OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 1 March 2011 [1]

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1 — Original language: Spanish.

I — Legal framework

A — *European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR')*

1. The entry into force of the Charter of Fundamental Rights of the European Union with the status of primary law has increased the need to take further steps to adapt the categories and principles of European Union law to the requirements resulting from the integration of fundamental rights as a criterion determinative of the validity of Community law.

2. This case provides a good opportunity to attempt to bring together the various expressions of current law which, in the context of the European Union and the Member States (but also in the context of certain international instruments) contribute towards the definition of a fundamental right – in this case, the right to effective judicial protection. Leaving aside the formal diversity of their provisions, these expressions of current law can only be regarded, in terms of their content, as the hasty conclusion of a process involving various stages of formulation entrusted, at their respective levels, to relatively autonomous legislative bodies. Our analysis will therefore take us into an area that brings into sharp relief the integrative nature of European Union law and, accordingly, the need to consider in a truly organised and systematic fashion how best to consolidate the various provisions that together play a legitimate role in the organisation of a single domain. [2]

3. Article 6(1)

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …'

4. Article 13

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

2 — The interest in this issue has inevitably triggered fertile debate in legal literature, and some studies on this matter can be mentioned here and now. For example, Rolla, G. 'La Carta de Derechos Fundamentales del Unión Europea y el Convenio Europea de Derechos Humanos: Su contribución a la formación de una jurisdicción constitucional de los derechos y libertades', in *Revista Europea de Derechos Fundamentales* No 15 (2010), pages 15-39; Genevois, B., 'La Convention européenne des droits de l'homme et la Charte des droits fondamentaux de l'Union européenne: complémentarité ou concurrence?', in *Revue Française de Droit Administratif*, No 3 (2010), pages 437- 444; García Roca, F.J., and Fernández Sánchez, P.A., (coord.), *Integración europea a través de derechos fundamentales: de un sistema binario a otro integrado*, Centro de Estudios Políticos y Constitucionales, Madrid, 2009.

B — *European Union law*

5. Article 47 of the Charter of Fundamental Rights of the European Union.

'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. …'

6. Recitals 11 and 27 in the preamble to Directive 2005/85/EC. [3]

'(11) It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. 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 this Directive.

…

(27) 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.'

7. Article 23 of Directive 2005/85/EC

'1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

3 — 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).

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. 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.

4. 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:

...

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

...'

8. Article 39 of Directive 2005/85/EC:

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

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

(iii) not to conduct an examination pursuant to Article 36;

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

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

(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) a decision to withdraw refugee status pursuant to Article 38.

...'

C — *National law*

9. Article 19 of the Loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection [4] (Amended (Luxembourg) Law of 5 May 2006 on the right of asylum and complementary forms of protection) provides that:

'(1) The Minister shall rule on the merits of the application for international protection by a reasoned decision which shall be communicated to the applicant in writing. Where the application is rejected, information on the right of action shall be expressly set out in the decision. … A decision by the Minister rejecting the application shall constitute an order to leave the territory in accordance with the provisions of the Amended Law of 28 March 1972 ….

...

(3) A decision rejecting an application for international protection may be challenged by an action for reversal before the Tribunal Administratif (Administrative Court). An order to leave the territory may be challenged by an action for annulment before the Tribunal Administratif. The two actions must form the subject of a single originating application, being inadmissible if they are brought separately. The action must be brought within one month of notification. The time-limit for bringing an action and an action brought within the time-limit shall have suspensory effect....

(4) A decision of the Tribunal Administratif may be challenged by an appeal before the Cour Administrative (Higher Administrative Court) sitting as the court of annulment. The appeal must be lodged within one month of notification.... The time-limit for lodging an appeal and an appeal lodged within the time-limit shall have suspensory effect.....'

4 — *Mémorial* A No 78 of 9 May 2006, as amended by the Law of 17 July 2007 (*Mémorial* A No 121) and the Law of 29 August 2008 (*Mémorial* A No 138).

10. Article 20 of the Law provides that:

'(1) The Minister may rule on the merits of the application for international protection under an accelerated procedure in the following circumstances:

...

(b) the applicant clearly does not qualify for the status conferred by international protection;

...

(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 or nationality that could have had a negative impact on the decision;

...

