THE COURT OF APPEAL

Peart J.
Irvine J.
Hogan J.

2015 No. 296

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGATION ACT 1999, E.U. COUNCIL DIRECTIVE 2005/85, S.I. 51 OF EUROPEAN COMMUNITIES (ASYLUM PROCEDURES) REGULATIONS 2011 AND SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN /

N. M. (DRC)

APPLICANT/

RESPONDENT

- AND –

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT/

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of July 2016

1. This is an appeal taken by the Minister for Justice, Equality and Law Reform against the decision of the High Court (Barr J.) delivered on 18th December 2014: *N.M. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 638. In that decision Barr J. held that the internal review procedure provided by the Minister against adverse decisions at first instance refusing to admit an otherwise failed asylum seeker back into the asylum process did not comply with the effective remedy requirements of Article 39 of Council Directive 2005/85/EC ("the Procedures Directive"). This appeal accordingly raises an important point of EU law concerning the interpretation and requirements of Article 39 of the Procedures Directive.

2. Before examining this legal issue, it is necessary first to set out the background to the appeal. The applicant is a national of the Democratic Republic of Congo ("DRC") who arrived in Ireland and made a claim for asylum on 25thApril 2008. She had contended that she was of Rwandan parentage and that by reason of an allegation of espionage she was at risk from the authorities in the DRC.

3. The Refugee Applications Commissioner refused her application and the Refugee Appeals Tribunal subsequently upheld this decision on 18th February 2011. The Minister subsequently refused her a declaration of refugee status pursuant to s.17 of the Refugee Act 1996 ("the 1996 Act"). On 30th March 2011 the applicant then applied to the Minister for subsidiary protection, claiming that she was at risk of torture and inhuman and degrading treatment in the DRC. The Minister refused this application and in September 2011 a deportation order was made against her.

4. The applicant's solicitors then made an application pursuant to s. 3(11) of the Immigration Act 1999 ("the 1999 Act") seeking the revocation of the order. In October 2012 the applicant sought re-admission to the asylum process pursuant to s.17 (7) of the 1996 Act on the ground, effectively, that she was now a refugee *sur place*. Her contention in this regard was that, based on contemporary newspaper reports (which she exhibited with her application), the DRC had a policy of ill-treating those of its citizens who had unsuccessfully applied for asylum status abroad following their return to their country of origin. The Minister refused this application for re-admission, but the applicant was nonetheless advised that she was entitled to a review of that decision.

5. The applicant then applied for a review of the decision which was carried out by a more senior official attached to the Ministerial Decisions unit of the Department. Following the review process a fresh adverse decision was subsequently communicated to the applicant on 7th February 2013. In the meantime, however, the applicant's solicitors had written to the Minister contending that the review process proposed by the Minister did not accord with the provisions of the Procedures Directive and, specifically, Article 39 thereof. This argument was not accepted by the Minister. The applicant then commenced the present judicial review proceedings in which the compatibility of the present review procedures with Article 39 of the Procedures Directive was directly put at issue.

6. This, accordingly, is, in outline, the background to these judicial review proceedings and to the present appeal. The key issue, therefore, is, as I have just stated, whether the procedure set out in the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51 of 2011) ("the 2011 Regulations") is lawful having regard to the provisions of the Procedures Directive and in particular Article 39 thereof. It is accordingly necessary for this purpose first to set out the relevant portions of the 1996 Act, as amended, and then to examine the relevant provisions of the Procedures Directive.

Section 17(7) of the Refugee Act 1996

7. Provision for re-admission into the asylum system was originally contained in s. 17 of the 1996 Act. Section 17 was, however, heavily amended by the 2011 Regulations, which were themselves made by the Minister pursuant to s. 3 of the European Communities Act 1972 "for the purpose of giving further effect" to the Procedures Directive.

8. Section 17(7) of the 1996 Act (as inserted by Article 8(a) of the 2011 Regulations) provides:

> "(7) A person to whom the Minister has refused to give a declaration may not make a subsequent application for a declaration under this Act without the consent of the Minister.'

9. Section 17(7A) *et seq*. of the 1996 Act (as inserted by Article 8(b) of the 2011 Regulations) provides:

"(7A) The consent of the Minister referred to in subsection (7):

(a) may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and

(b) shall be given if, following the preliminary examination referred to in paragraph (a), new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee.

(7B) An application for the consent referred to in subsection (7) shall be accompanied by:

(a) a written statement of the reasons why the person concerned considers that the Minister should consent to a subsequent application for a declaration being made,

(b) where the previous application or appeal was withdrawn or deemed to be withdrawn, a written explanation of the circumstances giving rise to the withdrawal or deemed withdrawal of the application or appeal,

(c) all relevant information being relied upon by the person concerned to demonstrate that he or she is entitled to protection in the State, and

(d) a written statement drawing to the Ministers attention any new elements or findings relating to the investigation of whether he or she is entitled to protection in the State which have arisen since his or her previous application for a declaration was the subject of a notice under subsection (5).

