Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

31 January 2013*

(Request for a preliminary ruling — Common European Asylum System — Application by a national of a third country seeking refugee status — Directive 2005/85/EC — Article 23 — Possibility of prioritising the processing of asylum applications — National procedure applying a prioritised procedure for the examination of applications by persons belonging to a certain category defined on the basis of nationality or country of origin — Right to an effective judicial remedy — Article 39 of Directive 2005/85 — Concept of 'court or tribunal' within the meaning of that article)

In Case C-175/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 8 April 2011, received at the Court on 13 April 2011, in the proceedings

H.I.D.,

B.A.

v

Refugee Applications Commissioner,

Refugee Appeals Tribunal,

Minister for Justice, Equality and Law Reform,

Ireland,

Attorney General,

THE COURT (Second Chamber),

composed of A. Rosas (Rapporteur), acting as President of the Second Chamber, E. Juhász, U. Lõhmus, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2012,

* Language of the case: English.

after considering the observations submitted on behalf of:

— Ms D., by R. Boyle SC, A. Lowry BL and G. O'Halloran BL, instructed by A. Bello Cortés, Solicitor,

— Mr A., by R. Boyle, A. Lowry and G. O'Halloran, instructed by B. Trayers, Solicitor,

— Ireland, by E. Creedon, E. Burke, A. Flynn and D. O'Hagan, acting as Agents, and by M. Collins SC and D. Conlan Smyth, Barrister,

— the Greek Government, by M. Michelogiannaki and L. Kotroni, acting as Agents,

— the European Commission, by M. Condou-Durande and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 23 and 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

2 The request has been made in separate sets of proceedings between, on the one hand, Ms D. and Mr A., Nigerian nationals, and, on the other hand, the Refugee Applications Commissioner, the Refugee Appeals Tribunal, the Minister for Justice, Equality and Law Reform (the 'Minister'), Ireland and the Attorney General concerning the dismissal by the Minister, in the context of a prioritised procedure, of their applications for refugee status.

Legal context

European Union law

3 As is apparent from recital 2 in the preamble to Directive 2005/85, the conclusions of the Tampere European Council of 15 and 16 October 1999 provided for, inter alia, the establishment of a common European asylum system, based on the full and inclusive application of 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'), which entered into force on 22 April 1954. This Convention has been supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which itself entered into force on 4 October 1967, for the purpose of ensuring that nobody is sent back to a place where he or she risks suffering persecution again, that is to say, maintaining the principle of *non-refoulement*.

4 Pursuant to recitals 3 and 4 in the preamble to Directive 2005/85:

'(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

(4) The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.'

5 According to recital 8, the directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (the 'Charter').

6 Recital 11 in the preamble to the directive states:

'It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.'

7 The first sentence of recital 13 in the preamble to Directive 2005/85 is worded as follows:

'In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure.'

8 Recital 17 in the preamble to Directive 2005/85 states:

'A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.'

9 Recital 27 in the preamble to the directive specifies:

'It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article [267 TFEU]. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.'

10 Pursuant to the first subparagraph of Article 4(1) of Directive 2005/85, Member States are required to designate, for all procedures, a determining authority which will be responsible for an appropriate examination of the asylum applications in accordance with that directive. Under Article 2(e) of that directive, the term 'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I to that directive.

11 The examination carried out by that authority must comply with a number of basic principles and guarantees, set out in Chapter II of Directive 2005/85, which contains Articles 6 to 22.

12 Article 8(2) of the directive provides:

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

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

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

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

13 In addition, Article 9(1) and the first subparagraph of Article 9(2) of Directive 2005/85 provide that Member States must ensure that decisions on applications for asylum are given in writing, and that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

14 Likewise, under Article 10(1) of Directive 2005/85, applicants for asylum must benefit from a minimum of guarantees, such as being informed in a language which they may reasonably be supposed to understand, allowed access to the services of an interpreter, being able to communicate with the UNHCR, being given notice in reasonable time of the decision taken on their application for asylum or being informed of the result of the decision taken by the designated competent authority. In addition, the first subparagraph of Article 12(1) of the directive provides that an applicant for asylum must also be given an opportunity to have a personal interview on his or her application for asylum with a competent person before a decision is taken by the determining authority.

15 Under the heading 'Examination procedure', Article 23(1) to (3) of Directive 2005/85 provides:

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

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

...

