Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 7 November 2013 [1]

Case C-604/12

H. N.
v
Minister for Justice, Equality and Law Reform

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Common European asylum system — Directive 2004/83/EC — Minimum standards for qualification for refugee status or subsidiary protection status — Directive 2005/85/EC — Minimum standards on procedures in Member States for granting and withdrawing refugee status — National procedural rule making the consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status — Whether permissible — Respect for the right to good administration — Expedition and impartiality of the examination procedure)

1. The present reference for a preliminary ruling once again raises the question of the organisation of the procedure for granting international protection in Ireland and follows in the line of the judgments in *M.* [2] and *D. and A.* [3]

2. Specifically, the Supreme Court (Ireland) asks the Court whether a national procedural rule that makes the consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status satisfies the requirements of Directive 2004/83/EC [4] and, in particular, the principle of good administration laid down in Article 41 of the Charter of Fundamental Rights of the European Union. [5]

3. Subsidiary protection is international protection that, under Article 2(e) of Directive 2004/83, concerns third country nationals who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that they would face a real risk of suffering serious harm if returned to their country of origin.

1 — Original language: French.

2 — Case C-277/11 [2012] ECR.

3 — Case C-175/11[2013] ECR.

4 — Council Directive 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 OJ 2005 L 204, p. 24).

5 — 'The Charter'.

4. In the common European asylum system, subsidiary protection supplements the rules governing refugee status laid down by the Convention relating to the Status of Refugees. [6] Most of the Member States have therefore adopted a single procedure in which they consider the asylum application made by the person concerned in the light of the two forms of international protection. Ireland, for its part, has kept a more compartmentalised system, establishing two distinct procedures. Thus, an application for subsidiary protection may be made in Ireland only when the procedure for the grant of refugee status has been exhausted and when the Minister for Justice, Equality and Law Reform has notified the person concerned that he proposes to make a deportation order against him. Under that system – as indeed under any other system – a person may not make a 'stand-alone' application for subsidiary protection alone.

5. It is pursuant to that legislation that the Minister for Justice, Equality and Law Reform refused the application for subsidiary protection made by Mr N.

6. Mr N. is a Pakistani citizen who has resided in Ireland since the year 2003. Mr N. was first issued a student visa, before being granted permission to remain, valid until 31 December 2005, on account of his marriage to an Irish national. On 23 February 2006, the Minister for Justice, Equality and Law Reform notified Mr N. that he proposed to make a deportation order on the ground that his permission to remain had not been renewed because Mr N. had separated from his wife. However, Mr N. remained in Ireland as a student and obtained a degree in business studies in 2007. He also brought proceedings against the Minister for Justice, Equality and Law Reform and the Irish State, claiming that part of the legislation providing for deportation was unconstitutional.

7. Mr N. has never applied for asylum in Ireland. He explains that he does not fear persecution by reason of race, religion, nationality, political opinion, or membership of a particular social group and that he is, therefore, not a refugee within the meaning of Article 2(c) of Directive 2004/83. Nevertheless, he claims that he risks suffering serious harm if returned to Pakistan, in particular because of the indiscriminate violence occurring in the Swat Valley, where his family lives.

8. Consequently, Mr N. applied for subsidiary protection on 16 June 2009. The Minister for Justice, Equality and Law Reform refused that application on the ground that he had not first made an application for refugee status. Following the refusal of the application for judicial review which he had brought against that decision in the High Court (Ireland), Mr N. appealed to the Supreme Court.

9. In so far as that national procedural rule raises concerns relating to the effectiveness, impartiality and length of the procedure, the Supreme Court has decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does ... Directive 2004/83 ..., interpreted in the light of the principle of good administration in the law of the European Union and, in particular, as provided by Article 41 of the Charter ..., permit a Member State to provide in its law that an application for subsidiary protection status can be considered only if the applicant has applied for and been refused refugee status in accordance with national law?'

10. In other words, in the context of the implementation of Directive 2004/83, does respect for the right to good administration require a Member State to introduce a 'stand-alone' procedure for obtaining subsidiary protection status?

6 — That Convention, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954) ('the Geneva Convention')), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967.

11. While the question referred to the Court by the national court addresses the compatibility of the Irish legislation with EU law, it actually concerns a procedural rule that can be found in all the Member States. Whatever the structure of the examination procedure, whether it is a 'one-stop shop' or a procedure like that at issue in the main proceedings, the competent national authority always examines whether the person concerned is eligible for refugee status before examining whether he qualifies for subsidiary protection. In this sense, the Irish procedure is therefore not so different from the procedures established in other Member States. In addition, none of the systems, at present, envisages the introduction of a 'stand-alone' procedure for granting subsidiary protection.

