Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 26 April 2012 [1]

Case C-277/11

M.
v
Minister for Justice, Equality and Law Reform,
Ireland,
Attorney General

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

(Common European Asylum System — Directive 2004/83/EC — Minimum standards for the qualification and status of third country nationals or stateless persons as refugees — Directive 2005/85/EC — Minimum standards on procedures in Member States for granting and withdrawing refugee status — Procedure for examining an application for subsidiary protection following rejection of an application for asylum — Procedural guarantees afforded to the applicant — Right to be heard — Scope of the duty of cooperation)

1. By the question it has referred to the Court, the High Court (Ireland) in essence requests clarification of the scope of the right to be heard in the framework of the procedure for examining an application for subsidiary protection brought by a Rwandan national under Directive 2004/83/EC. [2] Subsidiary protection concerns every third country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned would, if returned to his country of origin, face a real risk of suffering serious harm. [3]

2. Under Article 78(2) TFEU, the European Union ('EU') has laid down criteria common to all the Member States with regard to the conditions that third country nationals must fulfil in order to qualify for international protection under Directive 2004/83. Chapter II of the directive, which deals with the individual assessment of an application for international protection, contains the following provision in Article 4(1):

'Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.'

1 — Original language: French.

2 — Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

3 — See the definition in Article 2(e) of Directive 2004/83.

3. In this case, the referring court asks the Court whether the duty of cooperation laid down in that provision must be interpreted as requiring the authority responsible for examining the application to communicate to the applicant, before adoption of a negative decision and where an application for asylum has already been refused, the elements on which it intends to base its decision and to seek the applicant's observations in that regard.

4. The request for a preliminary ruling has arisen in proceedings between, on the one hand, Mr M., a Rwandan national of Tutsi ethnicity, and, on the other, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General, concerning the legality of the procedure followed by the Irish authorities when dealing with Mr M.'s application for subsidiary protection.

5. Following the expiry of the student visa granted him by the Irish authorities, Mr M., on 21 May 2008, made an application for asylum to the Office of the Refugee Applications Commissioner.[4] Following rejection of that application, Mr M. then applied for subsidiary protection on 31 December 2008; on 24 September 2010 that application was rejected too. The Minister for Justice, Equality and Law Reform held that, because of the serious credibility doubts that attended Mr M.'s claim, it was not possible to establish that he would be at risk of serious harm once he returned to his country of origin, which would give grounds for granting subsidiary protection.

6. Mr M. brought proceedings for judicial review of the latter decision before the High Court. He submits that the competent national authorities have failed to comply with their duty of cooperation under Article 4(1) of Directive 2004/83 by not affording him any opportunity to comment upon the draft decision rejecting his application, which relied, inter alia, on a document of which Mr M. was not made aware during the procedure.

7. In its order for reference, the High Court states that it does not concur with Mr M.'s analysis concerning the interpretation of Article 4(1) of Directive 2004/83. In that regard it refers to its judgment of 24 March 2011 in *Ahmed* v *Minister for Justice, Equality and Law Reform* and to two of the arguments which it had set out when refuting such an interpretation. The first related to the need to avoid having a multiplicity of procedural steps. The second related to the considerable degree of interaction to have already taken place between the competent national authority and an applicant in the course of the assessment of his asylum application. The High Court pointed out that an application for subsidiary protection is not made in isolation but following a procedure in which an asylum application has been considered and in the course of which the applicant has already been heard on a number of occasions.

8. Nevertheless, in its order for reference, the High Court notes that the Raad van State (Council of State) (Netherlands), in a judgment of 12 July 2007, has apparently adopted a different interpretation of Article 4(1) of Directive 2004/83. In order to avoid any discrepancies in interpretation among the courts of the Member States, the High Court has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of … Directive 2004/83 … require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?'

4 — 'ORAC'.

9. Observations have been lodged by the parties to the dispute in the main proceedings, by the Czech and German Governments, Ireland, the French, Hungarian, Netherlands and Swedish Governments and by the European Commission.

10. At the hearing, Mr M.'s representative requested that the Court reformulate the question raised so as to allow it, in essence, to consider whether the examination procedure in issue ensured observance of the right to an effective judicial remedy, as embodied in Article 47 of the Charter of Fundamental Rights of the European Union.[5] Since that reformulation goes well beyond the bounds fixed by the referring court and since that question has consequently not been the subject of debate between the parties, I propose that the Court should not grant the request.

I – Analysis

11. By its question, the referring court, in essence, asks the Court whether the duty of cooperation, laid down in Article 4(1) of Directive 2004/83, must be interpreted as requiring the Member State to give the person concerned an opportunity to comment on the assessment of the facts and circumstances which it has carried out, before a decision refusing the application is adopted.

12. The issues involved in answering the referring court's question are clear.

13. First, it will be necessary to determine the scope of the right to be heard within the framework of the procedure for examining an application for international protection. In particular, the question will be whether the duty of cooperation laid down in Article 4(1) of Directive 2004/83 requires the authority responsible for considering an application for subsidiary protection to notify the applicant, before adoption of a negative decision and where an asylum application has already been refused, of the matters on which it intends to base that decision and to seek his observations in that regard.