(2) The Minister shall make his decision no later than two months from the day on which it is apparent that the applicant falls within one of the categories provided for in paragraph 1 above. The Minister shall give his ruling in the form of a reasoned decision which shall be communicated to the applicant in writing. Where the application is rejected, information on the right of action shall be expressly set out in the decision. A decision by the Minister rejecting the application shall constitute an order to leave the territory in accordance with the provisions of the Amended Law of 28 March 1972 ....

...

(4) A decision rejecting an application for international protection taken under an accelerated procedure may be challenged by an action for reversal before the Tribunal Administratif. An order to leave the territory may be challenged by an action for annulment before the Tribunal Administratif. The two actions must form the subject of a single originating application, being inadmissible if they are brought separately. The action must be brought within 15 days of notification. The Tribunal Administratif shall give judgment within two months of the making of the application. ... The time-limit for bringing an action and an action brought within the time-limit shall have suspensory effect. The decisions of the Tribunal Administratif shall not be open to appeal.

(5) A decision by the Minister to rule on the merits of the application for international protection under an accelerated procedure shall not be open to any appeal.'

II — Facts

11. On 19 August 2009, Mr Samba Diouf, a Mauritanian national, made an application to the competent department of the Ministry of Foreign Affairs and Immigration of the Grand Duchy of Luxembourg for international protection under the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection ('the 2006 Law'). He claimed that he had left Mauritania to flee from slavery and wished to settle in Europe in order to live in better conditions and start a family. He feared that his former employer, from whom he had stolen EUR 3 000 in order to get to Europe, would have him hunted down and killed.

12. By decision of 18 November 2009, the Minister for Labour, Employment and Immigration rejected Mr Samba Diouf's application under Article 20(1)(b) and (d) of the 2006 Law since, on the one hand, he had produced a forged passport, thereby misleading the authorities, and, on the other hand, the grounds relied on were economic in nature and did not satisfy the criteria for international protection.

13. The decision of 18 November was adopted under an accelerated procedure and entailed an order to leave national territory.

14. Mr Samba Diouf brought an action against that decision before the Tribunal Administratif du Grand-Duché de Luxembourg, seeking (1) annulment of the decision to rule on his application under the accelerated procedure, (2) reversal or annulment of the decision refusing to grant him international protection and (3) annulment of the order to leave national territory.

15. The Tribunal Administratif considers that Article 20(5) of the 2006 Law raises doubts as to the interpretation of Article 39 of Directive 2005/85/EC so far as the right to an effective remedy is concerned, inasmuch as the former does not allow an action to be brought against the decision to rule on the merits of an application for international protection under the accelerated procedure.

16. The Tribunal Administratif points out that the decision to give a ruling under the accelerated procedure none the less has significant consequences for the person concerned since, on the one hand, it reduces to 15 days the ordinary 1-month time-limit for bringing an action before the administrative courts and, on the other hand, it reduces to one the customary two levels of jurisdiction before those courts.

17. Having concluded that the 2006 Law does not support the view that the decision to rule on an application under the accelerated procedure may be challenged even indirectly as part of any action brought against the decision on the merits, on the ground that, in its opinion, the legislature wished to preclude that possibility, the Tribunal Administratif refers the following questions for a preliminary ruling:

III — Questions referred

18. 'Is Article 39 of Directive 2005/85/EC to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?

If the answer is in the negative, is the general principle of an effective remedy under Community law, prompted by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?'

IV — Procedure before the Court

19. The reference for a preliminary ruling was lodged at the Court Registry on 5 February 2010.

20. Observations were submitted by Mr Samba Diouf, the Commission and the Governments of the Grand Duchy of Luxembourg, the Federal Republic of Germany, the Kingdom of the Netherlands and the Hellenic Republic.

21. At the hearing, held on 19 January 2011, the representatives of Mr Samba Diouf, the Luxembourg Government and the Commission presented oral argument.

V — Arguments of the parties

22. Mr Samba Diouf claimed that Article 39 of Directive 2005/85/EC requires the Member States to provide for an effective judicial remedy both against the decision on the merits of an application for asylum and against the decision to rule on that application under the accelerated procedure, particularly where, as is the case here, that decision is based on grounds that affect the merits of the application. In his view, which is shared by the Tribunal Administratif, the Luxembourg legislation likewise does not allow the decision to rule on an application under the accelerated procedure to form the subject-matter of judicial review as part of the action against the decision on the merits of the application, with the result that the substantive grounds for adopting the former decision remain unchallenged in any event.