12. In this Opinion I shall set out the reasons why I consider that, in the context of the examination procedure for an asylum application, the principle of good administration must, above all, ensure that the need of international protection is correctly ascertained, which calls for exhaustive assessment of the application in the light of the two forms of international protection. I shall therefore explain why I am convinced that, by requiring the previous examination of the application from the perspective of qualification for refugee status, the procedural rule in question makes it possible to ensure that a person who is legitimately seeking international protection is granted the appropriate status and effective access to the rights conferred on him by Directive 2004/83, on the basis of an examination consistent with the spirit and the letter of the instruments governing the common European asylum system.

I – Irish law

13. In Ireland, the examination procedure for an application for international protection is notable for its many procedural steps.

14. The procedural rules governing applications for refugee status are laid down by the Refugee Act 1996.[7]

15. Under section 8 of the Refugee Act, the asylum application is made to the Refugee Applications Commissioner. Section 11 of the Act provides that this member of the Office of the Refugee Applications Commissioner is required to interview the applicant and to 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.[8]

16. Under section 17(1) of the Refugee Act, if the recommendation of the Refugee Applications Commissioner is positive, the Minister for Justice, Equality and Law Reform is obliged to grant refugee status to the applicant concerned. Where it is recommended that refugee status should not be granted to the applicant, the latter may, pursuant to section 16 of the Act, appeal against that recommendation to the Refugee Appeals Tribunal (Ireland). Where the Refugee Appeals Tribunal allows the appeal and finds that the recommendation must be positive, the Minister for Justice, Equality and Law Reform is required, under section 17(1) of the Act, to grant refugee status. Conversely, where the Refugee Appeals Tribunal confirms the negative recommendation of the Refugee Applications Commissioner, the Minister for Justice, Equality and Law Reform has a discretion which allows him to decide whether or not to grant refugee status.

7 — Act 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').

8 — Article 13 of that Act.

17. Under section 5 of the Illegal Immigrants (Trafficking) Act 2000, an applicant for asylum may challenge the validity of a recommendation of the Refugee Applications Commissioner or a decision of the Refugee Appeals Tribunal before the High Court, subject to the specific conditions applicable to cases concerning asylum applications. In accordance with that provision, an appeal against the decision of the High Court lies to the Supreme Court only when the High Court issues a certificate of leave to appeal.

18. Where the asylum application is definitively refused, the Minister for Justice, Equality and Law Reform may notify the person concerned of his proposal to make a deportation order ('proposal to deport') in accordance with section 3(3) of the Immigration Act 1999.

19. It is at this stage of the procedure that the rules governing the procedure for applications for subsidiary protection are applicable. Those rules are set out in the European Communities (Eligibility for Protection) Regulations 2006, adopted by the Minister for Justice, Equality and Law Reform on 9 October 2006, which seek, inter alia, to transpose Directive 2004/83. [9]

20. Under regulation 4(1) of the Regulations 2006, the notification from the Minister for Justice, Equality and Law Reform must include a statement informing the person concerned that he may make an application for subsidiary protection and for leave to remain in Ireland. To that end, the letter encloses an information leaflet on subsidiary protection and the form in which the application may be made. In addition to personal information, the applicant is invited to attach all additional documentation and to set out fully the grounds relating specifically to the circumstances relied on in support of his application for subsidiary protection, giving details, in particular, of the serious harm that he might suffer on his return to his country of origin.

21. The Minister for Justice, Equality and Law Reform determines the application for subsidiary protection by reasoned decision. Annulment of that decision may be sought in proceedings for judicial review.

22. Under regulation 4(2) of the Regulations 2006, the Minister for Justice, Equality and Law Reform is not obliged to consider an application for subsidiary protection when it is made by a person whose application for asylum has not been refused. In its judgment of 9 July 2010 in Izevbeckhai and Others v Minister for Justice, Equality and Law Reform, [10] the Supreme Court stated that, under that provision, the Minister for Justice, Equality and Law Reform may consider only applications for subsidiary protection made by persons whose application for asylum has been previously refused.

II – My analysis

23. I would point out that, by its question, the referring court in essence asks the Court whether a national procedural rule making the consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status satisfies the requirements of Directive 2004/83 and, in particular, the principle of good administration laid down in Article 41 of the Charter.

24. In my view, this question must clearly be answered in the affirmative.

A – *Preliminary remarks*

25. Before examining the question, I should like to make two remarks.

9 — 'The Regulations 2006'.

10 — [2010] IESC 44.