14. Second, it will be necessary to identify the minimum safeguards which the competent national authorities may not deny an applicant for international protection when examining his application. Indeed, although, according to recital 11 in the preamble to Directive 2005/85/EC[6] and the case-law of the Court of Justice, the Member States have a discretion as to how to organise the processing of applications for international protection, they are none the less obliged to ensure observance of the rights and procedural rules, albeit minimum, laid down in that directive.[7]

A – *Preliminary observations*

15. Before examining the question, I should like to make two observations.

16. First, it should be noted at the outset that the wording of Article 4(1) of Directive 2004/83 – whichever language version thereof is considered – cannot be construed as placing an obligation on the Member States of the kind Mr M. seeks to invoke.

17. In order to reply to the question asked by the referring court, it will therefore be necessary, first of all, to recall the scope of the right to be heard in the EU legal order, as determined by the Court in its case-law, before ascertaining what the scope of that right should be in the framework of the procedure for examining an application for international protection.

5 — 'The Charter'.

6 — 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, and corrigendum, OJ 2006 L 236, p. 36).

7 — See the judgment of 28 July 2011 in Case C-69/10 *Samba Diouf* [2011] ECR I-7151, in which the Court recalled that the Member States have, in a number of respects, a margin of assessment with regard to the implementation of the provisions of Directive 2005/85, obviously taking account of the particular features of their national laws (paragraph 29).

18. It will then be necessary to consider the way in which concrete expression is given to that right by the EU legislature in Directives 2004/83 and 2005/85. Indeed, the extent of the duty of cooperation referred to in Article 4(1) of Directive 2004/83 must not only be considered in the light of the scheme and purpose of that provision but must also be assessed in the light of the rules governing the procedure for granting international protection laid down in Directive 2005/85.

19. It must be pointed out that Directive 2004/83, by virtue of its title and preamble as well as its content and purpose, does not seek either to set out the procedural rules that apply to the examination of an application for international protection or to lay down the procedural safeguards that the applicant must, in that respect, be afforded. The sole objective of the directive is to set criteria common to all the Member States with regard to the standards for the qualification of third country nationals for international protection [8] and the content of that protection.

20. It is against that background that Directive 2004/83 sets out, in Article 4, the list of facts and circumstances which the Member States must assess in order to determine the merits of the application and lays down, in Article 4(1), the duty of cooperation, the extent of which is in issue here.

21. It is Directive 2005/85, however, which is more specific about the extent of that cooperation.

22. Adopted some months after Directive 2004/83, Directive 2005/85 is intended to establish procedural rules common to all the Member States as regards the grant and withdrawal of refugee status. In that respect, Chapters II and III of Directive 2005/85 set out the rights and procedural obligations laid down in relation to the applicant and the Member State regarding the assessment of an asylum application and specify what is entailed by the cooperation established in Article 4(1) of Directive 2004/83.

23. Some clarification must be given concerning the scope of Directive 2005/85.

24. Under Article 3(1) of Directive 2005/85, the latter applies to all asylum applications made in the territory of the Member States.

25. Pursuant to Article 3(3) of the directive, it also applies when a Member State introduces a single procedure in which applications are examined in the light of both forms of international protection, namely asylum and subsidiary protection. Indeed, under that provision, '[w]here Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the … Convention [relating to the status of refugees [9]] and as applications for other kinds of international protection given under the circumstances defined by Article 15 of Directive 2004/83 [relating to subsidiary protection], they shall apply this directive throughout their procedure'.

26. It is my understanding that most of the Member States, in fact virtually all of them, have adopted the so-called 'one-stop-shop' system, a system broadly promoted by the EU legislature since 2004 [10] and now established in the amended proposal for Directive 2005/85. [11]

8 — Article 1 of Directive 2004/83.

9 — The Convention relating to the Status of Refugees, 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 extended by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967.

10 — Communication from the Commission to the Council and the European Parliament – A More Efficient Common European Asylum System: The Single Procedure as the Next Step (COM(2004) 503 final).

11 — Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (COM(2011) 319 final, point 3.1.5). That proposal provides for a single procedure and thus clearly establishes that applications should be considered in the light of both forms of international protection set out in Directive 2004/83, the objective being to extend the body of procedural safeguards applicable to the procedure for dealing with an asylum application to that for dealing with an application for subsidiary protection.

27. However, it would seem from the hearing that, where a Member State introduces a separate administrative procedure for dealing with an application for subsidiary protection, it is not required, *stricto sensu*, under Article 3(3) of Directive 2005/85, to apply the procedural safeguards afforded in relation to the examination of an asylum application.

28. Second, 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, 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. Those two directives thus play a part in establishing a common European asylum system based on the full and inclusive application of that convention and are intended to assist the competent national authorities to apply the latter by defining concepts and common conditions.