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

16 Article 23(4) of the directive lists 15 specific reasons justifying the application of a prioritised or accelerated examination procedure.

17 Article 23(4) states in particular:

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

...

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under [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)]; or

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

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

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

...'

18 Article 39 of Directive 2005/85, entitled 'The right to an effective remedy', provides, inter alia, at paragraph (1)(a) that Member States must ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against any decision taken on their application for asylum.

19 Annex I to Directive 2005/85 provides that, when implementing the provisions of the directive, Ireland may consider that the term 'determining authority' under Article 2(e) of that directive is, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, to mean the Office of the Refugee Applications Commissioner (the 'ORAC'). In accordance with that annex, the 'decisions at first instance' provided for under that provision are to include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Irish law

20 The relevant legislation is the Refugee Act 1996, as amended by section 11(1) of the Immigration Act 1999, section 9 of the Illegal Immigrants (Trafficking) Act 2000 and section 7 of the Immigration Act 2003 ('the Refugee Act'). The Refugee Act sets out, inter alia, the procedural rules governing asylum applications.

The procedure governing the examination of an asylum application in Ireland

21 It is apparent from the judgment of the High Court of 9 February 2011, which is appended to the decision making the reference, that the procedure governing the examination of an asylum application is as follows.

22 Under section 8 of the Refugee Act the asylum application is made to the Refugee Applications Commissioner. Section 11 of the act provides that the latter, who is a member of the ORAC, is required to interview the applicant and to carry out such investigation and inquiry as is needed. Under section 13 of that act, he compiles a report in which he makes a positive or negative recommendation as to whether refugee status should be granted to the applicant concerned and submits that report to the Minister.

23 Under section 17(1) of the Refugee Act, if the recommendation of the Refugee Applications Commissioner is positive, the Minister is obliged to grant refugee status to the applicant concerned. Where it is recommended that refugee status should not be granted to the applicant, the latter may, pursuant to section 16 of the act, appeal against that recommendation to the Refugee Appeals Tribunal.

24 The appeal before the Refugee Appeals Tribunal may involve an oral hearing before a member of that Tribunal. Following that hearing the Refugee Appeals Tribunal is required to adopt a decision confirming or rejecting the recommendation of the Refugee Applications Commissioner. Where the Refugee Appeals Tribunal allows the appeal and finds that the recommendation must be positive, the Minister is required, under section 17(1) of the act, to grant refugee status. Conversely, where the

Refugee Appeals Tribunal confirms the negative recommendation of the Refugee Applications Commissioner, the Minister has a discretion which allows him to decide whether or not to grant refugee status.

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

26 It should also be noted that section 12 of the Refugee Act provides that the Minister may, where he considers it necessary or expedient to do so, give a direction in writing to the Refugee Applications Commissioner and/or to the Refugee Appeals Tribunal requiring either or both of them, as the case may be, to give priority to certain categories of applications. In accordance with section 12(1)(b) and (e), that priority may be given by reference to the country of origin or habitual residence of the applicants, or by reference to the dates on which the asylum applications were made.

27 On 11 December 2003, the Minister, acting pursuant to section 12(1)(b) and (e) of the Refugee Act, directed the Refugee Applications Commissioner and the Refugee Appeals Tribunal to give priority to asylum applications made by nationals of Nigeria on or after 15 December 2003 (the 'ministerial direction of 2003').

28 Ireland indicated in the written observations submitted to the Court and pointed out at the hearing that that ministerial direction was subsequently revoked, with effect from 1 March 2010, by letters dated 25 February 2010 addressed to the ORAC and to the Chairman of the Refugee Appeals Tribunal.

Provisions relating to the Refugee Appeals Tribunal

29 Section 15(1) of the Refugee Act provides for the establishment of an appeals board, entitled the 'Refugee Appeals Tribunal', to examine the appeals lodged under section 16 of that act and to take decisions on those appeals. Section 15(2) provides that the 'Tribunal shall be independent in the performance of its functions'.

30 Section 16 of the Refugee Act, entitled 'Appeals to Tribunal', provides:

'1. The applicant may appeal in the prescribed manner against a recommendation of the Commissioner under section 13 …

2. The Tribunal may –

(a) affirm a recommendation of the Commissioner, or

(b) set aside a recommendation of the Commissioner and recommend that the applicant should be declared to be a refugee.