26. First, the question asked by the national court requires consideration to be given to rules of law other than those expressly mentioned by the Supreme Court in its order for reference.[11] While the Supreme Court focuses its question on the rights conferred on an applicant for asylum by Directive 2004/83 and by Article 41 of the Charter, I take the view that mention must also be made of the rules on procedures for granting international protection laid down in Directive 2005/85/EC.[12]

27. Directive 2004/83, by virtue of its content and purpose, does not seek either to set out the procedural rules applicable to the examination of an application for international protection or to determine the procedural safeguards that the asylum applicant must, in that respect, be afforded.[13] The directive has the sole purpose of laying down the criteria common to all the Member States as regards the substantive conditions to be met by nationals of third countries in order to qualify for international protection[14] and the substance of that protection.[15] It is against that background that Directive 2004/83 determines, in Article 2(c) and (e), the persons eligible for refugee status and subsidiary protection status and, in Chapter VII, the rights attaching to each of those statuses.

28. The procedural rules relating to the examination of an application for international protection are laid down in Directive 2005/85. Under Article 1, the purpose of that directive is to establish common minimum standards for all the Member States on procedures for granting and withdrawing refugee status and Chapters II and III set out the procedural rights and obligations of the applicant and of the Member State as regards the assessment of an application for international protection.

29. Consequently, I shall assess the compatibility of the legislation in question with EU law not only in the light of the wording and purpose of Directive 2004/83, but also having regard to the provisions laid down in Directive 2005/85.

30. Second, the question referred by the national court requires account to be taken of the procedural autonomy enjoyed by Ireland in organising the processing of applications for international protection. It must be stated that, as the law applicable to the present case now stands, the European Union does not regulate the procedural arrangements for the examination of an application for subsidiary protection when that examination forms part of a procedure distinct from the procedure for the grant of refugee status.

31. Like Directive 2004/83, Directive 2005/85 seeks minimum harmonisation of the rules. Accordingly, it allows the Member States discretion in implementing its provisions, in particular, in the organisation of the processing of applications for asylum.[16] In addition, under Article 3, the directive applies only when the Member State examines an application for refugee status or when it has established a single procedure in which it examines an application in the light of the two forms of international protection, namely, refugee status and subsidiary protection.

32. Directive 2005/85 thus allows the Member States full discretion in arranging the examination procedure for an application for subsidiary protection when they have opted to examine that application in a procedure distinct from the procedure for obtaining refugee status, as is the case in Ireland.

11 — It should be noted that it is settled case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may take into consideration rules of European Union law to which the national court did not refer in its questions in so far as they are necessary for the purposes of examining the main proceedings (see, inter alia, Case C-157/10 *Banco Bilbao Vizcaya Argentaria* [2011] ECR I-13023, paragraphs 18 to 20 and cited case-law).

12 — Council Directive of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum OJ 2006 L 236, p. 36).

13 — *M.*, paragraph 73.

14 — See Article 1 of that directive.

15 — See point 19 of my Opinion in *M.*, and *M.*, paragraph 72.

16 — See, in this regard, recital 11 in the preamble to Directive 2005/85 and *D. and A.*, paragraphs 62 to 66.

33. Nevertheless, this *renvoi* to the procedural autonomy of the Member States is traditionally tempered by the obligation to comply with the principles of equivalence and effectiveness [17] and by the need to ensure respect for fundamental rights.

34. The principle of equivalence requires the procedural rules adopted by the Member States in this connection to be no less favourable than those governing similar actions based on national law. In this instance, this question does not arise.

35. As regards the principle of effectiveness, those procedural arrangements must not render impossible in practice or excessively difficult the exercise of rights conferred on the person concerned by EU law. In the present case, it should therefore be examined whether the procedural rule in question ensures that persons seeking international protection have effective access to the rights conferred on them by Directive 2004/83.

36. Furthermore, the Member States are required to ensure observance of fundamental rights and the general principles of Union law when they adopt decisions falling within the ambit of EU law. That is the case with decisions relating to the examination of an application for subsidiary protection. [18] There is therefore no doubt that the Irish authorities must ensure respect for the right to good administration enjoyed by the persons concerned, not only because that right constitutes a general principle of EU law, [19] but also because it is a fundamental right affirmed in Article 41 of the Charter. Although the wording of Article 41(1) of the Charter refers to relations between individuals and the 'institutions, bodies and agencies of the Union', [20] I think that the right to good administration is incumbent in the same way on the Member States when they are implementing EU law. [21]

37. In the light of these aspects, I shall now examine whether the procedural rule in question is compatible with the requirements of Directive 2004/83, satisfying the principles of effectiveness and good administration.

B – *Observance of the principle of effectiveness*

38. I consider that the legislation in question ensures the applicant for asylum effective access to the rights conferred on him by Directive 2004/83 on the basis of an examination consistent with the spirit and the letter of the legislation governing the common European asylum system.