23. On the other hand, Mr Samba Diouf claimed that, even if the Tribunal Administratif were able, as part of the proceedings relating to the rejection of the application for asylum, to review the decision to rule on the application under the accelerated procedure, this would give rise to an unacceptable breach of the principle of equality since, instead of the 1-month time-limit applicable to an action against a decision adopted under the ordinary procedure, the time-limit for bringing an action against a decision adopted under the accelerated procedure is 15 days. It should be added that in the latter case an applicant does not have access to two levels of jurisdiction.

24. The Governments of the Grand Duchy of Luxembourg, the Federal Republic of Germany, the Kingdom of the Netherlands and the Hellenic Republic and the Commission all maintained that the question referred should be answered in the negative.

25. Basically, they all contended that Directive 2005/85/EC is to be understood as meaning that the subject-matter of the effective remedy for which it provides can be only the final decision on an application for protection, not the decision to examine it under an expedited procedure, although this does not rule out the possibility that the legal correctness of any preparatory decisions may be reviewed by the court when it adjudicates upon the final decision. Moreover, that interpretation is fully consistent with Articles 6 and 13 of the ECHR.

26. As regards the possible infringement, in particular, of Article 13 of the ECHR, the Luxembourg Government maintains that it is also the case-law of the European Court of Human Rights that the right to an effective remedy must always relate to the defence of a right protected by the Convention. In its view, however, the Convention may not

be regarded, on the basis of Article 13, as protecting the right to have an asylum application examined under a specific procedure.

27. As for the differences between the ordinary and accelerated procedures from the point of view of the time-limits for bringing an action and the existence of one or two levels of jurisdiction, the Governments represented and the Commission submit that the minimum required by the principle of effective judicial protection is already fulfilled by a single judicial decision and that, taking into due account the circumstances of the case, a time-limit of 15 days does not constitute a breach of that principle in the light of the case-law either of the European Court of Human Rights or even of the Court of Justice itself.

VI — Assessment

28. As I have indicated, the Tribunal Administratif du Grand-Duché de Luxembourg asks the Court of Justice in essence, in two successive questions, whether Article 39 of Directive 2005/85/EC or, failing that, the general principle of the right to an effective remedy deriving from Articles 6 and 13 of the ECHR preclude national rules which do not provide for a judicial remedy against an administrative decision to rule on an application for international protection under an accelerated procedure.

A — *Preliminary consideration*

29. In my view, the terms in which the question has been formally referred call for a preliminary consideration. The referring court has framed its reference in the form of two separate questions, the second one applicable only in the event that the first is answered in the negative, that is to say, to the effect that there is no conflict between Directive 2005/85/EC and Luxembourg law. What the second question asks, moreover, is whether the national law, once it has been declared to be compatible with EU secondary law, might none the less have infringed EU primary law in so far as the latter very specifically incorporates the content of Articles 6 and 13 of the ECHR.

30. Clearly, however, once it has been established, *ex hypothesi* and in the manner described, that the secondary law and the national law are compatible, this means that the national law cannot be called into question from this point of view without simultaneously and necessarily calling into question the validity of the secondary law.

31. After all, the secondary law in question in this case is Article 39 of Directive 2005/85/EC, which specifically recognises the right to effective judicial protection, and that right must in turn be transposed into national law. Assuming, then, that the Directive has been properly transposed into national law, such transposition will at the very least include the guarantee of judicial protection required by Article 39 of the Directive. Consequently, if, notwithstanding the foregoing, and if the second question is to have any independent meaning, the referring court is asking for a comparison of the national law with EU primary law, the question, ultimately, is whether the secondary law complies with the requirement to guarantee judicial protection, and this, logically, is where our response must begin. First, however, I should develop a little further the proposition which I have just outlined.

32. It seems clear in this regard that the content and scope of the right to an effective judicial remedy recognised by European Union law does not vary depending on the Community rule or principle enshrining that right in each case. Accordingly, the question cannot be whether the right to the remedy recognised in Article 39 of Directive 2005/85/EC in the field of asylum precludes a specific national provision or, if not, whether what precludes that provision is the right to the remedy in that field which the European Union assumes, in recital 27 in the preamble to that directive, to be the reflection of 'a basic principle of Community law' prompted by the Rome Convention. If that were the case, we would be dealing with two different rights and it would be necessary to admit the possibility that a provision of secondary law such as Article 39 of Directive 2005/85/EC may permit, without prejudice to its validity, what is none the less excluded by a general principle of European Union law.