...

2B. Where –

…

(b) the Minister notifies the Tribunal that he or she is of opinion that the applicant is in breach of subsection (4)(a), (4A) or (5) of section 9,

the Tribunal shall send to the applicant a notice in writing inviting the applicant to indicate in writing … whether he or she wishes to continue with his or her appeal and, if an applicant does not furnish an indication within the time specified in the notice, his or her appeal shall be deemed to be withdrawn.

...

3. An appeal under this section shall be brought by notice in writing within the period specified in section 13 …, and the notice shall specify the grounds of appeal and … shall indicate whether the applicant wishes the Tribunal to hold an oral hearing for the purpose of his or her appeal.

...

5. The Commissioner shall furnish the Tribunal with copies of any reports, documents or representations in writing submitted to the Commissioner under section 11 and an indication in writing of the nature and source of any other information relating to the application which has come to the notice of the Commissioner in the course of an investigation by him or her.

...

8. The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) and the High Commissioner whenever so requested by him or her with copies of any reports, observations, or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant or, as the case may be, the High Commissioner pursuant to section 11(6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section.

…

10. The Tribunal shall, where appropriate, following a notice under subsection (3), hold an oral hearing for the purpose of an appeal under this section.

11.

(a) For the purposes of an oral hearing … under this section, the Tribunal may –

(i) direct in writing any person whose evidence is required by the Tribunal to attend before the Tribunal … and there to give evidence and to produce any document or thing in his or her possession or control …,

(ii) direct any such person to produce any specified document or thing in his or her possession or control, or

(iii) give any other directions for the purpose of an appeal that appear to the Tribunal reasonable and just.

(b) Subparagraphs (i) and (ii) of paragraph (a) shall not apply to a document or thing relating to information as respects which the Minister or the Minister for Foreign Affairs, as the case may be, directs (which he or she is hereby empowered to do) that the information be withheld in the interest of national security or public policy (“*ordre public*”).

(c) The Tribunal shall enable the applicant and the Commissioner or an authorised officer to be present at the hearing and present their case to the Tribunal in person or through a legal representative or other person....

16. Before deciding an appeal under this section, the Tribunal shall consider the following:

(a) the relevant notice under subsection (3),

(b) the report of the Commissioner under section 13,

(c) any observations made to the Tribunal by the Commissioner or the High Commissioner,

(d) the evidence adduced and any representations made at an oral hearing, if any, and

(e) any documents, representations in writing or other information furnished to the Commissioner pursuant to section 11.

...'

31 The second schedule to the Refugee Act states that the Refugee Appeals Tribunal is to consist of a chairperson and such number of ordinary members as the Minister, with the consent of the Minister for Finance, considers necessary for the expeditious dispatch of the business of the Tribunal, each of whom must have had not less than five years' experience as a practising barrister or practising solicitor before his or her appointment. The members of the Refugee Appeals Tribunal are appointed by the Minister. Each ordinary member is appointed for a term of three years on such terms and conditions as the Minister may, subject to the provisions of that schedule, determine when appointing him or her. The chairperson carries out his or her duties under a written contract of service, containing such terms and conditions as the Minister, with the consent of the Minister for Finance, may from time to time determine. Each ordinary member receives remuneration, allowances and expenses which are to be determined upon the same conditions.

32 Paragraph 7 of the second schedule further specifies that an ordinary member of the Refugee Appeals Tribunal may be removed from office by the Minister for stated reasons.

The facts of the main proceedings and the questions referred for a preliminary ruling

33 In each of the two cases in the main proceedings, an asylum application was filed in Ireland by a Nigerian national who had entered Irish territory in 2008.

34 In the case of Ms D., the ORAC dismissed the asylum application in its report dated 15 August 2008 pursuant to section 13 of the Refugee Act. The processing of the appeal to the Refugee Appeals Tribunal against that dismissal has been deferred pending delivery of the judgment of the referring court in the cases in the main proceedings.

35 In the case of Mr A., the ORAC, in its report dated 25 August 2008, issued a negative recommendation in respect of the application of that Nigerian national, which was confirmed on appeal by the Refugee Appeals Tribunal by a decision of 25 November 2008.