39. First of all, by requiring a prior examination of the application for international protection by the yardstick of the conditions for qualifying for refugee status, that rule ensures to the full compliance with Article 78 TFEU.

17 — See, inter alia, Case C-416/10 *Križan and Others* [2013] ECR, paragraph 85 and cited case-law, and Case C-383/13 PPU *G. and R.* [2013] ECR, paragraph 35 and cited case-law.

18 — See, in this regard, Article 6(3) TEU. See also Joined Cases C-411/10 and C-493/10 *N. S. and Others* [2011] ECR I-13905, paragraph 77 and cited case-law; Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraphs 18 to 21; and *G. and R.*, paragraph 35 and cited case-law. See also point 111 of my Opinion in Case C-108/10 *Scatollon* [2011] ECR I-7491, and points 32 and 114 of my Opinion in *M.*

19 — See the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), with regard to Article 41 of the Charter: 'Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law (see inter alia Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253 ...)'. See also Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraphs 33 and 38.

20 — See Case C-482/10 *Cicala* [2011] ECR I-14139, paragraph 28.

21 — See Explanations relating to the Charter, regarding Article 51(1) thereof, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72, and *M.*, paragraphs 82 to 84.

40. It must be recalled that Directives 2004/83 and 2005/85 were adopted on the basis of point 1 of the first paragraph of Article 63 EC (new Article 78 TFEU), pursuant to which the Council of the European Union was to adopt measures on asylum based on 'a full and inclusive application of the Geneva Convention'.[22] Those two directives thus play a part in establishing a common European asylum system which, under the new Article 78(1) TFEU, must be in accordance with that Convention.

41. The Convention is an international treaty, which, as such, is binding on all the contracting parties, which include the Member States of the European Union. As the Union legislature acknowledges in recital 3 in the preamble to Directive 2004/83, the Convention forms the foundation or even the 'cornerstone' of international law on refugees, for it defines the very notion of refugee and the rights and obligations attaching to refugee status. It was to supplement the rules laid down in the Geneva Convention that the Union legislature introduced other forms of international protection, including subsidiary protection. Article 78(2)(a) and (b) TFEU thus states that the European Parliament and the Council must adopt measures for a common European asylum system comprising not only 'a uniform status of asylum for nationals of third countries, valid throughout the Union' but also 'uniform status of subsidiary protection for nationals of third countries who, *without obtaining European asylum*, are in need of international protection'.[23]

42. The use of 'subsidiary' in, and the wording of, Article 2(e) of Directive 2004/83 thus clearly indicate that subsidiary protection status is intended for third country nationals who do not satisfy the conditions for qualifying for refugee status.[24] Article 2(b) of Directive 2005/85 adds that any application for international protection made on the basis of Directive 2004/83 is presumed to be an application for asylum within the meaning of the Geneva Convention.

43. Consequently, by introducing a subsidiary form of protection in the common European asylum system, the Union legislature does not intend to offer the possibility of choosing between one form of international protection or the other. Its objective is to guarantee the 'primacy' of the Geneva Convention, by making sure that the subsidiary forms of protection established in the Union do not erode the importance of that Convention. That purpose is apparent from the *travaux préparatoires* for Directive 2004/83. In its proposal for a directive,[25] the European Commission expressly stated that 'consideration of whether an applicant qualifies for subsidiary protection shall only normally take place after it has been established that he or she does not qualify as a refugee',[26] the Commission basing its view on the need to ensure a 'full and inclusive application of the Geneva Convention'[27] and the need to avoid jeopardising the regime established by that Convention.

44. As a matter of principle, the protection offered by refugee status must therefore be considered first, since the Union legislature introduced other forms of international protection, described as 'subsidiary', 'supplementary' or even 'temporary', in addition to the rules laid down in that Convention.[28]

22 — See recital 2 in the preamble to Directive 2004/83.

23 — Emphasis added.

24 — See recitals 5 and 24 in the preamble to Directive 2004/83.

25 — Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (COM(2001) 510 final).

26 — Page 15.

27 — Idem. In its Opinion on the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2002 C 221, p. 43), the Economic and Social Committee also noted that 'as pointed out by the Commission, a priority rule exists, according to which it is always the status of refugee which must be examined first during the assessment of a claim, and whereby subsidiary protection cannot be a means of weakening the protection conferred by refugee status' (point 2.3.5).

28 — See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12).