33. The foregoing proposition having therefore been ruled out, the view must be taken that the Tribunal Administratif is in fact asking two questions, although not on the alternative basis expressed in its order for reference and not for the sole purpose of determining whether Directive 2005/85/EC is compatible with Article 20(5) of the Luxembourg Law. In particular, the Tribunal Administratif is asking, on the one hand – explicitly – whether Article 39 of Directive 2005/85/EC precludes Article 20(5) of the Luxembourg Law and, on the other hand – implicitly – whether, if there is no conflict between the two, it would be the right to an effective judicial remedy as a general principle of European Union law deriving from Articles 6 and 13 of the ECHR which would preclude that national provision, and also, therefore, Article 39 of Directive 2005/85/EC, which would in that event be vitiated by invalidity for infringement of the fundamental right recognised in Article 47 of the Charter of Fundamental Rights of the European Union (CFREU).

34. I therefore consider that the terms of the reference require us in any event to determine, first, whether the expression given to the aforementioned fundamental right in Directive 2005/85/EC is legally correct in

that it is consistent with the content of that right as defined in Article 47 of the CFREU and, therefore, indirectly, with the meaning and scope conferred on it by the ECHR. This means that a reply must be given, first, to the question raised in the alternative by the referring court, which must be reworded as a question concerning the validity of Article 39 of Directive 2005/85/EC in the light of Article 47 of the CFREU. Once any doubt as to the compatibility of Article 39 of Directive 2005/85/EC with Article 47 of the CFREU has, if appropriate, been dispelled, it will then make sense to answer the question raised in these proceedings as the first and main question. [5]

B — *Validity of Directive 2005/85/EC: comparison of Article 39 of the Directive with Article 47 of the CFREU*

35. It is settled case-law that the principle of effective judicial protection constitutes a general principle of European Union law stemming from the constitutional traditions common to the Member States which is enshrined in Article 6 of the ECHR (see, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 29).

36. The fact that the right to effective judicial protection is included as a fundamental right in Article 47 CFREU has meant that, following the entry into force of the Lisbon Treaty, that right has the 'same legal value as the Treaties', according to Article 6(1) TEU, and it must be respected by the Member States when they are implementing European Union law (Article 51(1) of the CFREU).

37. Under Article 47 of the CFREU, everyone whose 'rights and freedoms guaranteed by the law of the Union' are violated has the right to an effective judicial remedy (paragraph 1) such as to enable them to obtain 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'; they also have the possibility of being advised, defended and represented (paragraph 2) and, where appropriate, access to legal aid (paragraph 3).

38. Pursuant to the third paragraph of Article 6(1) TEU and Article 52(7) of the CFREU, for the purposes of interpreting Article 47 of the CFREU, due regard must be had to the

5 — The German Government implicitly adopts the same approach in its observations, in that it starts by examining the question raised in the alternative by the referring court.

Explanations relating to the Charter of Fundamental Rights initially drawn up by the Praesidium of the Convention which drafted the Charter. Those Explanations merely state that the first paragraph of Article 47 of the CFREU is based on Article 13 of the ECHR, while the second paragraph corresponds to Article 6(1) of the ECHR, although the protection afforded is more extensive in both cases.

39. On the basis of the foregoing, I consider that, beyond the interpretative value of those Explanations, the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question stems and, together with them, the conceptual universe within which the defining principles of a State governed by the rule of law operate. This is in no way to disregard the very tradition represented by the *acquis* of over half a century of European Union law, which, as a system of law, has given rise to the development of its own set of defining principles.

40. In fact, Article 13 of the ECHR, as it pursues the objective of ensuring that protection of the rights established by the ECHR is, in each of the Member States which are parties to that convention, guaranteed by an effective remedy before a national authority, can, in accordance with its own words, extend only to the rights of the ECHR itself. However, it is difficult to accept that, because the first paragraph of Article 47 of the CFREU draws its inspiration from that provision, it thus confines its scope exclusively to the rights contained in the CFREU.