36 Ms D. and Mr A. each appealed to the High Court seeking annulment of the ministerial direction of 2003 which sought to give priority to asylum applications from Nigerian nationals and, respectively, the report from the Refugee Applications Commissioner of 15 August 2008 and the decision of the Refugee Appeals Tribunal of 25 November 2008.

37 In the context of their respective appeals before the High Court, the applicants invoked two main arguments.

38 The first argument is that the ministerial direction of 2003 is illegal for the following reasons. It is, they contend, incompatible with Article 23(3) and (4) of Directive 2005/85, which contains an exhaustive list of circumstances in which an accelerated procedure may be used and does not include either prioritising or accelerating the examination of applications made by one group of nationals by reference to their nationality. In addition, it infringes the prohibition of discrimination based on nationality. In that regard, the applicants in the main proceedings invoked the existence of 'a procedural disadvantage' in relation to the other applicants for asylum who come from unsafe third countries, since less time and resources are devoted to priority cases, with the result that less attention is given to the question of whether an additional investigation or information is necessary for the examination of the applications and that, accordingly, there are less opportunities for applicants to supply additional information.

39 Their second argument relates to the fact that the possibility of lodging an appeal before the Refugee Appeals Tribunal against the ORAC report may not comply with the obligation set out in Article 39 of Directive 2005/85 to guarantee 'the right to an effective remedy before a court or tribunal'.

40 In support of this contention, the applicants submit that the Refugee Appeals Tribunal is not 'a court or tribunal' within the meaning of Article 267 TFEU for the following reasons.

41 Firstly, the jurisdiction of the Refugee Appeals Tribunal is not compulsory since the decision of the ORAC may also be judicially reviewed for legal validity by the High Court. Secondly, that jurisdiction is not exercised on an *inter partes* basis; the ORAC need not be represented at the appeal in order to defend its decision at first instance. Thirdly, the Refugee Appeals Tribunal is not independent because of the existence of functional links with the ORAC and the Minister, and because of certain powers of the latter.

42 In its judgment of 9 February 2011, the High Court dismissed both appeals before it and refused to grant the applicants' claims.

43 In relation to the first argument submitted by the applicants, the High Court regarded the organisational aspects of the asylum procedure as being left to the discretion of the Member States, as indicated by recital 11 in the preamble to Directive 2005/85. Article 23 of that directive, it found, is optional, non-exhaustive and contains no express limitation as to the type of application capable of being processed in priority. The High Court therefore found that Article 23 did not require Member States to grant priority to such cases any more than it excluded prioritisation in other cases.

44 As regards the argument relating to discrimination based on nationality, the High Court found that the difference in treatment was solely of an administrative nature and did not concern the substantive processing of the asylum applications, as, despite having been processed more quickly, the applications were reviewed in compliance with the principles and guarantees applicable to all asylum applications, including the requirements set out in Chapter II of Directive 2005/85. Though the applicants argued that they had been subject to a 'procedural disadvantage' as a result of the shortening of the time period for the examination of their asylum applications, the High Court found that they had not asserted any specific omission, illegality or infringement of those principles and guarantees in the processing of their applications. Finally, the High Court noted that the organisational difference resulting from the ministerial direction of 2003 was justified by the large number of applications lodged by Nigerian nationals, who represented 39% of the total number of applications for 2003, the year during which that ministerial direction was made.

45 Concerning the applicants' allegation relating to the lack of an effective remedy, the High Court found that the ORAC was 'the determining authority' referred to in Article 2(e) of Directive 2005/85, that the recommendation of the ORAC under section 13 of the Refugee Act was 'the decision at first instance' on the asylum application and that the appeal before the Refugee Appeals Tribunal was the effective remedy referred to in Article 39 of that directive. As that remedy was a full appeal on both matters of fact and law in the context of which the Refugee Appeals Tribunal could re-hear the claim, entertain new testimony and undertake additional inquiry, it was deemed to comply with the minimum requirements of Article 39.

46 The High Court also found that the Refugee Act required the Refugee Appeals Tribunal to be independent and that the provisions governing its establishment, its functioning and its organisation, as well as the appointment and remuneration of its members, were not substantially different to those of other statutory courts or tribunals having a similar role, and held that it constitutes a 'court or tribunal'.

