Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 3 September 2020 [1]

Case C-616/19

M.S.,
M.W.,
G.S.
v
Minister for Justice and Equality

(Request for a preliminary ruling
from the High Court, Ireland)

(Reference for a preliminary ruling – Asylum policy – Admissibility of an application for international protection in one Member State after subsidiary protection has been granted in another Member State – Application in a Member State subject to Regulation (EU) No 604/2013 but not to Directive 2013/32/EU – Directive 2005/85/EC – Grounds of inadmissibility – Article 25(2)(a) and (d) – Concept of the 'Member State concerned')

I. Introduction

1. The request for a preliminary ruling submitted by the High Court (Ireland) concerns the interpretation of the rules on admissibility laid down in Directive 2005/85/EC [2] on minimum standards on procedures in Member States for granting and withdrawing refugee status.

2. The questions submitted to the Court are raised in the context of three disputes [3] involving three third-country nationals applying to Ireland for the grant of refugee status; those persons have, moreover, already been granted subsidiary protection in Italy.

1 Original language: French.

2 Council Directive of 1 December 2005 (OJ 2005 L 326, p. 13).

3 These disputes have been joined by the referring court.

3. The problem of interpretation arises in a very specific context, namely Ireland's notification of its intention to take part in the adoption and application of Regulation (EU) No 604/2013,[4] with the result that it is subject to that regulation, but it did not take part in the adoption of the associated Procedures Directive, Directive 2013/32/EU,[5] and is neither bound by that directive nor subject to its application. That Member State remains subject to the previously applicable Procedures Directive, namely Directive 2005/85, which was associated with Regulation (EC) No 343/2003[6] ('the Dublin II Regulation').

4. The Court is thus faced with a question of interpretation of a provision of Directive 2005/85 falling outside the framework of the Dublin II Regulation, as envisaged by the EU legislature.

5. After examining the rules of admissibility concerned in the particular context at issue, I will propose that the Court find that those rules do not preclude Ireland from regarding as inadmissible applications, such as those lodged by the third-country nationals in the main proceedings, for the grant of refugee status in the case where those persons have been granted subsidiary protection by another Member State.

II. Legal context

A. EU law

1. The Dublin II and Dublin III Regulations

6. The Dublin III Regulation repealed and replaced the Dublin II Regulation.

7. Whereas the Dublin II Regulation established, according to Article 1 thereof, read in conjunction with Article 2(c) thereof, only the criteria and mechanisms for determining the Member State responsible for examining an asylum application, within the meaning of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 ('the Geneva Convention'), the Dublin III Regulation, as is clear from Article 1 thereof, now seeks to establish such criteria and mechanisms in relation to applications for international protection which, according to the definition contained in Article 2(b) of the Dublin III Regulation, which refers to that set out in Article 2(h) of Directive 2011/95/EU,[7] are applications for the grant of refugee status or subsidiary protection status.

2. Directive 2005/85

8. Directive 2005/85 is associated with the Dublin II Regulation.

9. Under Article 1 of Directive 2005/85, the purpose of that directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

4 Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) ('the Dublin III Regulation'); see recital 41 thereof.

5 Directive 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).

6 Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

7 Directive 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).

10. Recital 22 of Directive 2005/85 is worded as follows:

'Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with 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 [8], except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.'

11. Article 25 of Directive 2005/85, which is entitled 'Inadmissible applications', provides:

'1. In addition to cases in which an application is not examined in accordance with [the Dublin II Regulation], Member States are not required to examine whether the applicant qualifies as a refugee in accordance with [Directive 2004/83] where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as a result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of [Directive 2004/83];

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against *refoulement* pending the outcome of a procedure for the determination of status pursuant to point (d);

(f) the applicant has lodged an identical application after a final decision;

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

3. Directive 2013/32

12. Directive 2013/32 is associated with the Dublin III Regulation. That directive recast Directive 2005/85.

8 OJ 2004 L 304, p. 12.

13. Recital 58 of Directive 2013/32 states:

'In accordance with Articles 1, 2 and Article 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 [EU and the FEU Treaties], and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.'

14. Under Article 1 of that directive, the purpose thereof is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95.

15. Article 33 of the Directive, which is entitled 'Inadmissible applications', reads as follows:

'1. In addition to cases in which an application is not examined in accordance with [the Dublin III Regulation], Member States are not required to examine whether the applicant qualifies for international protection in accordance with [Directive 2011/95] where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

B. Irish law

16. Under section 21(2)(a) of the International Protection Act 2015, an application for international protection is regarded as inadmissible where another Member State has granted refugee status or subsidiary protection status.

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

17. M.S., M.W. and G.S. are third-country nationals, the first two of whom come from Afghanistan and the third from Georgia, who, after having been granted subsidiary protection status in Italy, entered Ireland in the course of 2017 and there submitted applications for international protection to the International Protection Office (Ireland).

18. By decisions of 1 December 2017, 2 February 2018 and 29 June 2018, the International Protection Office rejected the applications for international protection lodged, respectively, by M.S., M.W. and G.S. on the ground that they had already been granted subsidiary protection status in another Member State, namely Italy.

19. M.S., M.W. and G.S. each appealed against those decisions to the International Protection Appeals Tribunal (Ireland), which, by decisions of 23 May 2018, 28 September 2018 and 18 October 2018 respectively, dismissed those appeals.