41. I am therefore bound to conclude that, contrary to the view of the Luxembourg and Netherlands Governments, the fact that the independent procedural remedy required by Article 13 of the ECHR is required only in respect of the rights guaranteed by the ECHR has no bearing on the answer to be given to the referring court.

42. In short, the content of the right to judicial protection recognised by Article 47 of the CFREU must be defined by reference to the meaning and scope conferred on that right by the ECHR (Article 52(3) of the CFREU), but, once defined, its scope must be that described by the CFREU, [6] that is to say, in the words of the Charter itself, the scope enjoyed by the 'rights and freedoms guaranteed by

6 — Which, pursuant to Article 52(3) of the CFREU, may always grant more extensive protection than the ECHR.

the law of the Union'. Consequently, for the purposes of this case, there is no doubt that that right is applicable to 'decisions taken on an application for asylum' given that the fact that such decisions are made subject 'to an effective remedy before a court or tribunal' is, according to recital 27 in the preamble to Directive 2005/85/EC, simply the reflection of 'a basic principle of Community law', ultimately established as primary law by the Charter of Fundamental Rights of the European Union.

43. If we examine the right to effective judicial protection solely from the point of view of access to the courts, the European Union guarantees everyone the right to request protection from a court against any acts harmful to the rights and freedoms recognised by the European Union, it being of paramount importance that recourse to the courts should be effective, both in the sense that it must be legally capable of securing reparation, where appropriate, for the loss complained of, and in the sense that it must be a practical remedy, that is to say, that its pursuit must not be subject to conditions that make it impossible or extremely difficult to exercise.

44. That mandatory content of the right recognised by Article 47 of the CFREU is drawn from the ECHR as interpreted by the European Court of Human Rights,[7] with which Article 39 of Directive 2005/85/EC is quite naturally consistent, in that it expressly guarantees that 'applicants for asylum have the right to an effective remedy before a court or tribunal' against administrative decisions rejecting an application in any of the cases provided for in paragraph 1 of that article, that is to say on grounds of substance, form or procedure.

45. In accordance with the principle of the procedural autonomy of the Member States, Article 39(2) of Directive 2005/85/EC requires the Member States to 'provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy', while Article 39(3) makes clear that they must also, 'where appropriate, provide for rules in accordance with their international obligations dealing with' guaranteeing the effectiveness of the remedy by securing its outcome through the adoption of protective measures.

46. That being so, it is clear that Article 39 of Directive 2005/85/EC, in so far as it is in conformity with Article 47 of the CFREU, and therefore, indirectly, with the minimum content of the right to an effective remedy as represented by the requirements of the European Convention on Human Rights, has complied with the condition for validity which Article 6(1) TEU imposes on all provisions of secondary law by attributing to the Charter of Fundamental Rights 'the same legal value as the Treaties'.

47. It has done so, moreover, on the two levels on which the European Union is re-

7 — See generally in this regard van Dijk/van Hoof/van Rijn/Zwaak (eds.), *Theory and practice of the European Convention on Human Rights*, 4th ed., Intersciencia, Antwerp, 2006.

quired to do so. On the one hand, in that it exercises its legislative competence in the field concerned by explicitly providing for the right to an effective remedy in the context of procedures for granting or withdrawing refugee status. On the other hand, in that it requires the Member States to discharge their competence to organise those procedures in particular, and, moreover, to do so under conditions which ensure that that right is fulfilled, that is to say, in such a way that the procedural autonomy of the Member States does not create an obstacle to its effectiveness.

48. The doubts concerning the validity of Article 39 of Directive 2005/85/EC having been dispelled, it must now be determined whether that article precludes Article 20(5) of the Luxembourg Law of 5 May 2006, thereby providing an answer to the first of the questions referred by the Tribunal Administratif.

C — *Interpretation of the scope of Article 39 of the Directive as compared with Article 20(5) of the Luxembourg Law of 5 May 2006*

49. Article 20(1) of the 2006 Luxembourg Law virtually reproduces Article 23(4) of Directive 2005/85/EC in that they both list the cases in which an application for asylum may be processed under an accelerated procedure. It is clear from the cases provided for in Article 23(4) of the Directive that the accelerated procedure will conclude with a decision rejecting the application, since the cases in question include manifest failure to qualify as a refugee (point (b)), the fact that the application is unfounded (point (c)) or that it is the applicant's intention merely to delay a decision to remove him/her (point (j)). That interpretation is confirmed, *a contrario*, by Article 23(3) of the Directive, which provides for the possibility of an accelerated procedure 'where the application is likely to be well-founded or where the applicant has special needs'.

