, I am of the view that Article 39 of Directive 2005/85 and Article 47 of the Charter must be interpreted as meaning that they do not preclude national rules such as those at issue in the main proceedings, under which an appeal against the decision of the determining authority lies to the Refugee Appeals Tribunal and to the High Court.

V – Conclusion

96. In the light of the foregoing considerations, I propose that the Court should answer the questions raised by the High Court as follows:

(1) Article 23(3) and (4) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status must be interpreted as meaning that it does not preclude a Member State from subjecting to an accelerated or prioritised procedure the examination of certain categories of applications for asylum defined on the basis of the nationality or country of origin of the applicant.

(2) Article 39 of Directive 2005/85 and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not preclude national rules such as those at issue in the main proceedings, under which an appeal against the decision of the determining authority lies to the Refugee Appeals Tribunal and to the High Court.

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1 – Original language: French.

2– Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

3– United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954); 'the Geneva Convention'.

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4 – See Article 1 of that directive and recitals 4 and 5 in the preamble thereto.

5– See recital 2 in the preamble to that directive.

6– See Article 2(e) of that directive.

7– See Article 10(1) of that directive.

8– See the first subparagraph of Article 12(1) of that directive.

9– Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum in OJ 2005 L 204, p. 24).

10– See Article 39(2) of the directive.

11– See Article 39(4) of the directive.

12 – HID & BA v Refugee Applications Commissioner & Ors [2008] IEHC 1261 and [2009] IEHC 56.

13– Section 13 of the Act.

14 – These conclusions are available at the following internet address: http://www.europarl.europa.eu/summits/tam_en.htm.

15 – See points 2 and 3 of the grounds of the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final). See also Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2010) 465 final, p. 3).

16– See, in particular, recital 8 in the preamble to that directive.

17 – See point 2 of the grounds for that proposal. See also Communication from the Commission to the Council and the European Parliament 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum' (COM(2000) 755 final, p. 8).

18 – See, in that regard, Report of the Commission to the Parliament and the Council, cited at footnote 15 (p. 13).

19– Case C-69/10 [2011] ECR I-0000.

20– See, to that effect, Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-0000, paragraph 65.

21 – See Communication from the Commission to the Council and the Parliament, cited at footnote 17 (p. 8), and also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled

'Policy plan on asylum – An integrated approach to protection across the EU' (COM(2008) 360 final, p. 2).

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22 – See: Joyce, C., *Annual Policy Report on Migration and Asylum 2009: Ireland,* ESRI Survey and Statistical Report Series 32, Dublin, 30 July 2010, p. 13. See also: Quinn, E., Stanley, J., Joyce, C., and O'Connell, P. J., *Handbook on Immigration and Asylum in Ireland 2007,* ESRI Research Series 5, Dublin, 28 August 2007, p. 13.

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23 – It should also be noted that Article 39(2) and (4) of Directive 2005/85 leaves it to Member States to set time-limits for the exercise of the right to an effective remedy against decisions on asylum applications.

24– See, in particular, Case C-172/11 *Erny* [2012] ECR I-0000, paragraph 40.

25– See recital 17 in the preamble to Directive 2005/85.

26– See Article 8(2) of the directive.

27– See also recital 17 in the preamble to Directive 2005/85.

28– See, in that regard, Article 29(1) of that directive.

29– See recital 19 in the preamble to that directive.

30– See Article 23(4)(c) of that directive.

31– See, in particular, Article 10(1)(a) of that directive.

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32 – See HID & BA v Refugee Applications Commissioner & Ors (paragraphs 36 and 37).

33– See *Samba Diouf* (paragraphs 48 and 49).

34– See Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29, and Case C-517/09 *RTL Belgium* [2010] ECR I-0000, paragraph 36.

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35 – See point C.11 of the observations of the applicants; point 7.13 of the observations of Ireland; and point 47 of the observations of the Commission.

36– See Annex I to Directive 2005/85.

37– See Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 31.

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38 – See section 16(10) and (11)(a) and (c) of the Refugee Act 1996.

39– See *RTL Belgium*, paragraph 38 and the case-law cited.

40– *Ibid.*, paragraphs 39 and 40.

41– See Order in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 24 and the case-law cited.

42– Ibid.

43– See *Samba Diouf*, paragraph 61.

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44 – See Eur. Court HR, *I.M. v. France*, 2 February 2012.

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45 – § 127.

46 – § 129.

47 – § 138.