29. Consequently, and in accordance with the Court's settled case-law,[12] I shall interpret the provisions at issue not only in the light of the general scheme and purpose of Directives 2004/83 and 2005/85, but also having regard to the provisions laid down in the framework of the Geneva Convention[13] and, in particular, the interpretation adopted in that regard by the United Nations High Commissioner for Refugees (UNHCR).[14]

B – *The scope of the right to be heard*

30. The Court has affirmed the importance of the right to be heard and its very broad scope in the EU legal order.

31. Thus, according to settled case-law, that right is a general principle of EU law pertaining, on the one hand, to the right to good administration, laid down in Article 41 of the Charter and, on the other, to observance of the rights of defence and the right to a fair trial enshrined in Articles 47 and 48 of the Charter.[15]

32. The right to be heard must be applicable in any procedure which may culminate in a decision of an administrative or judicial nature adversely affecting a person's interests. Observance of that right is required not only of the EU institutions, by virtue of Article 41(2)(a) of the Charter,[16] but also – because it constitutes a general principle of EU law – of the authorities of each of the Member States when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement.[17] Consequently, the right to be heard must apply in relation to the procedure for examining an application for international protection followed by the competent national authority in accordance with rules adopted in the framework of the common European asylum system.

12 — Joined Cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979.

13 — Paragraph 78 and the case-law cited.

14 — Under Article 35(1) of the Geneva Convention, the UNHCR has the duty of supervising the application of the international conventions ensuring the protection of refugees. It is useful to refer to the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, published by the UNHCR, January 1992, and available at the internet address http://unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314.

15 — See the judgments of the Court of Justice in Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraphs 36 to 38 and the case-law cited, and Case C-27/09 P *France* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraph 66; see also the judgment of the General Court of 21 March 2012 in Joined Cases T-439/10 and T-440/10 *Fulmen and Mahmoudian* v *Council*, paragraphs 71 and 72 and the case-law cited.

16 — The Court, in its judgment of 21 December 2011 in Case C-482/10 *Cicala* [2011] ECR I-14139, expressly stated that, according to its wording, Article 41(2)(c) of the Charter is addressed not to the Member States but solely to the EU institutions and bodies (paragraph 28).

17 — *Sopropé* (paragraph 38).

33. According to settled case-law, the right to be heard ensures that every person is entitled to make representations, in writing or orally, on the matters on which the authorities intend to base a decision liable to affect him adversely.[18] It requires the authorities to enable the person concerned to consider those matters in the course of the procedure and actually put his case effectively. It also implies that the authorities must take note, with all requisite attention, of the representations made by the person concerned.

34. The right to be heard has a number of objectives.

35. First, it is useful in establishing the facts and thus in the examination of the case. The representations made by the person concerned and the production of all elements liable to have a bearing on the authorities' decision must enable the authorities to examine, with full knowledge of all the implications and exhaustively, all the elements of fact, circumstance and law on which the procedure rests.

36. Second, the right to be heard must ensure that the person concerned is in fact protected. That person is entitled to take part in a procedure which concerns him and, in that setting, he must be certain that he will be able to express his view, in advance, on all the important points on which the authorities intend to base their decision. The right to be heard must give him an opportunity to correct an error or submit such information relating to his personal circumstances as will tell in favour of the decision's being adopted or not or of its having this content or that.[19] That serves as a basis for the trust which the citizen must be able to have in the authorities.

37. The Court has clearly recognised the existence of the right to be heard in administrative procedures commenced by an interested party seeking to benefit from an entitlement such as a customs exemption[20] or Community financial assistance.[21]

38. The Court has also made clear the scope of that right in the context of quasi-criminal proceedings in which the authorities proceed against the person concerned on account of conduct deemed objectionable and impose economic and financial penalties on that person.[22]

39. Thus, when the Commission censures a cartel or an abuse of a dominant position, the Court has accepted that the right to be heard involves, at the end of the investigation and prior to adoption of a decision, disclosure to the party concerned of the objections relied on against it.[23] That statement of objections is a preparatory document which does not prejudge the Commission's final decision. However, it sets out the Commission's preliminary conclusions regarding the existence of an infringement of the competition rules, explaining the assessments of fact and law it has undertaken in the course of investigating the case, and opens the adversarial stage of the proceedings.[24]

18 — Ibid., paragraph 37 and the case-law cited and paragraph 50.

19 — Ibid., paragraph 49. See also *France* v *People's Mojahedin Organization of Iran*, paragraph 65.

20 — See, in particular, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 23 to 25, concerning the grant of customs exemption for the importation of a scientific instrument, and Case T-346/94 *France-aviation* v *Commission* [1995] ECR II-2841, paragraph 34, for the application of that precedent to the procedures for repayment of customs duties.

21 — Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373.

22 — For an application of that right in relation to the competition rules, see Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191; and in the sphere of counter-terrorism, *France* v *People's Mojahedin Organization of Iran*, paragraphs 61 to 66 and the case-law cited.

23 — See, in particular, my Opinion in *Papierfabrik August Koehler and Others* v *Commission*.

24 — See, to that effect, Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds* v *Commission* [1987] ECR 4487, paragraph 70.

40. Similarly, in the case of decisions by which the Council freezes the funds of entities involved in terrorist acts, the Court requires, as a rule, that the adoption of such restrictive measures be preceded by notification to the person or entity concerned of the incriminating evidence and by allowing that person or entity an opportunity of being heard.[25] However, that principle applies only to subsequent decisions to freeze funds. So far as initial decisions are concerned, the Court has decided to set limits on the right to be heard in order to protect a higher public interest. Since those decisions must, by their very nature, be able to take advantage of a surprise effect and apply immediately, the Court has accorded precedence to the effectiveness of administrative action by restricting the disclosure of reasons to the person concerned and by affording that person the right to be heard at the same time as, or immediately after, adoption of the decision.