45. It should be noted that such an interpretation is also necessary when the applicant clearly does not qualify as a refugee within the meaning of Article 2(c) of Directive 2004/83, as Mr N. claims in the present case. In such a situation, Article 23(4)(b) of Directive 2005/85 expressly provides that the Member State may accelerate the examination of qualification for refugee status, but the Union legislature does not in any circumstances relieve it of carrying out that prior examination. [29] And rightly so, for that examination alone makes it possible to grant the person concerned 'appropriate status' in accordance with Article 78(1) TFEU. It allows each Member State to carry out an exhaustive assessment of the application in the interests of a correct recognition of the need of international protection of the person concerned. This means that the determining national authority must be able, prior to examining the application for subsidiary protection, to ascertain that the threat to which the person concerned claims to be exposed does not constitute 'persecution' within the meaning of Article 2(c) of Directive 2004/83 and does not require him to be granted refugee status.

46. In this connection, it is not to be forgotten that, under the aegis of Directive 2004/83, refugee status provides broader rights and economic and social benefits than those accorded by subsidiary protection. [30] Accordingly, that prior assessment also makes it possible to guarantee the person concerned the maximum level of rights. As the Court noted in its judgment in *M.*, the nature of the rights attaching to refugee status and the nature of the rights attaching to subsidiary protection status are different. [31] In Chapter VII, entitled 'Content of international protection', Directive 2004/83 draws a distinction according to whether the person concerned is a refugee or is eligible for subsidiary protection. [32] With regard to beneficiaries of subsidiary protection, it permits the Member States to adopt stricter conditions governing the issue of residence permits or travel documents. [33] Thus, whilst the Member States are required to grant refugees a residence permit with a duration of at least three years, they may limit the duration of that permit to one year where it is granted to a beneficiary of subsidiary protection. The directive also permits the Member States to limit access to certain economic and social rights such as access to the labour market or to social welfare. [34] For example, although the Member States are obliged to accord beneficiaries of international protection the same necessary social assistance as is provided to nationals of that Member State, they may nevertheless limit that assistance to core benefits in the case of the beneficiaries of subsidiary protection.

47. Clearly, it is in the interest of any applicant for asylum that his application should be examined with a view to qualification for refugee status. I do not therefore understand the reasons behind the approach taken by Mr N. in this case.

48. In this regard, I think that it is not for the applicant for asylum to determine the status most appropriate to his situation. This falls within the exclusive competence of the determining national authority which, on the basis of the information obtained from the person concerned and from its staff, examines the application in accordance with the rules laid down in Directives 2004/83 and 2005/85.

29 — Article 23(4)(b) provides:

'Member States may ... 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 ...'.

30 — Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) eliminates the differences existing in the level of rights granted to refugees and beneficiaries of subsidiary protection that can no longer be considered as justified. The amendments concern the duration of residence permits, access to social welfare, health care and the labour market.

31 — See paragraph 92 of that judgment.

32 — That chapter details, inter alia, the conditions under which beneficiaries of international protection can obtain a residence permit and travel documents and have access to employment, education, social welfare, health care and accommodation.

33 — See, respectively, Articles 24 and 25 of that directive.

34 — See, respectively, Articles 26 and 28 of Directive 2004/83.

49. It must be borne in mind that the expected decision is of vital importance to the person who is legitimately seeking international protection. Nor must sight be lost of the fact that he finds himself in an exceedingly difficult human and material situation and that the procedure before the national authorities initiated by him must enable him to safeguard his most basic rights. However, it is unlikely that the person concerned is always able to ascertain whether the situation in which he finds himself meets the criteria specified for obtaining refugee status or qualifies for subsidiary protection. It can be extremely difficult to distinguish between the two forms of international protection, especially in situations of indiscriminate violence towards certain groups, which always requires the determining national authorities to conduct a detailed, rigorous examination of the statements made and evidence provided by the applicant Account must also be taken of the psychological deprivation which the applicant for asylum is likely to face and the difficulties which he may encounter, by reason of his language for example, not only in understanding the procedural rules, but also in ascertaining his rights and the obligations. In this connection, there will be many who are not in a position to avail themselves of legal aid. For that reason we cannot run the risk of a person seeking refuge refraining from applying for refugee status even though he is entitled to do so.

50. Lastly, it must not be forgotten that this prior assessment exhausts the procedure for the grant of international protection, thus ensuring that no further application will be made within the Union and therefore limiting the secondary movements of applicants for asylum within the Union, a phenomenon better known as 'asylum shopping'. [35]

51. Having regard to all those considerations, I find it difficult to concur with the opinions expressed by Mr N. and the Commission in their observations. They take the view that, in the light of the applicable legislation, Ireland should introduce a 'stand-alone' procedure for obtaining subsidiary protection status.

52. In the light of the foregoing, such an interpretation of the rules of law would, in my view, fail to have regard to the considerations that inform the common European asylum system and, in particular, the purpose and the wording of Article 78 TFEU and Directives 2004/83 and 2005/85.