(7C) The Minister shall, as soon as practicable after receipt by him or her of an application under subsection 7B, give or cause to be given to the person concerned a statement in writing specifying, in a language that the person may reasonably be supposed to understand:

(a) the procedures that are to be followed for the purposes of subsections (7) to (7H),

(b) the entitlement of the person to communicate with the High Commissioner,

(c) the entitlement of the person to make submissions in writing to the Minister,

(d) the duty of the person to co-operate with the Minister and to furnish information relevant to his or her application, and

(e) such other information as the Minister considers necessary to inform the person of the effect of subsections (7) to (7H), and of any other relevant provision of this Act or of the Regulations of 2006.

(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that:

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16).

(7E) Pursuant to an application under subsection (7B) by or on behalf of a person who the Minister has, under Regulation 4(5) of the Regulations of 2006, determined not to be a person eligible for subsidiary protection, the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that:

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for protection in the State, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16) or, as the case may be, for the purposes of his or her application for subsidiary protection under Regulation 4 of the Regulations of 2006.

(7F) Where the Minister consents to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact.

(7G) Where the Minister refuses to consent to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact and of the reasons for it and of how a review of that decision may be sought.

(7H) In this section, 'protection' has the same meaning as it has in the Regulations of 2006.'"

Articles 32, 34 and 39 of the Procedures Directive

10. It is next necessary to set out the relevant provisions of the Procedures Directive. Chapter III of the Procedures Directive is headed "Procedures at First Instance" and section IV (comprising Articles 32 to 34) deals with subsequent applications. Chapter V deals with appeals procedure and it comprises a single article, Article 39, which is headed "The right to an Effective Remedy."

11. Before considering these provisions, it is also worth observing that Recital 27 to Directive 2005/85 states:

> "It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole."

12. Turning now to the substantive provisions, it may be noted that Article 32 is headed "Subsequent application" and provides:

> 1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.
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> 2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:(a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;(b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.
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> 3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.
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> 4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II…
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> Article 34
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> 1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).
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> 2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, *inter alia*:
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> (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
>
> (b) (b) […]
>
> (c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview. The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.
>
> 3. Member States shall ensure that:
>
> (a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision;
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> (b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible."

13. Chapter V is headed "Appeals Procedures" and it comprises of one single provision, namely, Article 39. Article 39 is in the following terms:

> 1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:…
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> (c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;
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> 2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.
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> 3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
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> (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;
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> (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have

the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c)."

The procedure provided for by the 2011 Regulations

14. The essential issue on this appeal is whether the procedures provided in the 2011 Regulations constitute an adequate transposition of the Article 39(1)(c) of the Procedures Directive. It is not really disputed but that the form of internal review provided by the 2011 Regulations would not be regarded as the equivalent of a decision of a court or tribunal which was independent of the first instance decision maker. In fact, under the Carltona doctrine (*Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560) both decisions would be regarded in law as having been taken by civil servants (of admittedly different rank) in the name of the Minister. Where the Minister parts company with the applicant's analysis is that she (i.e., the Minister) says that it is the availability of the remedy of judicial review to quash any refusal to re-admit an applicant to the asylum process which constitutes the effective remedy for the purposes of Article 39(1)(c).

The judgment of the High Court

15. In his judgment in the High Court Barr J. found that the availability of judicial review did not satisfy the requirements of an effective remedy for the purposes of Article 39. He noted:

"The applicant has stated that the remedy of judicial review cannot be seen as an "*effective remedy*" due to the limitations on the jurisdiction of the court when considering a judicial review application. The jurisdiction of the court is limited in a number of ways. The court cannot reverse the earlier decision and substitute its own findings of fact on the substantive issues. The court can only annul the earlier decision and remit the matter back to a different decision maker for further consideration. The court cannot look at more up to date country information. It is confined to a consideration of the information that was before the decision maker at the time he made the decision under review. There is no doubt that the court in exercising its judicial review jurisdiction is limited in the role that it plays. It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision maker. Under the system put forward by the respondent, the applicant, if dissatisfied with the decision made by the higher official, can only apply to the court if she can point to some fault in the decision making process on the part of the decision maker. She cannot simply appeal to the High Court. She is only permitted to seek annulment of the decision on one of the grounds on which *certiorari* is granted by the court."