20. The applicants in the main proceedings brought actions before the High Court in which they sought the annulment of those decisions.

21. Referring to the judgment in *Ibrahim and Others*,[9] the referring court recalls that Article 33(2)(a) of Directive 2013/32 permits a Member State to reject an application for asylum as inadmissible in the case where the applicant has been granted subsidiary protection by another Member State; that provision had extended the right previously provided for in Article 25(2)(a) of Directive 2005/85, which allowed such rejection only where the applicant had been granted refugee status in another Member State.

22. That court thus observes that, pursuant to the combined application of Directive 2013/32 and the Dublin III Regulation, a Member State is not required to process an application for international protection in a case where that protection has already been granted in another Member State.

23. However, the referring court points out that Ireland, whilst taking part in the adoption and application of the Dublin III Regulation, decided not to take part in the adoption and application of Directive 2013/32, with the result that Directive 2005/85 continues to apply in that Member State.

24. In that context, the referring court expresses uncertainty as to whether Directive 2005/85, and in particular Article 25 thereof, read in the light of the Dublin III Regulation, must be interpreted as precluding national legislation that allows an application for international protection to be rejected as inadmissible in the case where the applicant has already been granted subsidiary protection in another Member State. In particular, it asks about the scope of the grounds of inadmissibility laid down in Article 25(d) and (e) of that directive, inter alia as regards the interpretation of the concept of 'the Member State concerned' contained in those provisions.

25. Furthermore, the referring court seeks to ascertain whether the fact that a third-country national who has been granted subsidiary protection status in a first Member State lodges an application for international protection in a second Member State constitutes an abuse of rights, such that the latter Member State may consider such an application inadmissible.

26. It is in those circumstances that the High Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the reference to "the Member State concerned" in Article 25(2)(d) and (e) of Directive 2005/85 mean (a) a first Member State which has granted protection equivalent to asylum to an applicant for international protection or (b) a second Member State to which a subsequent application for international protection is made or (c) either of those Member States?

9 Judgment of 19 March 2019 (C-297/17, C-318/17, C-319/17 and C-438/17, 'the judgment in *Ibrahim*', EU:C:2019:219).

(2) Where a third-country national has been granted international protection in the form of subsidiary protection in a first Member State, and moves to the territory of a second Member State, does the making of a further application for international protection in the second Member State constitute an abuse of rights such that the second Member State is permitted to adopt a measure providing that such a subsequent application is inadmissible?

(3) Is Article 25 of Directive 2005/85 to be interpreted so as to preclude a Member State which is not bound by [Directive 2013/32[10]] but is bound by [the Dublin III Regulation], from adopting legislation such as that at issue in the present case which deems inadmissible an application for asylum by a third-country national who has previously been granted subsidiary protection by another Member State?'

IV. Analysis

A. Preliminary remarks

27. By its questions referred for a preliminary ruling, the referring court is seeking to ascertain whether the introduction into its International Protection Act 2015[11] of a ground of inadmissibility based on the fact that an applicant for international protection has already been granted subsidiary protection status in another Member State is compliant with Directive 2005/85 within the context of the application of the Dublin III Regulation. To that end, it asks the Court about the interpretation of the grounds of admissibility contained in Article 25 of that directive.

28. I would point out at the outset that, although Directive 2013/32 repealed Directive 2005/85, the repeal of the latter does not apply to Ireland. Article 53 of Directive 2013/32 expressly provides that Directive 2005/85 is repealed 'for the Member States bound by this Directive'. However, as is indicated in recital 58 of Directive 2013/32, Ireland did not take part in the adoption of that directive and is not bound by it or subject to its application. Consequently, Ireland does indeed remain subject to Directive 2005/85, which has not been repealed in its regard.

29. With regard to Article 25 of Directive 2005/85, the Court has already interpreted that provision and examined whether the fact that subsidiary protection has been granted in a first Member State allows a second Member State to which a third-country national has made an application for asylum to reject that application as being inadmissible.[12] The question, which was examined in the context of the joint application of that directive and the Dublin II Regulation, received a clear answer in the negative.

30. Can the fact that Directive 2005/85 is being considered, in the present case, in the context of the application of the Dublin III Regulation and no longer in that of the Dublin II Regulation result in a different interpretation?

31. That issue lies at the heart of the first and third questions submitted by the referring court. Those questions, which are closely linked, seek to ascertain whether 'the Member State concerned' mentioned in Article 25(2)(d) of Directive 2005/85 can be the first Member State which granted protection equivalent to that conferred by refugee status, such that the subsidiary protection granted by it could be a ground of inadmissibility in the context of the Dublin II Regulation (first question) or in the

10 The original version of the question referred for a preliminary ruling mentions Directive 2011/95. However, it appears that this is a typographical error in the light of the explanations given in paragraph 11 of the order for reference, in which that court mentions 'the recast procedures directive 2011/95' and refers to Article 33(2)(a) of that directive. The Recast Procedures Directive is Directive 2013/32 and Article 33(2)(a) appears in that directive and not in Directive 2011/95.

11 See point 16 of this Opinion.

12 See judgment in *Ibrahim*.

context of the Dublin III Regulation (third question). I propose to address the issue raised by starting with an analysis of the grounds of inadmissibility provided for in Article 25 of Directive 2005/85 in the context of the Dublin II Regulation (section B) before examining those grounds in the context of the Dublin III Regulation (section C). I will finish with some comments on the question of abuse raised in the second question referred for a preliminary ruling.