50. Although the provision does not rule out the possibility of a favourable decision, [8] the fact is that the accelerated procedure provided for in Article 20 of the Luxembourg Law amounts in reality to an early refusal procedure. As such, the decision terminating that procedure must be amenable to an effective judicial remedy. And indeed just such a remedy is provided for in Article 20(4) of the 2006 Luxembourg Law, which states that '[a] decision rejecting an application for international protection taken under an accelerated procedure may be challenged by an action for reversal before the Tribunal Administratif'.

8 — Article 20(2) of the Luxembourg Law establishes a right of action 'where the application is rejected', so the possibility is not ruled out that, notwithstanding the wording of the grounds for the accelerated procedure, the procedure may conclude with the grant of the international protection sought.

51. The question is whether, in addition, the decision to rule on an application under the accelerated procedure must itself also be amenable to a judicial remedy, which is expressly precluded by Article 20(5) of the Luxembourg Law.

52. Article 39(1)(a) of Directive 2005/85/EC provides that Member States must ensure that applicants for asylum have an effective remedy against 'a decision taken on their application'. The question being asked by the Tribunal Administratif in these proceedings is how that particular expression is to be interpreted and, more specifically, whether it is to be understood as referring only to the final decision on the application or as also including the decision to rule on the application under the accelerated procedure.

53. It is true that the wording of Article 39 of Directive 2005/85/EC could be interpreted as meaning that 'a decision taken on their application' refers to any decision given in relation to an application for asylum. Consequently, interlocutory decisions or decisions in preparation for the final decision on an asylum application could also be amenable to an independent remedy.

54. However, such an interpretation would not be consistent with the interest in the expediency of procedures relating to applications for asylum. In accordance with recital 11 in the preamble to the Directive itself, that interest is shared by both the Member States and the asylum applicants and it is on the basis of that interest that Article 23(2) of Directive 2005/85/EC provides that 'Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination'. [9]

55. In addition to the foregoing teleological reason, Article 39 of the Directive seems to indicate a clear desire to restrict challengeable decisions to those that involve a refusal to grant an application for asylum (A) on substantive grounds or, where appropriate, (B) on formal or procedural grounds that make it impossible to give a ruling based on grounds of substance.

56. Article 39 of Directive 2005/85/EC includes in the expression 'a decision taken on

9 — As the Greek Government pointed out in paragraphs 7 to 10 of its written observations, although the practice of accelerated procedures is widespread, it has nevertheless always been accompanied by a concern on the part of the international authorities and of the States themselves to ensure in all cases that the expediency of the procedures does not adversely affect the guarantees of individual rights. For its part, the Commission rightly pointed out in paragraph 54 of its observations that the accelerated treatment of unsound or unfounded applications is perfectly justified by the most expedient processing of applications meriting a favourable decision. That said, there is no need to endorse the Netherlands Government's detailed list of procedural objections which, in its view, should be raised against the idea of an independent remedy, set out in paragraphs 34 to 36 of its written observations.

[the] application for asylum' a series of decisions – listed in point (a)(i), (ii) and (iii) – which, in so far as they encompass a decision not to allow an application for asylum or a decision taken at the border, amount to a final decision rejecting the application on the merits. That characteristic is also shared by the other decisions which, under Article 39(1)(b) to (e) of Directive 2005/85/EC, are expressly and necessarily made the subject of the right to an effective judicial remedy: a refusal to re-open the examination of an application after its discontinuation; a decision not to further examine the subsequent application; a decision refusing entry in the case of an application made subsequently to another application which has been withdrawn, abandoned or refused; a decision to withdraw refugee status.

57. In the light of the foregoing, it may be concluded that Article 39 of Directive 2005/85/EC is clearly directed towards those decisions which make it definitively impossible for an asylum application to succeed.