16. Barr J. then to say that the present case could be distinguished from the decision of the Court of Justice in Case C-175/11 *H.I.D. & B.A. v. Refugee Appeals Tribunal* EU:C:2013:45. In that case it was held that the initial asylum procedure under the 1996 Act, whereby the decision of ORAC could be appealed to the RAT - which is an independent Tribunal whose members are protected from interference due to the existence of the remedy of judicial review – constituted an effective remedy. In its judgment, the Court of Justice rejected the argument that this right of appeal did not constitute an effective remedy. The Court held at paras. 103 – 105, as follows:

"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."

17. Barr J. noted that Cooke J. had subsequently explained the effect the judgment of the CJEU in his decision in *H.I.D. & Anor. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 146 after the matter had been returned to the High Court, where he held as follows at paras. 14-15:

"14. In the concluding paras. 102 – 105, the Court of Justice deals with the question as to whether the independence of the Tribunal, which is otherwise clear, could be said to be jeopardised by the absence of statutory definition of removal grounds by pointing out that the effectiveness of the remedy required by Article 39 "depends on the administrative and judicial system of each Member State considered as a whole". That system includes the availability of judicial review before the High Court both in respect of the recommendations of the ORAC and the decisions of the RAT together with the fact that the decisions may also be susceptible of being appealed to the Supreme Court. The Court finds, at para 103:

"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".

It then rules in the following paragraph:

"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".

> Contrary to the submission made on behalf of the applicants to this Court, the Court of Justice is not therefore treating the availability of an application for judicial review before the High Court as an integral part of the asylum process as if it were a further appeal against the decision of the Tribunal and therefore a part of the "effective remedy" for the purpose of Article 39. Quite clearly, what the Court is addressing in those paragraphs is the argument that the Tribunal could not be considered to be "independent" so long as the Minister had an entitlement to remove individual members thereby exposing the membership to the threat of external interference or influence.

15. In the judgment of the Court, the intention and effect of the ruling of the Court of Justice is that it is the nature and extent of the jurisdiction available in the judicial system as a whole, including the availability of remedies by way of administrative law review, that renders the remedy "effective" because members of the Tribunal are protected against external interference (including improper influence on the part of the Minister or the State) by the availability of judicial review of any removal decision. Equally, the availability of judicial review of individual asylum decisions of the RAT rejecting appeals operates as an assurance that such decisions can, if necessary, be protected from external interference."

18. Barr J. then observed:

> "It seems to me, therefore, that the central point of the judgment of the CJEU in *H.I.D.* is that it was the combination of the power of the High Court by way of judicial review, together with the particular characteristics of the Refugee Appeals Tribunal, that led the court to find that the RAT was an independent court or tribunal for the purposes of Article 39 of the Procedures Directive, and that therefore the right of appeal to the RAT constituted an effective remedy, when looked at in the context of the administrative and judicial system as a whole. I am of the view that the present case may be distinguished from the circumstances pertaining in *H.I.D.* In that case, having applied the relevant test, the CJEU found that the RAT was a court or tribunal for the purposes of Article 39 of the Procedures Directive and that its independence was safeguarded by the availability of judicial review. In other words, it was the combination of the right to an appeal to the RAT, and the availability of judicial review to quash the Tribunal's decision, that meant that the Tribunal was an effective remedy. In the present case, however, in the context of a s. 17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken as a whole in respect of s. 17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal. In the circumstances, the court is satisfied that the review procedure under the statutory instrument and the supervisory role of the High Court in exercising its judicial review jurisdiction does not constitute an "effective remedy" before a court or tribunal as required by Article 39 of the Directive."

Whether judicial review provides an effective remedy for the purposes of Article 39: the decision of the Court of Justice in Diouf

19. The leading decision of the Court of Justice in respect of the proper interpretation of Article 39 is that in Case C-69/10 *Diouf*. Given the manifest importance of that decision, it is, perhaps, convenient to examine the terms of the judgment in a little detail.

20. In that case the applicant applied for asylum in Luxembourg, alleging that he fled slavery in Mauritania, together with persecution by his former employer. His application was dealt with by the Luxembourg authorities under an accelerated procedure and it was rejected as unfounded. The applicant had been informed that he had been dealt with under the accelerated procedure because:

> (a) he clearly did not qualify for the status conferred by international protection and
>
> (b) he had misled the authorities by presenting false information or documents.

21. The applicant then applied to the *Tribunal Administratif* in which he sought to have the decision to place him under the accelerated procedure annulled. The Tribunal noted that under Luxembourg law a decision to apply the accelerated procedures was not - unlike the substantive decision to grant or refuse protection - open to any appeal, a matter which itself raised questions concerning the right to an effective remedy under Article 39 of the Procedures Directive. The Tribunal accordingly referred the following two questions to the CJEU:

> "1. Is Article 39 of Directive 2005/85/EC to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the … Law [of 5 May 2006], pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?
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> 2. If the answer [to the first question] is in the negative, is the general principle of an effective remedy under Community law, prompted by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the … Law [of 5 May 2006], pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?"