B. The grounds of inadmissibility provided for in Directive 2005/85 in the context of the Dublin II Regulation

32. In this section, I will examine, in the first place, Article 25(2) of Directive 2005/85 and, more specifically, the meaning of point (d) of that provision, as follows from its wording and context, and then, in the second place, the insights provided by the judgment in *Ibrahim* in that regard.

1. Article 25(2) of Directive 2005/85

33. Article 25(2) of Directive 2005/85 contains seven optional grounds of inadmissibility which allow the Member States to consider inadmissible an application for asylum lodged by a third-country national.

34. The first ground of inadmissibility set out in that provision, in point (a) thereof, concerns the case where *another Member State* has granted *refugee* status. The following two grounds, in points (b) and (c) of the provision, relate to the situation in which *protection* is offered by a *third country* which is regarded as the first country of asylum or a safe third country. Points (d) and (e) of the provision concern cases where the applicant is allowed to remain in the territory of the *Member State concerned* either because he or she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/38, in other words that Member State has granted him or her subsidiary protection status [13] (point (d)), or because that Member State protects him or her against *refoulement* pending the outcome of a procedure to determine whether to grant or to withdraw refugee status or subsidiary protection status (point (e)). Points (f) and (g) of the provision cover, respectively, the situation where an identical application is re-submitted after a final decision has been adopted and that of an application lodged by a dependant of the third-country national who had already consented to have his or her case be part of an application made on his or her behalf.

35. The present case concerns the consequences of subsidiary protection granted in a first Member State, and the question is raised as to whether the 'Member State concerned', as referred to in points (d) and (e) of Article 25(2) of Directive 2005/85, may be that first Member State. If that is the case, the fact that the Italian Republic has granted subsidiary protection to third-country nationals, such as those in the main proceedings, constitutes, pursuant to point (d) of that provision, a ground for the inadmissibility of the application for international protection made in the second Member State, Ireland. By contrast, if those words refer to the second Member State alone, the grant of subsidiary protection in the first Member State does not constitute a ground of inadmissibility, pursuant to that point.

13 As is apparent from recital 5 thereof, Directive 2004/83 seeks to provide for rules relating to refugee status as well as 'subsidiary forms of protection, offering an appropriate status to any person in need of such protection'. The Court has found that, as regards the beneficiaries of subsidiary protection, Directive 2004/83 seeks to offer, 'within the territory of the Member States, protection similar to that afforded to refugees' (see judgment of 24 April 2018, *MP (Subsidiary protection of a person previously a victim of torture)* (C-353/16, EU:C:2018:276, paragraph 55)).

36. The *wording* of Article 25(2)(d) of Directive 2005/85 does not provide a clear answer to that question. That wording is ambiguous, as is shown by the questions submitted by the referring court. According to the third-country nationals, the concept of the 'Member State concerned' in points (d) and (e) covers the second Member State alone and the grant of subsidiary protection in Italy is not relevant, whereas Ireland and the European Commission, like the referring court, take the view that that concept covers both the first and the second Member States.

37. The ambiguity is reinforced by recital 22 of Directive 2005/85. That recital states that Member States should examine an application for asylum on the substance, except where that directive provides otherwise, 'in particular where it can be reasonably assumed that *another country* would do the examination or provide sufficient protection'.[14] That recital clarifies that, 'in particular, Member States should not be obliged to assess the substance of an asylum application where *a first country of asylum* has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.' [15]

38. The meaning of the terms 'another country' and 'first country of asylum' used in that recital is liable to encompass both third countries and the Member States. Unlike the term 'country' contained in Article 25(2)(b) and (c) of Directive 2005/85, which refers expressly and solely to a third country, it is not made clear that the countries mentioned in recital 22 do not include the Member States.

39. Relying on that recital, Ireland and the Commission argue that the concept of the 'Member State concerned' contained in Article 25(2)(d) and (e) of Directive 2005/85 covers both the first Member State and the second Member State. They conclude from this that, if the first Member State has granted subsidiary protection to third-country nationals who lodge an application for asylum in a second Member State, the latter may reject that application as inadmissible.

40. However, if considered in greater detail, the wording of Article 25(2) of that directive and the context of that provision provide a different answer.

41. As I have already pointed out, the EU legislature drafted that provision using the words 'another Member State' in point (a) and the words 'Member State concerned' in points (d) and (e). If different terms have been used in point (a) as compared with points (d) and (e), this is because the legislature was referring to two different situations. The words 'Member State concerned' cannot, therefore, be regarded as equivalent to the words 'another Member State' and the 'Member State concerned' is therefore not the first Member State in which the third-country national lodged his application for asylum.

42. If the legislature had wished to take a different approach, it would have been logical for it to add in point (a) of the same provision that subsidiary protection status granted by another Member State constituted a ground of inadmissibility in the same way as refugee status.

43. That literal reading is borne out by a *contextual* interpretation that takes into account the definition in Article 2(k) of Directive 2005/85[16] of the words 'remain in the Member State' that are used in Article 25(2)(d) and (e) of that directive.[17] Those words are defined as remaining in the territory of the Member State in which the application for asylum has been made or is being examined.