41. Although the right to be heard may, in certain special circumstances, be limited where it is likely to be detrimental to a higher public interest, it is nevertheless an essential procedural requirement. Consequently and in keeping with the case-law, infringement of that right must be censured as such by the court and must entail annulment of the decision or the part of the decision concerning the facts or objections on which the person concerned has not been able to make representations.[26]

42. The Court has not had an opportunity to rule on the scope of the right to be heard within the framework of the procedure for examining an application for international protection. However, the reasoning that it has developed in the case-law mentioned is, to my mind, equally germane.

43. Indeed, in this type of procedure, which inherently entails difficult personal and practical circumstances and in which the essential rights of the person concerned must clearly be protected, the observance of this procedural safeguard is of cardinal importance. Not only does the person concerned play an absolutely central role because he initiates the procedure and is the only person able to explain, in concrete terms, what has happened to him and the background against which it has taken place, but also the decision given will be of crucial importance to him.

44. I shall now consider the way in which the EU legislature has implemented the right to be heard in Directives 2004/83 and 2005/85.

C – *Application of the right to be heard in the procedure for examining an application for international protection*

45. As stated in recital 10 to Directive 2004/83 and recital 8 to Directive 2005/85, the EU legislature has undertaken to respect the fundamental rights when laying down the substantive and procedural rules linked to the grant of international protection.

46. In relation to the procedure for examining an application for international protection the EU legislature has thus sought to ensure that the competent national authorities guarantee that an applicant's procedural rights – in particular his right to be heard – can actually be exercised.

47. In the first place, I note that the competent national authority is obliged to carry out its task by means of an individual, objective and impartial examination of the application for international protection pursuant to Article 8(2)(a) of Directive 2005/85. In addition, its consideration of the facts and circumstances on which the application for international protection is based must be adequate and complete, pursuant to the first sub-paragraph of Article 23(2) of Directive 2005/85.

25 — *France* v *People's Mojahedin Organization of Iran*, paragraphs 61 and 62.

26 — See, for application of that rule, *Technische Universität München* and *Papierfabrik August Koehler and Others* v *Commission*.

48. In the second place, I would point out that, to ensure respect for an applicant's right to put his case effectively, the applicant enjoys the procedural safeguards contained, in particular, in Articles 10 and 13 of Directive 2005/85. Thus, the competent national authority must inform the applicant, in a language that he understands, of the procedure to be followed and of the means at his disposal for presenting his arguments. It must also allow him to have an interpreter and ensure that his application is examined with care and attention by making sure that the person who conducts the interview is competent to take account of the personal or general circumstances surrounding the application. Finally, the competent national authority must ensure that the interview is confidential and must thereby actually make the applicant feel secure enough to state his case clearly and give full expression to his opinions and feelings.

49. In the third place, I note that, before any decision is taken, the applicant is heard in one or more meetings during which he can give a full account of the facts and circumstances on which his application is based.

50. First of all, the applicant is heard at a meeting whose purpose is laid down in Article 12(2)(b) of Directive 2005/85. [27]

51. To my mind, that meeting gives specific embodiment to the duty of cooperation laid down in Article 4(1) of Directive 2004/83, the extent of which is in issue here.

52. Pursuant to Article 12(2)(b) of Directive 2005/85, the meeting must allow the competent national authority to assist the applicant 'with completing his/her application and submitting the essential information regarding the application, in terms of Article 4(2) of Directive 2004/83'. That information consists not only in 'the applicant's statements' and all documentation at his disposal 'regarding the applicant's age, background, including that of [his] … relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents' but also the reasons for applying for international protection.

53. That first meeting thus falls squarely within the framework established in Article 4 of Directive 2004/83 and must therefore be seen in the light of the rules laid down by the EU legislature in that article.

54. Article 4 of Directive 2004/83 lays down the rules which the competent national authorities must apply in relation to the submission and assessment of the facts and circumstances supporting an application for international protection.

55. In the case of an asylum application, the objective is to determine, as required by Article 2(c) of Directive 2004/83 and on the basis of very specific information, whether the individual's fear of being persecuted once he has returned to his country of origin is objectively justified. In the case of an application for subsidiary protection, the aim is to determine, in the light of Article 2(e) of the directive, whether substantial grounds have been shown for believing that the person concerned would face a real risk of suffering serious harm if returned to his country of origin.

56. Under Article 4(1) of Directive 2004/83, the burden of proof lies on the applicant for international protection. The applicant is in fact required to submit all elements needed to substantiate his application, [28] which stands to sense since only the applicant is, a priori, in a position to describe the situation in which he finds himself and to produce evidence relating thereto.

27 — The procedure established in Article 14 of Directive 2005/85 is applicable to that meeting pursuant to Article 14(4).

28 — See also in that regard Article 10(1)(a) of Directive 2005/85.

57. The EU legislature has none the less tempered that rule by adding that '[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application'. It is thus at this stage of the procedure that the EU legislature intends to establish the cooperation the extent of which is in issue here.

58. The cooperation must therefore be understood as being restricted to submission of the relevant facts and to provision of the elements needed for an assessment of the merits of the application.