47 The High Court is required to determine an application lodged by the applicants in the main proceedings seeking leave to appeal against its judgment of 9 February 2011 to the Supreme Court. Such an appeal can be exercised only if the High Court authorises the appeal and certifies that its decision involves a point of law of exceptional public interest and that it is desirable in the public interest that an appeal should be heard (in which case the High Court grants a certificate of leave to appeal).

48 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

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

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

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

49 At the referring court's request, the need to deal with this case under the urgent procedure provided for in Article 104b of the Court's Rules of Procedure, in the version applicable at the date of this request, was assessed. By decision of 2 May 2011, taken pursuant to the fourth subparagraph of Article 104b(1) of those rules, it was decided, after the Advocate General had been heard, not to accede to that request.

Consideration of the questions referred

The first question

50 By its first question the referring court asks, in essence, whether Article 23(3) and (4) of Directive 2005/85 must be interpreted as precluding a Member State from examining by way of an accelerated or prioritised procedure certain categories of asylum applications defined on the basis of the criterion of nationality or of the country of origin of the applicant.

51 In that regard, Ms D. and Mr A. submitted at the hearing that an asylum application may be processed by a prioritised or accelerated procedure under Article 23(3) of that directive only where it is well founded or on one of the 15 grounds set out in Article 23(4), when there is every indication that it is unfounded. Therefore, Member States are not entitled to submit the examination of asylum applications to such a procedure on the sole basis of the criterion of nationality or of the country of origin of the applicants.

52 In addition, the applicants in the main proceedings submit that the choice of an accelerated or prioritised procedure may relate only to an individual application and not to a category of applications. They note, inter alia, that Article 3 of the Geneva Convention states that Contracting States must apply the provisions of that Convention to refugees without discrimination as to race, religion or country of origin. Therefore, they submit that the establishment of an accelerated or prioritised procedure for a category of persons defined on the basis of such a criterion is contrary to the principle of non-discrimination on grounds of nationality.

53 Ireland submits that Article 23(3) of Directive 2005/85 should be interpreted in the light of Article 23 as a whole, as well as in the general context of that directive, taking account of its recitals, in particular recital 11, which recognises the principle of procedural autonomy of Member States in matters relating to the organisation of the processing of asylum applications.

54 That provision, it is submitted, does not preclude Ireland from granting priority to certain applications on the basis of the criterion of the nationality of the applicants for asylum. Indeed, it does not impose any constraint or limitation on Member States in relation to the establishment of categories of groups of applicants, provided that the examination process is carried out in compliance with the basic principles and guarantees set out in Chapter II of that directive.

55 According to Ireland, Article 23(4) of Directive 2005/85 cannot be interpreted in isolation, without taking account of, in particular, Article 23(3) or of the remainder of the directive as a whole. That conclusion is apparent from, firstly, the use in paragraph 4 of the adverb 'also', which seeks to develop the basic provision set out in paragraph 3, and, secondly, from the fact that paragraph 4 sets out a non-exhaustive list of cases in which a Member State is authorised to process asylum applications in priority or to accelerate their examination. Such an interpretation is, moreover, that endorsed by the UNHCR, which expresses the opinion, in a report published in March 2010, that, in the light of the content of Article 23(3) of Directive 2005/85, the extensive list of optional grounds for prioritised or accelerated processing which appears in paragraph 4 of that article is 'merely illustrative'.

56 Ireland submits, in addition, that the difference in treatment applied to nationals of certain third countries has no incidence on the material rights conferred by Directive 2005/85. Thus, after the entry into force of the ministerial direction of 2003, all asylum applications, whether prioritised or not, benefited from a detailed examination. The difference between prioritised and non-prioritised applications takes place at the level of the ORAC and concerns the periods relating to the timetable of interviews as well as the drafting and issuing of the reports required under the Refugee Act. All applicants, whether their application is prioritised or not, benefit from the right of appeal before the Refugee Appeals Tribunal; there is no procedural or material difference between the appeals lodged with the Tribunal according to whether the applications are prioritised or not.

57 In order to answer the first question, it should be noted at the outset that, as set out in recitals 3 and 4 and in Article 1 of Directive 2005/85, the directive's purpose is to establish common minimum standards for fair and efficient asylum procedures in the Member States.