58. In so far as the decision to rule on an application under the accelerated procedure may itself already contain the substance of the ruling on the merits, it is clear that that substance must none the less be the subject of an effective judicial remedy. However, this does not necessarily mean that that procedural remedy must of necessity be exercised against the actual decision to use the accelerated procedure and as soon as that decision is taken. The decisive factor is that, in so far as it contains elements of a substantive decision, that decision should be amenable to a remedy before the refusal to grant asylum becomes final and definitive and, therefore, enforceable. [10]

59. That means that Article 39 of Directive 2005/85/EC does not in principle require that the national law should provide for a specific or independent – or, if preferred, 'direct' – remedy against the decision to rule on an asylum application under the accelerated procedure.

60. There is one exception to the foregoing, however: the grounds on which the decision was taken to give a ruling under the accelerated procedure must subsequently be effectively challengeable before the court as part of the action which may in any event be brought against the final decision concluding the procedure dealing with the application.

61. If it were otherwise and, as the Tribunal Administratif considers to be the case, the ground on which the accelerated procedure was applied were excluded from review by virtue of Article 20(5) of the 2006 Law, it would have to be concluded that such a consequence is contrary to European Union law.

10 — Pursuant to Article 47 of the CFREU and Article 39 of Directive 2005/85/EC, that remedy must be effective and, therefore, capable of producing as its effect either the reversal of the measure adopted in the administrative procedure or the grant by the courts of the application rejected by the administrative authorities.

62. It remains to be determined whether European Union law precludes the national rules under consideration in so far as the decision to give a ruling under the accelerated procedure rather than under the ordinary procedure gives rise to differences which result in the applicant for asylum being in a weaker position from the point of view of his right to effective judicial protection, which may be exercised only within a period of 15 days and before only one level of jurisdiction.

63. First, as regards the fact that the time-limit for bringing an action is 1 month in the case of a decision adopted under the ordinary procedure and only 15 days in the case of the accelerated procedure, the important point, as the Commission has submitted, clearly has to be that the time available must be sufficient in practical terms to enable the applicant to prepare and bring an effective judicial action, which cannot be said not to be so in the case of a 15-day time-limit – common in abbreviated procedures and, in the context of an examination to determine the adequacy of procedural time-limits, perfectly reasonable and proportionate in relation to the rights and interests involved. [11]

64. That said, the national court would still have to determine whether, in a particular situation in which that time-limit proved inadequate in the light of the circumstances of the case, that fact alone might constitute a sufficient reason to uphold the challenge brought (indirectly) against the administrative decision to rule on the asylum application under the accelerated procedure, so that upholding the action would entail allowing the application to be dealt with under the ordinary procedure.

65. Secondly, with regard to the difference relating to the fact that it is only in the case of a decision adopted under the ordinary procedure that the person concerned has the possibility of bringing proceedings at two levels of jurisdiction, it is equally clear that, for the purposes of this case, it matters only that there should be at least one set of judicial proceedings, which is what Article 39 of Directive 2005/85/EC guarantees, the ECHR requiring nothing further [12] and Article 14 of the International Covenant on Civil and Political Rights – on which practically all the Member States rely for the purposes of establishing the content of fundamental rights – guaranteeing two levels of jurisdiction only in the context of a criminal case, which this case is not.

66. In short, to my mind, Article 39 of Directive 2005/85/EC, which is perfectly consistent with the fundamental rights guaranteed by Article 47 of the CFREU, does not, in principle, preclude a national provision such as Article 20(5) of the Luxembourg Law of 5 May 2006.

11 — See inter alia the judgments of the European Court of Human Rights in *Kudla v. Poland* of 26 October 2000 and *Ryabykh v. Russia* of 24 July 2003.

12 — See the judgment of the European Court of Human Rights in *Hoffmann v. Germany* of 9 May 2007.

VII — Conclusion

67. In the light of the foregoing considerations, I propose that the Court's answers to the questions referred by the Tribunal Administratif should be as follows:

'(1) Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status is consistent with the content of Article 47 of the Charter of Fundamental Rights of the European Union.

(2) Article 39 of Directive 2005/85/EC does not preclude national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, under which an applicant for asylum does not have an independent judicial remedy against the administrative authority's decision to rule on his application for international protection under the accelerated procedure, provided that the grounds for refusal which have already been assessed in that procedural decision can be effectively challenged before the court as part of the action that may, in any case, be brought against the final decision concluding the procedure dealing with the application for asylum.'