59. Use of the notion of cooperation also implies that the two parties will work together towards a common goal.

60. In the *travaux préparatoires* relating to Directive 2004/83, the Commission was concerned that the duty to ascertain and evaluate all relevant facts be 'shared' between the applicant and the Member State responsible for considering the application. [29]

61. In the UNHCR comments, the task of ascertaining and evaluating the elements needed for assessment of the application was regarded as a 'joint responsibility of the applicant and the examiner'. [30]

62. That duty of cooperation represents an obligation for the applicant for asylum, pursuant to Article 11 of Directive 2005/85.

63. He is the person who initiates the procedure in order to gain a right. He is also the only person who can explain, in concrete terms, what has happened to him and the background against which it has taken place and who can produce the initial relevant information. That cooperation takes the form of various obligations including, in particular, an obligation for the individual to appear before the authorities in person on a specific date, an obligation to hand over documentation and items which are in his possession and which are relevant to consideration of the application and, further, an obligation to accept that his statements are recorded.

64. The Member State is also subject to this duty of cooperation. It can be explained, in my view, in view of the difficulties with which an applicant for individual protection may be faced when making out his case.

65. First, it is unlikely that the applicant will always be in a position to determine whether his application meets the conditions set out in the Geneva Convention or in Directive 2004/83 and that he will be familiar with other human rights legislation underpinning other forms of international protection; he is unlikely to be in a position to submit, at the outset, the evidence most appropriate to consideration of his application.

66. Second, it is essential that account be taken of the state of not only material, but also psychological, privation in which an applicant for asylum is likely to find himself. As the UNHCR recalls, an applicant fleeing his country of origin may arrive with the barest necessities, have no documentary identification and, as a consequence, may not be able to support his statements with documentary evidence. The applicant may, furthermore, be suffering genuine psychological distress and feel apprehensive vis-à-vis a public authority, in view of his experiences in his country of origin, and may be afraid to speak freely and give a full and comprehensive account of all aspects of his situation. [31]

29 — See the Commission's comments on Article 7(a) in the Proposal for a Council Directive of 12 September 2001 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 (COM(2001) 510 final).

30 — See the annotated comments of the UNHCR on Directive 2004/83 concerning Article 4(1) thereof.

31 — See UNHCR Annotated Comments on Directive 2004/83 concerning Article 4 thereof and points 195 to 205 of the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, referred to in footnote 14.

67. Accordingly, the cooperation provided for in Article 4(1) of Directive 2004/83 must be a basis, in relation to the circumstances of each particular case, for assessing and obtaining the elements that are most relevant to the assessment of the application for international protection and for assembling, together with the applicant and with the help of the resources available to the competent national authority, all the information necessary to evaluate the applicant's credibility and the merits of his application.

68. At this stage in our analysis, it can already be concluded that, in laying down a duty of cooperation in Article 4(1) of Directive 2004/83, the EU legislature did not seek to compel the Member State to notify to an applicant, prior to the adoption of a negative decision, the elements on which it intends to base such a decision and to seek his observations in that regard. That cooperation, like the meeting in which it may actually occur, has the sole objective of assisting the applicant to complete his application and to assemble the elements deemed essential for that purpose.

69. Next, it is to be noted that the applicant is also afforded the right to be heard in a personal interview, as provided for in Article 12(1) of Directive 2005/85.

70. Under Article 13(3) of Directive 2005/85, that interview must allow the applicant to present the grounds for his application in a comprehensive manner. Consequently, it is not the purpose of this interview either to supply to the applicant the assessment which the competent national authority will have carried out in order for him to comment on it before a decision is adopted.

71. Finally, it should be noted that the applicant is provided with the reports drawn up after each of the meetings.

72. Indeed, under Article 14 of Directive 2005/85, a written report must be made of the interviews between the applicant and the competent national authority and the applicant must have 'timely' access to that report or must have access to it as soon as necessary for allowing an appeal to be prepared and lodged in due time. That report must contain 'at least' the essential information regarding the application. Furthermore, the Member State may request the applicant's approval of the contents of the report, while any points with which he does not agree may be entered on his personal file. The applicant thus has an opportunity to rectify certain elements either before a decision is adopted or after its adoption in the context of an appeal.

73. Following this analysis of the substantive and procedural rules governing the examination of an application for international protection, it is clear that the EU legislature did not intend to require the Member States – either in the sphere of the cooperation referred to in Article 4(1) of Directive 2004/83 or on the occasion of the personal interviews or communications preceding adoption of a decision – to supply a draft decision to the applicant in order for him to comment upon it, where they propose to give a negative decision.

74. If such an obligation cannot thus be derived from the provisions laid down by Directives 2004/83 and 2005/85, can it be derived from the Court's case-law relating to the scope of the right to be heard?

75. I do not think so.

76. As we have seen, it is true that, in the context of proceedings that are quasi-criminal in nature such as those in which the Commission censures a cartel or an abuse of a dominant position, the Court has accepted that the right to be heard entails – before a decision is adopted – provision to the person concerned of a statement of the objections raised against it. That statement of objections sets out the Commission's preliminary conclusions regarding the existence of an infringement of the competition rules, explaining the assessments of fact and law which it has undertaken in the

investigation of the case.[32]

77. In that situation, the right to be heard in fact allows the person concerned to acquaint itself, before the decision is adopted, with the legal findings the authority intends to make in respect of the facts alleged and to express a view, should it so wish, on the legal reasoning.