58 The procedure for granting and withdrawing refugee status relies, as appears from recital 8 in the preamble to Directive 2005/85, on compliance with the fundamental rights and principles recognised by, inter alia, the Charter. The provisions contained in Chapter II of that directive set out the basic principles and guarantees in accordance with which, pursuant to Article 23(1) of the directive, Member States must process all asylum applications within the framework of an examination procedure.

59 Article 23(2) of that directive provides that Member States must ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

60 The importance of expediency in processing asylum applications is, as appears from recital 11 in the preamble to the directive, shared both by Member States and by applicants for asylum.

61 In that context, Article 23(3) and (4) of Directive 2005/85 confers upon Member States the possibility of applying a prioritised or accelerated procedure to asylum applications.

62 That possibility for Member States to provide for the prioritised processing of an asylum application must be interpreted in the light of the discretion which Member States enjoy in relation to the organisation of the processing of such applications.

63 At paragraph 29 of the judgment in Case C-69/10 *Samba Diouf* [2011] ECR I-7151, the Court has already stressed the fact that Member States enjoy, in a number of respects, a discretion with regard to the implementation of the provisions of Directive 2005/85 in the light of the particular features of national law.

64 In the course of the drafting of Directive 2005/85, the European Union legislature stated that Member States enjoy a discretion when implementing the procedure for granting and withdrawing refugee status. Thus, at point 2 of its proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final), the European Commission made clear that all standards for operating a fair and efficient procedure are laid down without prejudice to Member States' discretionary power to prioritise cases on the basis of national policies.

65 The same intention of the European Union legislature to leave a broad discretion to Member States is found in the actual text of Directive 2005/85, inter alia in the wording of recital 11 and Article 23, which deal with the examination procedure.

66 Thus, the second sentence of recital 11 in the preamble to Directive 2005/85 provides that the organisation of the processing of asylum applications should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in that directive.

67 The wording of Article 23(3) of Directive 2005/85 points to the same intention. Under that provision, Member States 'may' prioritise an application or accelerate its examination, 'including' where the application is likely to be well founded or where the applicant has special needs.

68 As the Commission maintains, the terms used ('any examination') indicate that the possibility given to Member States to prioritise certain asylum applications or to accelerate their examination cannot be limited to the cases set out in Article 23(3). The use of the term 'including' in Article 23(3) implies that such a procedure may be applied to both well-founded and unfounded applications.

69 Likewise, under Article 23(4) of Directive 2005/85, Member States 'may' prioritise or accelerate the procedure on the basis of one of the 15 specific grounds justifying the implementation of such a procedure.

70 As Ireland and the Greek Government submit, it follows from the wording of Article 23(3) and (4) that the list of applications which can be subject to prioritised or accelerated examination is indicative and non-exhaustive. Member States may thus decide to examine in priority, or by way of an accelerated procedure, applications which do not fall within any of the categories listed in paragraph (4), provided that they comply with the basic principles and guarantees set out in Chapter II of Directive 2005/85.

71 As to the principle of non-discrimination, relied on by the applicants in the main proceedings, it should be noted that, in matters of asylum and, in particular, under the system established by Directive 2005/85, the country of origin and, consequently, the nationality of the applicant play a decisive role, as appears from both recital 17 and Article 8 of the directive. It is clear from Article 8(2)(b) of the directive that the country of origin of the applicant has a bearing on the determining authority's decision, given that the determining authority is required to keep abreast of the general situation existing in that country in order to determine whether a danger exists for the applicant for asylum and, if necessary, whether that person has need of international protection.

72 In addition, as appears from recital 17 in the preamble to Directive 2005/85, the European Union legislature introduced the concept of 'safe country of origin' according to which, when a third country may be regarded as safe, Member States should be able to designate it as safe and presume that a particular applicant will be safe there. The European Union legislature therefore provided under Article 23(4)(c) of that directive that Member States may decide that an examination procedure be prioritised or accelerated in the case where the asylum application is considered unfounded because the applicant is from a safe country of origin within the terms of that directive.

73 It follows, as the Advocate General has noted in point 67 of his Opinion, that the nationality of the applicant for asylum is an element which may be taken into consideration to justify the prioritised or accelerated processing of an asylum application.

74 Nonetheless, it must be stated that, in order to avoid any discrimination between applicants for asylum from a specific third country whose applications might be the subject of a prioritised examination procedure and nationals of other third countries whose applications are subject to the normal procedure, that prioritised procedure must not deprive applicants in the first category of the guarantees required by Article 23 of Directive 2005/85, which apply to all forms of procedure.