14 Emphasis added.

15 Emphasis added.

16 Article 2 of Directive 2005/85 contains a number of definitions including the concept of 'remain in the Member State', which is defined as 'to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined'.

17 Points (d) and (e) provide that 'the applicant is allowed to remain in the Member State concerned'.

44. It follows that the 'Member State concerned' within the meaning of Article 25(2)(d) and (e) refers to the Member State in which the third-country national has lodged an application for asylum (here: Ireland) and in the territory of which he or she may remain by reason of the fact [18] that that Member State has previously granted him or her subsidiary protection status (point (d)) or is in the process of examining his or her application for asylum (for the first time) and has allowed that third-country national to remain in its territory pending its decision (point (e)).

45. The judgment in *Ibrahim*, which was delivered by the Grand Chamber of the Court and concerned more specifically the ground of inadmissibility laid down in Article 33(2)(a) of Directive 2013/32, confirms that analysis. As I will set out in the section which follows, the Court compared Article 33(2)(a) of that directive with the provision which it replaced, namely Article 25(2)(a) of Directive 2005/85. The Court's analysis reveals that the ground of inadmissibility based on the grant of subsidiary protection by a first Member State, which is expressly contained in Article 33(2)(a) of the later directive, was not laid down in point (a) of Article 25(2) of Directive 2005/85 or in any other point of that provision.

2. The judgment in Ibrahim

46. This judgment concerned four applications for asylum lodged in Germany, in three cases by stateless Palestinians and in one case by a third-country national to whom a first Member State, namely Bulgaria and Poland respectively, had already granted subsidiary protection status. The judgment concerned cases joined by the Court, to which I shall refer as, first, the *Ibrahim* cases and, second, the *Magamadov* case. One of the questions referred for a preliminary ruling in those cases concerned whether, on the ground that subsidiary protection had been granted in a first Member State, the German court in question could reject the applications for asylum as inadmissible by immediately applying Article 33(2)(a) of Directive 2013/32, even though the facts of the case related wholly or in part to periods preceding the entry into force of that directive and of the Dublin III Regulation.

47. In paragraph 58 of the judgment in *Ibrahim*, the Court ruled that, by allowing a Member State to reject an application for international protection as inadmissible in the case where the applicant has been granted subsidiary protection in another Member State, Article 33(2)(a) of Directive 2013/32 extended the option previously provided for in Article 25(2)(a) of Directive 2005/85, which permitted the rejection of such an application *solely* in the case where the applicant had been granted refugee status in another Member State.

48. In paragraph 71 of that judgment, the Court added that Directive 2013/32 thus introduced an additional ground of inadmissibility which is explained by the wider legislative framework provided for by the legislature with the adoption, concomitantly with that directive, of the Dublin III Regulation. The scope of that regulation, like that of Directive 2013/32, is in effect extended to applications for international protection, [19] namely applications for the grant both of refugee status and of subsidiary protection status, and is no longer limited, as it was under the Dublin II Regulation, to the asylum procedure and, therefore, to refugee status.

49. The link between the Dublin II or III Regulations and the Procedures Directives respectively associated with them is further outlined in paragraph 72 of the judgment in *Ibrahim*, which makes it clear that Article 25(1) of Directive 2005/85 refers to the Dublin II Regulation, whereas Article 33(1) of Directive 2013/32 refers to the Dublin III Regulation.

18 In my view, the words 'on some other grounds' in points (d) and (e) must be understood as references, respectively, to the case where subsidiary protection has previously been granted and to the case where the right to remain in the territory of the Member State has been granted, inter alia for humanitarian reasons.

19 See Article 2(h) of Directive 2011/95.

50. That analysis by the Court highlights the importance of the legal framework within which the rules of procedure operate by distinguishing between two regulatory systems: that governed by the Dublin II Regulation and that governed by the Dublin III Regulation. The difference between those two systems, which arises from the extension of the scope of the Dublin III Regulation, is reflected in the titles of the different instruments,[20] with the first referring only to an 'asylum application' whereas the second mentions an 'application for international protection'. Each of those systems has been supplemented by a number of legislative instruments and I will refer below to those systems as supplemented by using the expressions 'the Dublin II system'[21] and 'the Dublin III system'.[22]

51. That extension of the scope explains, in my view, not only the insertion of an additional ground in point (a) of Article 33(2) of Directive 2013/32 but also the removal from that provision of two grounds of inadmissibility laid down in Article 25(2) of Directive 2005/85, namely those contained in points (d) and (e) thereof. Those points and point (f) of that provision are now encompassed solely in point (d) of Article 33(2) of Directive 2013/32, which concerns a subsequent application in the same Member State that does not put forward any new element or finding with a view to obtaining the status of a beneficiary of international protection, that is to say refugee status or subsidiary protection status.

52. In addition, in paragraphs 73 and 74 of the judgment in *Ibrahim*, the Court found that it follows from the structure of the Dublin III Regulation and from that of Directive 2013/32, as well as from the wording of Article 33(1) of that directive, that the additional ground of inadmissibility provided for in Article 33(2)(a) of that directive does not apply to an application for asylum which still comes entirely within the scope of the Dublin II Regulation.