78. However, that situation entails proceedings that are quasi-criminal in nature, in which the Commission proceeds against an undertaking on account of an act deemed objectionable. The statement of objections is thus akin to an 'indictment' drawn up when the Commission concludes its investigation. It triggers the adversarial phase of the proceedings in which the undertaking is then given an opportunity to make written representations and to put its case at a hearing on the facts alleged against it, the evidence on which those facts are based and the classification of those facts.

79. In that context, the right to be heard is to be understood as a genuine right of defence, allowing the undertaking to refute the objections made against it before the Commission censures it or imposes a penalty on it.

80. On the other hand, in a procedure such as that at issue in the main proceedings, which is itself initiated by an applicant seeking to avail himself of a right, the applicant has already had an opportunity to make representations on the matters to be taken into account.

81. As the Court observed in *Sopropé* and *France* v *People's Mojahedin Organization of Iran*, the purpose of the rule that the addressee of a decision adversely affecting him must be placed in a position to make representations before the decision is taken is to enable the authority concerned effectively to take into account all relevant information. In order to ensure that the addressee is in fact protected, the object of that rule is, inter alia, to enable him to correct an error or produce such information relating to his personal circumstances as will tell in favour of the decision's being adopted or not, or of its having this content or that.

82. It is clear that, in the light of the regulatory framework described above, the EU legislature sought to ensure that, before a decision is adopted, the applicant's right to be heard is guaranteed in those terms.

83. Although the initial elements in support of an application for international protection are, at the outset, provided on the basis of a form or standard questionnaire, the applicant may subsequently, at the stage of examination of the application, put forward information about the reality of the facts and circumstances that he has faced in his country of origin. In that situation, the cooperation established in Article 4(1) of Directive 2004/83 enables the applicant to evaluate the most relevant matters and to assemble, together with the competent national authority, all the information necessary to support his application. As to the personal interview(s) referred to in Article 12 of Directive 2005/85, they represent a further opportunity for the applicant to speak with the person who is best qualified to take account of his personal situation. He may present the grounds for his application in a comprehensive manner together with any new elements which he had not included in his arguments and may give an account of himself. As regards the competent national authority, that interview enables there to be a very specific examination of the relevance of all those elements in order to evaluate the personality of the individual and the credibility of his statements and to shed light, should that be necessary, on certain inconsistencies.

32 — See footnotes 22 and 23.

84. Furthermore, mention must be made of the fact that, under Article 9 of Directive 2005/85, the competent national authority is obliged to state the reasons in fact and law for a decision rejecting an asylum application. Moreover, under Article 39 of the directive, the Member States must guarantee the right to effective judicial protection. Thus, the legality of the final decision adopted and, in particular, the reasons which led the competent authority to reject the asylum application as unfounded may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application. [33]

85. Finally, it must be recalled that the procedures laid down under Directives 2004/83 and 2005/85 are minimum standards. According to Article 3 of Directive 2004/83 and Article 5 of Directive 2005/85, the Member States are free to provide for or retain more favourable standards with regard to the substantive requirements and the procedures for granting and withdrawing international protection, in so far as those standards are compatible with the directives. Consequently, the Member States are free to strengthen the fundamental safeguards afforded to the applicant in the examination of his application. The Netherlands Government thus states, in its observations, that, in the Netherlands, the competent minister is required to inform the applicant, in writing and stating reasons in support, of his intention to reject the applicant's application for international protection in order to obtain his written observations and, if need be, to rectify any errors affecting the legality of the decision.

86. Having regard to those matters, I am therefore of the view that the duty of cooperation referred to in Article 4(1) of Directive 2004/83, read in the light of the rules and procedural safeguards established in Directive 2005/85, must be interpreted to the effect that the authority responsible for considering the application is not required to notify the applicant, before the adoption of a negative decision, of the elements on which it intends to base that decision and to seek his observations in that regard.

87. That interpretation obtains in the case of examination of an application for asylum.

88. It will likewise obtain, by virtue of Article 3(3) of Directive 2005/85, where the Member State has established a single procedure in which it considers the asylum application in the light of both forms of international protection, at the applicant's request or of its own motion – the competent national authority then automatically considering the grounds for subsidiary protection when the applicant does not qualify for refugee status. Indeed, we have seen that, in that situation, the authority must respect the rules and procedural safeguards established by Directive 2005/85 throughout the entire procedure.

89. On the other hand, where the Member State considers the application for subsidiary protection in the framework of a separate procedure, it is not required – because of the scope of Directive 2005/85 – to accord the procedural safeguards laid down for the examination of an application for asylum. Nevertheless, it remains obliged, first, to cooperate with the applicant, in the framework set out in Article 4(1) of Directive 2004/83, and second, to guarantee the applicant's right to be heard inasmuch as that right, as stated above, constitutes a general principle of EU law.

90. Consequently and in view of the foregoing reasoning, when, following rejection of an application for asylum, an application for subsidiary protection is made in the framework of a new procedure, the competent national authority is not, to my mind, required to supply its draft decision, provided, however, that it has given the applicant the opportunity to put his arguments comprehensively and to produce all the documents tending to show that he qualifies for subsidiary protection as provided for in Article 15 of Directive 2004/83.

33 — See in this regard *Samba Diouf*, paragraph 56.