75 Thus, the establishment of a prioritised procedure such as that in the main proceedings must allow in full the exercise of the rights that that directive confers upon applicants for asylum who are Nigerian nationals. In particular, the latter must enjoy a sufficient period of time within which to gather and

present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin.

76 In its request for a preliminary ruling, the High Court noted that the applicants in the main proceedings had not invoked before it any factor capable of establishing that the prioritised processing required by the ministerial direction of 2003 gave rise to any infringement of the basic principles and guarantees set out in Chapter II of Directive 2005/85 and, in its judgment on the merits of 9 February 2011, it found that the applications of Ms D. and Mr A. had been examined in accordance with those basic principles and guarantees.

77 It follows from the foregoing that Article 23(3) and (4) of Directive 2005/85 must be interpreted as not precluding a Member State from examining by way of prioritised or accelerated procedure, in compliance with the basic principles and guarantees set out in Chapter II of that directive, certain categories of asylum applications defined on the basis of the criterion of the nationality or country of origin of the applicant.

The second question

78 By its second question the referring court asks, in essence, whether Article 39 of Directive 2005/85 must be interpreted as precluding national legislation in asylum matters such as that at issue in the main proceedings, which establishes a system relating to the procedures for granting refugee status which has various features of an administrative or organisational nature.

79 The referring court seeks to ascertain, in particular, whether legislation such as that at issue in the main proceedings, which provides for an appeal against the decisions of the determining authority before the Refugee Appeals Tribunal, the status of which as an independent court or tribunal is disputed by the applicants in the main proceedings, respects the requirement of an effective remedy as provided for under Article 39 of Directive 2005/85.

80 Article 39(1)(a) of Directive 2005/85 states that the Member States must ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum. The principle of effective judicial protection, which is a general principle of European Union law, is enshrined in Article 47 of the Charter (see, to that effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 29 and 31, and *Samba Diouf*, paragraph 49).

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

82 The applicants in the main proceedings submit, inter alia, that the Refugee Appeals Tribunal is not ‘a court or tribunal’ within the meaning of that article.

83 In this regard, it must be borne in mind that, according to settled case-law of the Court, in order to determine whether a body making a reference is ‘a court or tribunal’ for the purposes of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; Case C-517/09 *RTL Belgium* [2010] ECR I-14093, paragraph 36; and Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37).

84 It is common ground, regard being had to the observations submitted to the Court both by the applicants in the main proceedings and by the Member States and the institutions, that the Refugee Appeals Tribunal meets the criteria of establishment by law, permanence and application of rules of law.

85 By contrast, the applicants in the main proceedings contest the assertions that that Tribunal has compulsory jurisdiction, that the procedure before it is *inter partes* and that it is independent.

86 In that regard, it should be noted, firstly, that, in accordance with sections 15 and 16(1) of the Refugee Act, the Refugee Appeals Tribunal is the competent tribunal to examine and rule on appeals brought against the recommendations of the Refugee Applications Commissioner, which are the decisions at first instance on asylum applications in accordance with Annex I, second indent, to Directive 2005/85.

87 In addition, in the event that the appeal before the Refugee Appeals Tribunal is upheld, the Minister is obliged, in accordance with section 17(1) of that act, to grant refugee status. It is only in the case where the Refugee Appeals Tribunal does not uphold the appeal brought by the applicant for asylum that refugee status may nonetheless be granted to him by the Minister. The Minister therefore has no discretion where the Refugee Appeals Tribunal has taken a decision favourable to the applicant for asylum. Positive decisions of the Refugee Appeals Tribunal have, to that effect, binding force and are binding on the State authorities.

88 Secondly, it should be noted that the requirement that the procedure be *inter partes* is not an absolute criterion (See Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 31).

89 In that regard, the ORAC's participation as a party to the appeal proceedings before the Refugee Appeals Tribunal to defend the decision taken at first instance is not an absolute requirement.

90 By contrast, it is important to note that section 16(5) of the Refugee Act provides that the Refugee Applications Commissioner must provide to the Refugee Appeals Tribunal copies of all reports, documents or representations in writing submitted to him under section 11 of that act, as well as a written indication of the nature and source of any other information concerning the application of which he has become aware in the course of his investigation. In accordance with section 16(8), the Refugee Appeals Tribunal provides the applicant and his solicitor, as well as the United Nations High Commissioner for Refugees, at its request, with copies of those documents.