53. Thus, with regard to a situation such as that at issue in the *Magamadov* case which, in view of the dates on which the application for asylum in the second Member State and the take-back request to the first Member State were made,[23] *comes entirely within the scope of the Dublin II Regulation*, the fact that subsidiary protection was granted in the first Member State does not constitute a ground of inadmissibility. The second Member State is required, in principle, to examine the application for asylum, unless it decides to transfer the applicant to the first Member State, in accordance with Article 16(1)(e) and Article 20 of the Dublin II Regulation,[24] in order for that first Member State to take charge of that examination.

20 See footnotes 6 and 4 to this Opinion.

21 Alongside the Dublin II Regulation, this system includes, in particular, three directives: Directive 2004/83, 'the Qualification Directive', which determines the minimum standards to be met in order to obtain refugee status or subsidiary protection status and clarifies the rights associated therewith; Directive 2005/85, 'the Procedures Directive', which relates *only* to refugee status and concerns the grant and withdrawal of that status; and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), 'the Reception Directive', which establishes minimum rules for the reception of asylum seekers in the Member States.

22 Alongside the Dublin III Regulation, this system includes, in particular, three directives which are recast versions of the directives mentioned in footnote 21 to this Opinion, namely, respectively, Directive 2011/95 (recast version of the Qualification Directive), Directive 2013/32 (recast version of the Procedures Directive) and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96) (recast version of the Reception Directive).

23 Those dates are 19 June 2012 and 13 February 2013 respectively. They pre-date the entry into force of the Dublin III Regulation and Directive 2013/32, on 20 July 2013, and the date from which the Dublin III Regulation has applied, namely 1 January 2014.

24 Article 16(1) of the Dublin II Regulation establishes, in particular, the cases in which the Member State responsible is required to take back the asylum seeker and examine his application. Point (e) of that provision states that that obligation applies in the case of a third-country national whose application it has rejected and who is in the territory of another Member State without permission. As the Commission has noted in its written observations in the present case, that provision is applied in particular where the first Member State has granted subsidiary protection but not refugee status. Article 20 of that regulation clarifies the circumstances in which that take-back is to occur and provides in paragraph 1(d) thereof for the *transfer* of the applicant to the first Member State. According to the Commission, in view of that possibility of transferring the third-country national and of a take-back by the first Member State, there was no need for Directive 2005/85 also to provide for a ground of inadmissibility in such a situation.

54. That finding made by the Court that the ground of inadmissibility based on the grant by a first Member State of subsidiary protection status is not laid down in Directive 2005/85 and therefore does not allow the second Member State to reject an application for asylum where the facts of the case come entirely within the scope of the Dublin II Regulation supports the analysis that Article 25(2) of that directive, including point (d) thereof, does not provide for such a ground of inadmissibility and, therefore, that the concept of the 'Member State concerned' contained in that point does not cover the first Member State.

55. By contrast, in a situation which, like the *Ibrahim* cases, *does come within the scope of the Dublin III Regulation*, the Court took the view in that judgment that the Member State concerned, that is to say, the second Member State, has the option to reject the application for asylum as inadmissible.[25]

56. That conclusion reached by the Court applies where the facts of the case come *wholly* within the scope of the Dublin III Regulation and Directive 2013/32, that is to say, where they occur not only after the date on which the Dublin III Regulation began to apply, that is, 1 January 2014 in accordance with the second paragraph of Article 49 thereof, but also after the date on which Directive 2013/32 entered into force, that is, 20 July 2015.

57. The same conclusion likewise applies where the facts of the case come *partially* within the scope of the Dublin III Regulation[26] where the national legislation of the second Member State allows for the immediate application of Directive 2013/32 before the deadline for the transposition of that directive and provided that the facts take place after the joint date of entry into force of Directive 2013/32 and of the Dublin III Regulation[27] and that some of those facts occur, as in the *Ibrahim* cases, after the entry into force of the Dublin III Regulation.[28] In that situation, both the Dublin III Regulation and Directive 2013/32 are applicable to such facts.

58. Although it is clear from the judgment in *Ibrahim* that, in a situation governed *entirely* by the *Dublin II Regulation*, a Member State cannot reject an application for asylum as inadmissible on the ground that the applicant has been granted subsidiary protection in a first Member State, I note that that judgment does not answer the question whether that ground is applicable where a Member State (here: Ireland) is subject to the application of the Dublin III Regulation but not to the application of Directive 2013/32, which is linked to that regulation.

59. Furthermore, with regard to the Court's conclusion which I recalled in point 57 of this Opinion, on the application of the additional ground of inadmissibility, where the facts come only *partially* within the scope of the *Dublin III Regulation*, it must be stated, however, that that conclusion concerns a situation in which, unlike the present case, the second Member State is subject in full to the application of both the Dublin III Regulation and Directive 2013/32.

60. Does the same conclusion apply where that second Member State is not bound by Directive 2013/32?

25 See judgment in *Ibrahim*, paragraph 74. The Court thus examined the other questions referred for a preliminary ruling in that case with a view to clarifying the implementation of Article 33 of Directive 2013/32.

26 See, to that effect, judgment in *Ibrahim*, paragraphs 74 and 78.

27 On 20 July 2013 (see the first paragraph of Article 49 of the Dublin III Regulation and Article 54 of Directive 2013/32).

28 In the *Ibrahim* cases, the application for asylum in the second Member State was lodged on 29 November 2013 and the take-back request made on 22 January 2014.