91. Having regard to all the foregoing, I therefore suggest that the Court rule that the duty of cooperation referred to in Article 4(1) of Directive 2004/83, read in the light of the rules and procedural safeguards established in Directive 2005/85, is to be interpreted to the effect that where a competent national authority intends to reject an application for subsidiary protection made following rejection of an asylum application, the authority is not required to notify the applicant, before adopting its decision, of the elements on which it intends to base its decision and to seek his observations in that regard.

92. In accordance with Article 3 of Directive 2004/83 and Article 5 of Directive 2005/85, Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, in so far as those standards are compatible with those directives.

D – *Application to the present case*

93. Although it is for the referring court alone to consider whether the decision was adopted in breach of the procedural safeguards afforded to the applicant, I should none the less like, within the framework of the judicial cooperation provided for by Article 267 TFEU, to share the following considerations with that court.

94. At the material time, the rules concerning the treatment of asylum applications were set out in the Refugee Act 1996. The provisions concerning the procedure for examining an application for subsidiary protection were found in the European Communities (Eligibility for Protection) Regulations 2006,[34] which implement Directive 2004/83.

95. It was my understanding, at the hearing, that in Ireland an application for subsidiary protection is dealt with in a separate procedure. There is currently no single procedure. As was confirmed by Ireland and the Commission, the procedural safeguards established by the EU legislature in Directive 2005/85 are thus not applicable to that procedure.

96. First, Mr M. submits before the referring court that he has not had a fair hearing in the examination of his application for subsidiary protection and that he has not been informed of the matters on which the competent national authority intended to base its decision rejecting his application.

97. It is clear from the documents before the Court that Mr M. was not heard in a personal interview at that stage of the procedure.

98. Although the application for subsidiary protection is considered in a separate procedure, I do not think that the procedural safeguards from which Mr M. had already benefited when his asylum application was examined should be discounted. The two procedures remain closely linked and based, in practical terms, on one person's history and on similar facts. Nevertheless, it is vital to ensure that Mr M. has in fact been able state his case fully and effectively regarding the reasons that specifically substantiate his application for subsidiary protection.

99. Having regard to the material before the Court, my impression is that Mr M. has been given the opportunity to make known his arguments concerning the matters showing why not only refugee status but also subsidiary protection should be granted.

34 — 'The 2006 Regulations'.

100. Mr M. made his asylum application to ORAC on 21 May 2008, the date on which he was heard in a preliminary interview pursuant to Section 8 of the Refugee Act 1996. In that interview, he was provided with a questionnaire which sought all relevant information concerning both him and the grounds for his application. On that basis and pursuant to Section 11 of the 1996 Act, Mr M. was interviewed on 23 August 2008 when he was given the opportunity in person to explain in detail the reasons for his application and the elements supporting it. On the basis of that interview a report was drawn up, representing a first instance decision,[35] which contained a recommendation from ORAC that the application should be refused, ORAC taking the view, in particular, that Mr M.'s application lacked credibility given the time that had elapsed before he made the application.

101. The applicant was notified of that recommendation on 8 September 2008. Pursuant to Section 16(1) of the Refugee Act 1996, Mr M. appealed against that recommendation to the Refugee Appeals Tribunal (Ireland). That appeal was considered in a written procedure, as, under Section 13(5) and (6)(c) of the 1996 Act, there is no oral hearing where the applicant has failed, without reasonable cause, to make his application as soon as reasonably practicable.[36] That procedure gave him an opportunity, first, to state his views on the reasons given by ORAC for rejecting his asylum application and, second, to make further submissions on all the reasons preventing him from returning to his country of origin and to include with his written submissions additional information forwarded on 25 September 2008.

102. By decision of 28 October 2008, the Refugee Appeals Tribunal affirmed ORAC's recommendation and requested that refugee status should not be granted to Mr M. That decision, which, under Section 16(17) of the Refugee Act 1996, must state the reasons on which it is based, was notified to Mr M. on 31 October 2008. Mr M. did not challenge ORAC's conclusions or the latter decision before the High Court.[37]

103. By letter dated 8 December 2008, Mr M. was informed of the decision of the Minister for Justice, Equality and Law Reform to reject his asylum application and to make a deportation order against him. That letter included a notice informing him that he was entitled to make an application for subsidiary protection and for leave to remain in Ireland. To that end, the letter enclosed an information leaflet on subsidiary protection and the form on which the application could be made. In addition to personal information, the applicant was 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.

104. Mr M. therefore submitted an application for subsidiary protection on 31 December 2008, which was supplemented on 15 July 2009 and 6 August 2010 by documents in support of his application. The latter was examined pursuant to Regulations 4 and 5 of the 2006 Regulations, which transpose Article 4 of Directive 2004/83. Thus, in accordance with Regulation 5 of the 2006 Regulations, the competent national authority was required to take into account all relevant facts as they relate to the country of origin at the time of taking a decision, including its laws and regulations and the manner in which they are applied, the statements and documentation presented by the applicant, including information on whether he has been or may be subject to persecution or serious harm, and the individual position and personal circumstances of the applicant, including factors such as background, gender and age, and the activities engaged in since leaving his country which may expose him to persecution or serious harm if he returns to that country.

35 — Pursuant to Section 13(4)(a) of the Refugee Act 1996, that report must be provided to the applicant.