53. First of all, it would be likely to prejudice the primacy of the Geneva Convention in so far as the subsidiary forms of protection could in the end weaken the importance of that Convention. Next, it could well undermine the harmonisation of the rules on the right to asylum pursued by the Union legislature, [36] thereby encouraging those secondary movements of applicants for asylum that the Union has undertaken to combat. As the German Government points out in its observations, it would not be possible to rule out the risk that an applicant for asylum would seek subsidiary protection in a Member State other than the Member State responsible for the asylum procedure and that the same situation would then be examined at the same time in two Member States from two different legal perspectives.

54. In addition, and this is certainly the strongest argument, the introduction of a 'stand-alone' procedure would not ensure an exhaustive assessment of the application for international protection which is, however, the guarantor of the rights conferred on the applicant for asylum under Directive 2004/83. In other words, it could well deal a severe blow to the protection of the fundamental rights of the most vulnerable. The system argued for by the Commission leads, in fact, to the creation of an

35 — This phenomenon is caused by the differences between the Member States as regards the conditions for the grant of international protection. It describes the situation of an applicant for asylum who, having entered a Member State which is responsible for examining his application for international protection, nevertheless decides to submit it in another Member State because it has a greater prospect of success or because the reception conditions seem more favourable to him.

36 — See, inter alia, recitals 6 and 7 in the preamble to Directive 2004/83, recitals 3 to 6 in the preamble to Directive 2005/85, recitals 8 to 10 and 12 and 13 in the preamble to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), and recital 13 in the preamble to Directive 2013/32.

impasse in a stage essential to the safeguarding of the rights of persons concerned. Admittedly, the Commission observed at the hearing that the case in which the person concerned made no application would be rare indeed. This is an argument I will not entertain, for fundamental human rights may plainly not be infringed on the ground that only a few persons would suffer.

55. Lastly, I think that, besides the lack of a legal basis, there is no sense in requiring Ireland to introduce a 'stand-alone' procedure for obtaining subsidiary protection status when the Member States must now provide a 'one-stop shop'. My assessment would not be exhaustive if I failed to mention the objectives pursued by the Union legislature in the second phase of the common European asylum system, and in particular in the new Directive 2013/32, even though the latter is not applicable to the facts in the main proceedings. [37]

56. In accordance with recital 11 in its preamble, that directive establishes a single procedure in order to ensure a comprehensive and efficient assessment of the international protection needs of applicants for asylum. Article 10(2) of that directive now provides that '[w]hen examining applications for international protection, the determining authority shall *first* determine whether the applicants qualify as refugees and, *if not*, determine whether the applicants are eligible for subsidiary protection'. [38] The establishment of a single procedure is no longer merely an option, as was the case under Directive 2005/85, but is now an obligation, thereby also allowing the Union legislature to simplify and rationalise examination procedures for applications for asylum and to ease the administrative burden on the Member States.

57. These considerations show, if proof were needed, that the applicant for asylum does not have – and must not have – the option of choosing between one form of international protection and the other. As the Belgian Government correctly remarked at the hearing, the grant of international protection is not to depend on the applicant's subjective assessment and the applicant must not be able to avail himself of it having regard to real or supposed interests. His application must be assessed having regard to the criteria for qualifying for refugee status and it is only failing eligibility for that status that he may then apply for a subsidiary form of protection. This assessment holds, whatever the structure of the procedure chosen by the Member State, whether it is a 'one-stop shop' or a system like that at issue in the main proceedings, the two procedures differing very little in this regard.

58. In the light of the foregoing, I am therefore convinced that the procedural rule in question ensures that the applicant for asylum has effective access to the rights conferred on him by Directive 2004/83, in accordance with the principle of effectiveness.

59. I also take the view that such rules ensure good administration of the application for international protection in so far as they require a prior examination of the application by the yardstick of the conditions for qualifying for refugee status.

C – *Respect for right to good administration*

60. As is stated in recital 10 in the preamble to Directive 2004/83 and recital 8 in the preamble to Directive 2005/85, the Union legislature has undertaken to respect fundamental rights when laying down the substantive and procedural rules linked to the grant of international protection. It has therefore ensured that the competent national authorities guarantee the person concerned his right to good administration, to which it gives flesh in Chapter II of Directive 2005/85 by imposing on them certain procedural obligations.

37 — Directive 2013/32 entered into force on 19 July 2013. Nevertheless, as is stated in recital 58 in the preamble to that directive, Ireland is not bound by the directive in accordance with Articles 1, 2 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU.

38 — See also recital 22 in the preamble to Directive 2013/32. Emphasis added..

61. It is true that, as we have seen, the Member States are not obliged to apply these procedural safeguards to the examination of an application for subsidiary protection when that application is submitted in an administrative procedure distinct from the procedure for the grant of refugee status. This follows from the limits to the ambit of Directive 2005/85. It should nevertheless be noted that they are still required to ensure respect for the right of the person concerned to good administration in so far as, first, the grant of subsidiary protection falls within the ambit of EU law and, second, the right to good administration constitutes not only a general principle of EU law, but also a fundamental right.