C. The grounds of inadmissibility provided for by Directive 2005/85 in the context of the Dublin III Regulation

61. In this section, I will consider, firstly, the additions under the Dublin III system as compared with the Dublin II system and the logic behind the transfer and inadmissibility mechanisms associated with each of those systems, which allow the second Member State not to examine the application for international protection made to it (section 1). I will then go on to set out the inconsistencies which may arise from the particular situation of Ireland, which is not wholly bound by either system, before proposing the interpretation which, in my view, follows from the intention expressed by the legislature (sections 2 and 3).

1. The additions under the Dublin III system and the transfer and inadmissibility mechanisms

62. The Dublin III system marks a new stage in the creation of a common asylum system. The first stage, which corresponds to the Dublin II system, consisted in laying down a number of common standards. In a second stage, which corresponds to the Dublin III system, the legislature sought to approximate refugee statuses and subsidiary protection statuses by dealing with them jointly in a uniform manner and by increasing the rights of the persons concerned within the European Union. One of the fundamental and constant objectives of the legislature has been to limit the secondary movements of third-country nationals,[29] that is to say, movements by those persons within the European Union with a view to obtaining protection or potentially more favourable living conditions in another Member State. The approximation of the procedural rules was intended to contribute to limiting such movements.[30]

63. Each stage ended with the adoption of a system featuring a series of legislative instruments which are inter-coordinated.[31] As is clear from the judgment in *Ibrahim*, it is within each of those systems that the rules of admissibility laid down by the legislature logically apply.

64. In the context of the Dublin III system, given the considerable approximation between refugee status and subsidiary protection status, the Dublin III Regulation, unlike the Dublin II Regulation, no longer provides for the *transfer* of an asylum applicant by the second Member State to the first Member State in order for the latter to take back that person after having granted him subsidiary protection and to examine his application. As the Court has clearly confirmed, such a transfer can no longer be required by the second Member State in that context.[32] The latter does, by contrast, have the option of rejecting the application for international protection as *inadmissible* on the basis of Article 33 of Directive 2013/32.[33]

65. The two means, *transfer* and *inadmissibility*, of rejecting a new application for international protection lodged in a second Member State for the grant of refugee status thus each correspond to a particular set of legislation that has its own logic according to the degree of harmonisation achieved.

66. It must be stated that Ireland's choice to take part in the adoption of the Dublin III Regulation without being bound by Directive 2013/32, which accompanies that regulation, and therefore remaining subject to the application of Directive 2005/85 disrupts that logic, creating an asymmetry with consequences that have not been addressed by the legislature and which I will examine below.

29 See, with regard to the Dublin II system, judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 79), which mentions the objective of preventing forum shopping by asylum seekers and, with regard to the Dublin III system, judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraph 52).

30 See, in particular, recital 13 of Directive 2013/32.

31 See, to that effect, with regard to the Dublin III system, judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraphs 41 and 42) and also footnotes 21 and 22 to this Opinion.

32 See order of 5 April 2017, *Ahmed* (C-36/17, EU:C:2017:273, paragraph 41) and judgment in *Ibrahim*, paragraph 78.

33 See order of 5 April 2017, *Ahmed* (C-36/17, EU:C:2017:273, paragraph 39) and judgment in *Ibrahim*, paragraphs 79 and 80.

2. The inconsistencies that may follow from an asymmetrical situation

67. Since it is subject to the application of the Dublin III Regulation but *without being bound by Directive 2013/32*, Ireland cannot rely on Article 33(2)(a) of that directive in order to reject as *inadmissible* the asylum application lodged by a third-country national who enjoys subsidiary protection in a first Member State. Furthermore, since it is subject to Directive 2005/85 but *without being governed by the Dublin II Regulation*, nor can that Member State rely on Article 16 of that regulation for the purpose of *transferring* a third-country national to the first Member State in order for it to process that application. A purely literally interpretation of Directive 2005/85 in the context of the Dublin III Regulation could thus result in Ireland being required to examine the asylum application.

68. All of the parties intervening before the Court and the referring court have pointed to the inconsistencies which could follow from such an obligation.

69. There are two types of inconsistencies. They relate, in the first place, to the comparison of the consequences of the protection granted by the Member States with those resulting from the protection granted by third countries.

70. Pursuant to Article 25(2)(b) and (c) of Directive 2005/85, if protection deemed to be sufficient were granted by a *third country*, Ireland would not be required to examine the application for asylum and could reject it as inadmissible, whereas it would be forced to examine it if subsidiary protection had been granted by a first *Member State*. That difference is all the more surprising in the light of the mutual trust that Member States must, in principle, show to one another and of the degree of protection that the EU legislature has endeavoured to provide for third-country nationals.

71. Subsidiary protection is a status provided for by the European Union which complements and supplements the refugee status established by the Geneva Convention. It was made possible by the mutual trust that lies at the heart of European integration and, in particular, the Common European Asylum System.[34] Giving greater weight to the protection conferred by third countries than to that granted by a Member State would be at odds with the spirit of the European project that seeks to establish that asylum system.

72. The inconsistencies relate, in the second place, to the paradoxical effects of merely examining the first application for international protection, or even of rejecting that application, as compared with the effects of a decision granting the application.

34 See, to that effect, judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78, 79 and 83) and judgment in *Ibrahim*, paragraphs 83 to 85.