36 — That is also the case where the application is, inter alia, manifestly unfounded or where the applicant has misled the authorities by presenting false information (transposition of Article 23(4) of Directive 2005/85).

37 — It is apparent from the observations lodged by Ireland that an applicant in respect of whom a negative recommendation has been made by ORAC and/or the Refugee Appeals Tribunal may apply to the High Court for judicial review pursuant to Section 5(1)(h) and (i) of the Illegal Immigrants (Trafficking) Act 2000.

105. The application for subsidiary protection was rejected on 24 September 2010 by the Minister for Justice, Equality and Law Reform, who concluded that, because of serious doubts as to the credibility of the applicant's allegations, it was not possible to show that he would face a risk of serious harm if returned to his country of origin. That decision refusing his application was notified to Mr M. on 30 September 2010.

106. The above account of the facts serves, to my mind, to show that Mr M. has been able to submit all the facts and circumstances which show why, in his view, international protection is warranted, whether under the right to asylum or subsidiary protection. Furthermore, it may be presumed that Mr M. was familiar with the matters on the basis of which the competent national authority intended to assess the merits of his application since, in the course of the examination of his asylum application, he was heard a number of times by ORAC, and could then, in the appeal before the Refugee Appeals Tribunal, acquaint himself with the reasons relied on by ORAC in giving a negative recommendation. Finally, he was notified of the grounds for the decision of the Minister for Justice, Equality and Law Reform rejecting his application.

107. Second, Mr M. complains that the competent national authority based its assessment on documents published in 2010, in particular a report of the United States of America Department of State concerning the situation in Rwanda, Mr M. having himself submitted the 2008 report and additional up-dated information on the Rwandan judicial system in a letter of 6 August 2010.

108. I cannot take issue with the competent national authority for having assessed the merits of the application at issue on the basis of the most precise and up-to-date information concerning the situation in Rwanda.

109. Indeed, under Article 4(3)(a) of Directive 2004/83, the Member States must carry out the assessment of an application for international protection on an individual basis and take into account 'all relevant facts as they relate to the country of origin *at the time of taking a decision* [38]'. Furthermore, pursuant to Article 8(2) of Directive 2005/85, which, admittedly, is not applicable in the procedure in question, the authority responsible for examining the application must carry out an appropriate and objective examination and must, to that end, ensure that 'precise and up-to-date information is obtained from various sources, … as to the general situation prevailing in the [country] of origin of [the applicant]'.

110. Consequently, as the High Court indicated in *Ahmed* v *Minister for Justice, Equality and Law Reform*, the applicant must expect that the authority examining the application will, in carrying out its task, make sure that it is fully up to date.

111. The question now is whether the 2010 report was such as to have an appreciable influence on the decision of the competent national authority. If that were the case and inasmuch as an essential element would, as a consequence, be involved, the applicant should, in my view, have then been given an opportunity to submit his observations on that point. However, in this case and in view of the material in the file, that does not appear to be the case. First, the referring court states that there was no appreciable change in the general or security situation in Rwanda so far as the period 2007 to 2010 is concerned. Second, it states that, in relation to the applicant's personal situation and, in particular, the lack of credibility which is in essence held against him, the differences between the 2008 report and the 2010 report are not of great significance. It therefore seems that the information on which the Minister for Justice, Equality and Law Reform relied merely bore out the conclusions that had already been drawn in the procedure for examining the asylum application.

38 — Emphasis added.

112. Third, Mr M. maintains that he did not know when a decision would be taken on his application for subsidiary protection, also criticising the length of the proceedings.

113. It is clear from the documents on the file that the procedure for examining Mr M's asylum application took six and a half months and that concerning his application for subsidiary protection, 21 months. Mr M. was therefore informed about his situation on conclusion of a procedure that had lasted a little over two years and three months.

114. That length of time seems to me to be manifestly unreasonable. Although in Ireland examination of the application for subsidiary protection is not subject to the procedural rules mentioned in Article 23(2) of Directive 2005/85 – which provides that Member States must ensure that the procedure for examining applications for international protection is concluded *as soon as possible* and, *where a decision cannot be taken within six months*, that the applicant is either informed of the delay or receives information on the time-frame – the fact remains that the competent national authority is obliged to ensure, when it adopts a decision falling within the scope of EU law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU law.

115. Applications for subsidiary protection, like applications for asylum, must thus be the subject of a thorough examination, taking place within a reasonable period of time, as the prompt dispatch of the proceedings contributes not only to the applicant's legal certainty but also to his integration.

116. It will therefore be for the referring court to consider to what extent the relatively long duration of the proceedings may have undermined the rights and safeguards afforded to Mr M. in the procedure for examining his application for subsidiary protection.

II – Conclusion

117. Accordingly, I propose that the Court should give the following answer to the High Court's question:

The duty of cooperation referred to in Article 4(1) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country national 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 the rules and procedural safeguards established in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted to the effect that, where a competent national authority intends to reject an application for subsidiary protection made following rejection of an asylum application, the authority is not required to notify the applicant, before adopting its decision, of the elements on which it intends to base its decision and to seek his observations in that regard.

In accordance with Article 3 of Directive 2004/83 and Article 5 of Directive 2005/85, Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with those directives.