62. The scope of that right is extremely broad.

63. In accordance with Article 41(1) of the Charter, the right to good administration requires 'the right to have his or her affairs handled impartially, fairly and within a reasonable time'. Under Article 41(2) of the Charter, this right 'includes' the right of every person to be heard before any individual measure which would affect him or her adversely is taken,[39] the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions. As the Court found in *M.*, that provision is, by its wording, of general application.[40]

64. In the common European asylum system, the right to good administration is laid down in Chapter II of Directive 2005/85. It takes the form of the recognition of procedural obligations on the part of the authorities and the establishment of close cooperation between the authorities and the applicant for asylum. The right to good administration must therefore ensure the correct recognition of the need for international protection of the person concerned. To that end, Article 8(2)(a) of Directive 2005/85 requires the determining national authority to conduct an individual, objective and impartial examination of the application for international protection. In addition, the first subparagraph of Article 23(2) of that directive requires the procedure to be concluded as soon as possible on the basis of an adequate and complete examination of the factual and circumstantial evidence on which the application is based. Lastly, under Articles 10 and 13 of Directive 2005/85, the determining national authority must see to it that the person concerned's right to be heard is observed, through personal interviews in the course of which he must to able to explain his personal circumstances in full confidentiality and, if necessary, with the assistance of an interpreter. Once again, the purpose of all these procedural obligations is to ensure that the person concerned is granted appropriate status within the meaning of Article 78(1) TFEU and effective access to the rights conferred on him by Directive 2004/83.

65. By requiring a prior examination of the application from the perspective of the conditions for qualifying for refugee status, the procedural rule in question, as we have seen, contributes fully to those objectives.

66. Nevertheless, Mr N. and the Commission claim that that procedural rule does not guarantee that the examination is impartial and expeditious.

67. On the one hand, they point out that the effect of that legislation is that an applicant for subsidiary protection is faced with multiple procedural steps which inevitably exacerbate the already inordinate length of procedures in Ireland. The Commission notes in this regard that the legislation 'forces such an applicant to participate in a fiction'[41] when filling in his application for refugee status or even '[requires him] to go through the formality of a procedure which cannot be successful',[42] which inevitably leads to delays in assessing the request for subsidiary protection.

39 — *M.*, paragraph 82.

40 — Ibid., paragraph 84.

41 — Paragraph 43 of the observations submitted by the Commission.

42 — Paragraph 41 of those observations.

68. On the other hand, Mr N. and the Commission take the view that the procedural rule does not satisfy the requirement of impartiality in that the application for subsidiary protection is to be submitted only when the Minister for Justice, Equality and Law Reform has not only refused the application for refugee status, but also is about to issue a deportation order against the person concerned. Consequently, according to the Commission, the procedure is 'already orientated towards a person's removal from the state [and] the mindset of the Minister [for Justice, Equality and Law Reform] is in favour of deportation' [43] contrary to the requirements of fairness and impartiality.

69. Whilst I share the concerns expressed regarding the length of examination procedures for applications for asylum in Ireland, [44] I do none the less think that the criticisms raised in this regard by Mr N. and by the Commission relate more to the organisation of the procedure as a whole than to the legislation in question. It is true that this adds a procedural step in so far as the determining national authority is required to examine the application for international protection on the basis of the conditions laid down in Article 2(c) of Directive 2004/83 for the purposes of refugee status and, if appropriate, on the basis of the conditions set out in Article 2(e) of that directive for the purposes of subsidiary protection. I believe too that the prompt dispatch of the proceedings contributes not only to the applicant's legal certainty, but also to his integration.

70. Nevertheless, as I have stated, this examination is an essential prerequisite with which the Member States cannot dispense, lest the person concerned be deprived of the rights conferred on him by Directive 2004/83 and the rationale of the common European asylum system be compromised.

71. Moreover, this prior examination would not appear to be the source of the excessive delays in the procedure for, according to the information available to me, the delay occurs more at the stage of the examination of the application for subsidiary protection. [45] It must be noted in this regard that the prior examination does not cause excessive delays in procedures initiated in the other Member States. In consequence, I do not think that excluding examination of the application from the angle of the conditions for the status of refugee is warranted by any saving of time. On the contrary, that examination is necessary in order to ensure that rights are guaranteed and in full.