73. If a first Member State is *in the process of examining* the application for international protection or if it has *rejected* it, Ireland is not obliged, pursuant, respectively, to points (b) and (d) of Article 18(1) [35] of the Dublin III Regulation to examine the application made to it. By contrast, if the first Member State has *granted* the protection applied for in the form of subsidiary protection, Ireland could neither transfer the applicant to the first Member State [36] nor declare the application inadmissible on the basis of Article 33(2)(a) of Directive 2013/32, since that article does not apply to that Member State. Ireland could therefore be obliged to examine the application.

74. Thus, a decision favourable to the third-country national further to his or her first application would nevertheless place Ireland under an obligation to examine his or her subsequent application for international protection, whereas a situation in which a first decision has not yet been taken or is unfavourable to him or her would not oblige Ireland to examine such a subsequent application.

75. Those inconsistencies are due to the choices made by Ireland. As is clear from recital 41 of the Dublin III Regulation [37] and from recital 58 of Directive 2013/32, the legislature had indeed allowed that Member State to be subject to the application of the Dublin III Regulation without, however, taking part in the entire legislative framework specific to Dublin III. However, it did not provide for a solution in such an asymmetrical situation. It accepted in advance any choices made by that Member State without, however, laying down provisions to govern the situations arising from those choices and to avoid the inconsistencies identified.

76. As I have set out, the judgment in *Ibrahim* provides an answer to the question of whether or not there is an obligation on the second Member State to examine the substance of an application for asylum in two situations: the situation in which the application for asylum is covered by the Dublin II system and that in which that application comes within the scope of the Dublin III system. In *neither* of those situations is the second Member State *obliged* to examine the application for asylum if subsidiary protection has been granted in a first Member State. That Member State may either declare the application inadmissible (Dublin III system) or transfer the applicant to the first Member State (Dublin II system).

77. By contrast, that judgment does not answer the question – a question which is admittedly exceptional since it now concerns just one Member State – as to whether the second Member State must address the substance of an application for international protection where that Member State is subject to the Dublin III Regulation but not to Directive 2013/32, such that it remains subject to Directive 2005/85 and that application falls entirely under neither the Dublin III system nor the Dublin II system. With regard to questions of admissibility, how must Directive 2005/85 be applied within the context of the Dublin III Regulation?

78. In order to answer that question, it is necessary to examine that directive in the light of the objectives pursued by the legislature.

35 Article 18(1)(b) of the Dublin III Regulation provides that the Member State responsible is obliged to 'take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document'. That provision thus applies, inter alia, if the first Member State began to examine an application for international protection and the third-country national went to a second Member State whilst his application was *under examination*. Article 18(1)(d) of that regulation provides that the Member State responsible is obliged to 'take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document'. That provision thus applies, inter alia, if the first Member State *has rejected* the application for international protection and the third-country national makes a new application to the second Member State. In both cases, the second Member State may require the first Member State to take back the third-country national (in accordance with Articles 23 and 24 of the Dublin III Regulation) and, if that Member State accepts to take back the third-country national, the second Member State is required to notify that national of the decision to *transfer* him to the Member State responsible (in accordance with Article 26 of the Dublin III Regulation).

36 See order of 5 April 2017, *Ahmed* (C-36/17, EU:C:2017:273, paragraphs 27 and 28).

37 This recital states that the United Kingdom and Ireland notified their wish to take part in the adoption and application of the Dublin III Regulation, in accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of those two Member States in respect of the Area of Freedom, Security and Justice.

3. The interpretation of Directive 2005/85 in the light of the intention expressed by the legislature

79. As I have observed in point 62 of this Opinion, one of the legislature's fundamental objectives is to limit secondary movements.

80. I note that, if Ireland is required to examine applications lodged by third-country nationals on its territory even though they have already been granted subsidiary protection in a first Member State, that situation is liable to encourage such movements and thus run counter to the abovementioned objective. It will be in the interest of third-country nationals to attempt to obtain international protection in that other Member State in order to benefit from the living conditions prevailing there.

81. Since the legislature intended to allow the second Member States, within both the Dublin II and the Dublin III regulatory frameworks, not to process an application for asylum in the case where the third-country national already enjoyed subsidiary protection in a first Member State, that option must, in my view, likewise exist where a Member State, as in the case in the main proceedings, straddles those two regulatory frameworks.

82. Since transfer to the first Member State in order for that Member State to take back a third-country national is not provided for in the Dublin III Regulation, and since there is no longer any need for this in that context where subsidiary protection has been granted to that person by that Member State, I am of the view that the second Member State must be able, in the particular circumstances at issue, to reject the application as inadmissible, taking as its basis Directive 2005/85 as a whole and as applied in the context of the Dublin III Regulation.

83. Such an approach is wholly consistent with recital 22 of that directive. According to that recital, a Member State should not be obliged to assess the substance of an asylum application where a first country, whether a Member State or a third country, has already granted sufficient protection. I have already noted that the legislative intention expressed in that recital was given concrete expression in Article 25(2)(b) and (c) of the Directive with regard to third countries.