91 Furthermore, in accordance with section 16(10) and (11)(a) and (c) of the Refugee Act, the Refugee Appeals Tribunal may also hold a hearing during which it may direct any person whose evidence is required to attend, and hear both the applicant and the Refugee Applications Commissioner present their case in person or through a legal representative. As a consequence, each party has the opportunity to make the Refugee Appeals Tribunal aware of any information necessary to the success of the application for asylum or to the defence.

92 In addition, section 16(16) provides that, before deciding an appeal, the Refugee Appeals Tribunal must consider, among other things, the report of the Refugee Applications Commissioner, any observations made by the latter or by the United Nations High Commissioner for Refugees, the evidence adduced and any representations made at an oral hearing, and any documents, representations in writing or other information furnished to the Refugee Applications Commissioner.

93 It follows that the Refugee Appeals Tribunal has a broad discretion, since it takes cognisance of both questions of fact and questions of law and rules on the evidence submitted to it, in relation to which it enjoys a discretion.

94 Thirdly, the applicants in the main proceedings submit that the Refugee Appeals Tribunal is not independent, as organisational links exist between it, the ORAC and the Minister for Justice and its members are subject to outside pressure. In particular, they argue, the rules governing the appointment, length of service and cancellation of the appointments of its members and other aspects of its members' terms of office deprive that tribunal of its independence.

95 In accordance with the case-law of the Court, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 36, and *RTL Belgium*, paragraph 38).

96 There are two aspects to that concept. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 50 and 51, and *RTL Belgium*, paragraph 39). The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (*Wilson*, paragraph 52, and *RTL Belgium*, paragraph 40).

97 The Court has also stated that such guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In that regard, in order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions (see order in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 24 and the case-law cited).

98 In the present case, section 15(2) of the Refugee Act provides that the Refugee Appeals Tribunal is independent in the performance of its functions. In addition, though the Minister retains residual discretion to grant refugee status despite a negative decision on an asylum application, it should be noted that, where the Refugee Appeals Tribunal finds in favour of the applicant for asylum, the Minister is bound by the decision of that tribunal and is therefore not empowered to review it.

99 As for the rules governing the appointment of members of the Refugee Appeals Tribunal, these are not capable of calling into question the independence of that tribunal. The members of the Tribunal are appointed for a specific term from among persons with at least five years' experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister do not differ substantially from the practice in many other Member States.

100 With regard to the issue of the removal of members of the Refugee Appeals Tribunal, it follows from paragraph 7 of the second schedule to the Refugee Act that the ordinary members of that tribunal may be removed from office by the Minister. The Minister's decision must state the reasons for such removal.

101 As noted by the Advocate General at point 88 of his Opinion, the cases in which the members of the Refugee Appeals Tribunal may be removed from office are not defined precisely by the Refugee Act. Nor does the Refugee Act specify whether the decision to remove a member of the Refugee Appeals Tribunal is amenable to judicial review.

102 Nonetheless, as the second sentence of recital 27 in the preamble to Directive 2005/85 states, the effectiveness of the remedy, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State considered as a whole. It is therefore

necessary to assess as a whole the Irish system of granting and withdrawing refugee status in order to determine whether it is capable of guaranteeing the right to an effective remedy as provided for under Article 39 of that directive.

103 In the present case, under section 5 of the Illegal Immigrants (Trafficking) Act 2000, applicants for asylum may also question the validity of recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.

104 In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy.

105 Consequently, the answer to the second question is that Article 39 of Directive 2005/85 does not preclude national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal, and to bring an appeal against the decision of that tribunal before a higher court such as the High Court, or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court.

Costs

106 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 23(3) and (4) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status must be interpreted as not precluding a Member State from examining by way of prioritised or accelerated procedure, in compliance with the basic principles and guarantees set out in Chapter II of that directive, certain categories of asylum applications defined on the basis of the criterion of the nationality or country of origin of the applicant.**

2. **Article 39 of Directive 2005/85 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal (Ireland), and to bring an appeal against the decision of that tribunal before a higher court such as the High Court (Ireland), or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court (Ireland).**

[Signatures]