72. I shall now consider the fears expressed by Mr N. and by the Commission as to the impartiality of the procedure.

73. The Court has consistently held that the requirement of impartiality encompasses two aspects, subjective impartiality and objective impartiality. Subjective impartiality requires that no member of the institution concerned show bias or personal prejudice, there being a presumption of personal impartiality unless there is evidence to the contrary. Objective impartiality requires the institution to offer guarantees sufficient to exclude any legitimate doubt. [46]

74. It must be observed at the outset that there is nothing in the file to call into question the personal impartiality of the Minister for Justice, Equality and Law Reform, Mr N. not putting forward any evidence in this regard in support of that view.

75. Furthermore, I do not share the fears expressed with regard to the objective impartiality of the procedure.

43 — Paragraph 42 of those observations.

44 — See, in this regard, points 112 to 115 of my Opinion in *M.*.

45 — In *M.*, I noted that the examination of an application for the grant of refugee status to the person concerned took six and half months and that concerning his application for subsidiary protection 21 months.

46 — See order of 15 December 2011 in Case C-411/11 P *Altner* v *Commission*, paragraph 15, and judgment in Case C-439/11 P *Ziegler* v *Commission* [2013] ECR, paragraph 155 and cited case-law.

76. First, it must be again be recalled that, whatever the structure of the procedure, the examination of an application for subsidiary protection always takes place after a decision refusing refugee status.

77. Second, it must be noted that when the Minister for Justice, Equality and Law Reform initiates the examination of an application for subsidiary protection, he has not yet made a deportation order against the person concerned. In accordance with section 3(3) of the Immigration Act 1999, the Minister for Justice, Equality and Law Reform has merely given notice that he proposes to make such an order. That notification must explain to the person concerned that, following the refusal of his application for refugee status, he no longer has permission legitimately to remain in the country, a consequence which can be seen in all the Member States. It must also inform him of his rights at this stage of the procedure. In particular, and in accordance with regulation 4(1) of the Regulations 2006, that notification informs the person concerned that he may make an application for subsidiary protection and for leave to remain in Ireland. The notification therefore encloses an information leaflet on subsidiary protection and the form in which the application may be made. In addition to personal information, the applicant is invited to attach any additional documentation and to set out fully the grounds relating specifically to the circumstances relied on in support of his application for subsidiary protection, giving details, in particular, of the serious harm that he might suffer on his return to his country of origin. Accordingly, it would seem difficult to attribute to the Minister for Justice, Equality and Law Reform a 'mindset in favour of deportation', the grant of subsidiary protection allowing the person concerned to remain lawfully in Ireland.

78. Lastly, I cannot concur with the Commission's observations to the effect that such legislation would 'force such an applicant to participate in a fiction' or even '[require him] to go through the formality of a procedure which cannot be successful', which would impair the effectiveness of the procedure. The purpose of the procedure must not be forgotten. It is not a conventional administrative procedure for a tax rebate or a building permit, for example. The administrative procedure relates to the grant of a fundamental right, the right to asylum, and the prior examination must make it possible to take a decision of vital importance to the person who is legitimately seeking international protection. It is not therefore a question of 'forcing' him to take an additional administrative step, but rather of ensuring him an exhaustive assessment of his application and guaranteeing him the rights most appropriate to his situation in the host Member State. Nor is it a question of participating in a fiction for, however that may be, it is sometimes extremely difficult to determine with any certainty, at a preliminary stage in the proceedings, whether a person, if returned to his country of origin, runs the risk of being 'persecuted', within the meaning of Article 2(c) of Directive 2004/83, or of suffering 'serious harm' within the meaning of Article 2(e) of that directive, the proceedings before the Court demonstrating this to the requisite legal standard.

79. In the light of those considerations, I take the view that, in so far as the procedural rule in question requires a prior examination of the application for international protection by the yardstick of the conditions for qualifying for refugee status, it observes the principle of good administration as laid down in Article 41 of the Charter.

80. The fact remains that Ireland is still required to organise its procedure in such a way that applications for asylum are examined as efficiently as possible, in accordance with the objective of dispatch pursued by Directive 2005/85. In this regard, under Article 23(4) of Directive 2005/85, the Member States may accelerate the examination procedure for qualification for refugee status where the applicant clearly does not qualify as a refugee or where the [applicant] has made improbable or insufficient representations which make his/her claim clearly unconvincing.

81. In the light of all these considerations, I therefore propose that the Court rule that Directive 2004/83, read in the light, on the one hand, of the rules and procedural safeguards laid down in Directive 2005/85 and, on the other, of the principle of good administration, must be interpreted as not precluding a national procedural rule that makes the consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status.

III – Conclusion

82. In the light of the above considerations, I propose that the Court answer the question asked by the Supreme Court as follows:

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, read in the light of, on the one hand, the rules and procedural safeguards laid down in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and, on the other, the principle of good administration, must be interpreted as not precluding a national procedural rule that makes the consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status.