84. As regards the Member States, I would observe that, pursuant to Article 25(1) of Directive 2005/85, Member States were not obliged to examine the substance of an application for asylum if one of the grounds of inadmissibility listed in that article arises 'in addition to cases in which an application is not examined in accordance with [the Dublin II Regulation]'. In other words, the grounds of inadmissibility are in addition to the cases in which the Dublin II Regulation provided for the possibility of transferring the asylum applicant to the first Member State. That transfer option was expressly provided for in Article 16 of the Dublin II Regulation. [38]

85. It follows that provision was likewise made for Member States not to have to examine the substance of the application for asylum, in line with recital 22 of Directive 2005/85, within the context of the relationship between that directive and the Dublin II Regulation.

86. With the framework of the Dublin III system, I note that the content of recital 43 of Directive 2013/32 is, in essence, identical to that of recital 22 of Directive 2005/85. With regard to the Member States, recital 43 of Directive 2013/32 is given concrete expression in Article 33(2)(a) of that directive, by the express reference to a ground of inadmissibility, because transfers are no longer an option under the Dublin III Regulation.

87. This analysis reveals that, regardless of the system applicable, the legislature's intention was clearly not to compel the second Member State to examine an application for asylum where the third-country national has been granted subsidiary protection status.

38 See footnote 24 to this Opinion.

88. The solution that I propose is thus consistent with the aim pursued by the legislature in Directive 2005/85, as is apparent in particular from recital 22 of that directive. Furthermore, it appears to me to be the solution that is most in line with the logic behind the Dublin II and Dublin III systems and it makes it possible to avoid the inconsistencies identified in points 69 to 74 of this Opinion.

89. I would point out that this solution does not adversely affect the rights of the third-country national, as harmonised and consolidated by the Dublin III system, since the third-country national has been granted subsidiary protection status in a first Member State (here: Italy), which participates fully in that system.

90. This does, admittedly, amount to adding a ground of inadmissibility to those expressly listed in Directive 2005/85; however, I take the view that those grounds were designed solely to be applied in the context of the Dublin II Regulation, within the logic of the Dublin II system, and thus do not envisage Ireland's specific situation.[39]

91. The argument put forward by the applicants in the main proceedings, to the effect that, since the grounds of inadmissibility laid down in Article 25 of Directive 2005/85 introduce a derogation from the obligation on the Member States to examine the substance of the applications for asylum, those grounds should be interpreted restrictively, cannot invalidate the foregoing analysis. Such an argument cannot prevail if it were to culminate in an interpretation contrary to the objectives pursued by the legislature. In addition, as is apparent from that analysis, taking the view that Ireland is obliged to examine the application for asylum would run counter to those objectives and to the solutions adopted both within the context of the Dublin II system and within that of the Dublin III system for the 25 Member States which acceded to those systems in full.

92. I would add that the interpretation proposed in no way undermines the interpretation provided by the Court in the judgment in *Ibrahim* of Article 25(2) of Directive 2005/85 as regards both point (a) of that provision and all its other points. That interpretation remains wholly valid, including with regard to Ireland, where the facts of the case come entirely within the scope of the Dublin II Regulation, as in the *Magamadov* case.

93. I am therefore of the view that Directive 2005/85, read in the light of recital 22 thereof, does not preclude the second Member State from providing, in its legislation, that it may reject, as being inadmissible, an application for international protection made to it in the exceptional situation in which that Member State remains subject to that directive whilst being governed by the Dublin III Regulation.

94. In view of my analysis of the first and third questions referred for a preliminary ruling, I take the view that there is no need to address the second question referred. However, in so far as it may serve any purpose, I would point out that an application for international protection made by a third-country national after being granted subsidiary protection in a first Member State does not, in my view, constitute an abuse of rights per se. The EU legislature has recognised that third-country nationals may lawfully seek protection within the European Union where circumstances compel them to do so.[40]

39 Furthermore, I note that, in contrast to the wording of Article 33(2) of Directive 2013/32, Article 25(2) of Directive 2005/85 does not limit the list of the grounds of inadmissibility by using the word 'only'. I take the view that the wording of Article 25(2) of that directive thus allows the national legislature, in an asymmetrical situation such as that in which Ireland finds itself, to interpret those grounds more broadly.

40 See, inter alia, recital 1 of the Dublin II Regulation and of Directive 2005/85 as well as recital 2 of the Dublin III Regulation and of Directive 2013/32.

95. In addition, I note that a third-country national's attempt to secure refugee status in one Member State after being granted subsidiary protection status in another Member State has, as I have set out in this Opinion, been expressly provided for by the legislature within the framework both of the Dublin II Regulation and of the Dublin III Regulation. It cannot therefore be deemed to constitute an abuse of rights in general and abstract terms.

96. Accordingly, although improper conduct in efforts to be granted international protection cannot be ruled out in all situations, it should, at the very least, be examined on a case-by-case basis.[41]

V. Conclusion

97. In the light of the foregoing considerations, I propose that the Court answer as follows the questions referred for a preliminary ruling by the High Court (Ireland):

Article 25(2) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, examined in the context of the application of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, must be interpreted as not precluding Ireland from providing, in its national legislation, for a ground of inadmissibility allowing it to reject an application for international protection lodged by a third-country national in the case where that third-country national has already been granted subsidiary protection status in a first Member State.

41 Evidence of an abusive practice requires assessment, in particular, of whether the person concerned '[sought] to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it' (see, inter alia, judgments of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630, paragraph 58) and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 54)).