22. The Court of Justice observed (at para. 41 of the judgment) that although Article 39 of the Procedures Directive requires that applicants must have the right to an effective remedy against decisions 'taken on their application for asylum', this provision covers "a series of decisions which, because they entail rejection of an application for asylum or are taken at the border, amount to a final decision rejecting the application on the substance." This meant that decisions which were in fact preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure were not covered by that provision. Accordingly the Court concluded that:

> "Article 39(1) … must be interpreted as not requiring national law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure".

23. The Court accordingly agreed with the opinion of Advocate General Cruz Villalón that a contrary conclusion:

> "would not be consistent with the interest in the expediency of procedures relating to applications for asylum."

24. The Court then proceeded on to hold (at para. 56) that:

> "the absence of a remedy *at that stage of the procedure* does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application."

25. What was, nevertheless important, according to the Court, was that:

> "the reasons *justifying* the use of an accelerated procedure may be effectively challenged *at a later stage* before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum".

26. The Court accordingly held in essence that while judicial review of a decision to place on the accelerated procedure must not be wholly precluded, but may nonetheless be delayed until the review of the substantive final decision on the merits of the asylum application ultimately takes place.

27. The Court noted that the essence of the right to an effective remedy meant (at para. 61) that:

> "….the national court hearing the case must establish whether the decision to examine an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees."

28. It is, perhaps, significant that the Court of Justice did not regard the fact that Luxembourg law simply provided for the annulment of the decision as depriving that remedy of the quality of an effective remedy for the purposes of Article 39. This is borne out by the final disposition of the Court in its judgment:

> "On a proper construction, Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and the principle of effective judicial protection, do not preclude national rules such as those at issue in the main proceedings, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application – a matter which falls to be determined by the referring court."

The decisions in PM (Botswana)

29. Many of these issues concerning the scope of Article 39 had also been ventilated before me in three separate judgments which I delivered (as a judge of the High Court) in the *PM (Botswana)* litigation between 2011 and 2012. There were essentially two issues which arose in this litigation. First, did the right to an effective remedy imply that the court or tribunal was sufficiently independent and, if so, was the Refugee Appeals Tribunal to be regarded as independent for this purpose. Second, did the availability of the remedy of judicial review mean that the applicant had access to an effective remedy within the meaning of Article 39?

30. In the first judgment, which was delivered on 28th October 2011, I noted that the applicant's case was squarely based on the contention that s. 17 procedure contained in the 1996 Act was *ultra vires* the provisions of Article 39(1) of the Procedures Directive) on the basis that no effective remedy has been provided against the decision of the Minister to refuse the applicant a declaration of refugee status. In that judgment I ruled adversely to that claim, saying:

> "I am of the view that even if the Minister's decision to refuse to grant the applicant a declaration of refugee status under s. 17(1)(b) of the 1996 Act comes within the scope of Article 39.1 of the Procedures Directive, this will be of little consequence in itself, since the Irish law of judicial review guarantees her an effective remedy. The applicant has not in any event specified how Irish law failed to afford an effective remedy. For these reasons, I will refuse the applicant leave to apply for judicial review on the grounds canvassed in this judgment. Insofar as the applicant seeks to rely on the issues referred to the Court of Justice in *HID*, I will adjourn the balance of that application for leave pending the outcome of the reference."

31. The reference to *HID* was to Case C-175/*11 HID v. Refugee Applications Commissioner*, a case which had been referred by Cooke J. to the Court of Justice and which Article 267 TFEU reference was still pending when that judgment was delivered. The reference in *HID* effectively asked the Court of Justice to address questions of institutional independence on the part of the Refugee Appeal Tribunal and the guarantee of an effective remedy. The effect, nevertheless, of my judgment was that I had rejected the applicant's claim save only insofar as it raised issues which were to be governed by the outcome of *HID*.

32. Following the delivery of that judgment the applicant then applied for a certificate for leave to appeal to the Supreme Court pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. On 31st January 2012 I delivered a second judgment in this matter, *PM v. Minister for Justice and Law Reform (No.2)* [2012] IEHC 234 dealing with the application for a certificate for leave to appeal. Dealing with the institutional point I observed:

> "The essence of Ms. M.'s claim in respect of the lack of institutional guarantees is that she has been denied an effective remedy in respect of her appeal from the Office of the Refugee Applications Commissioner to the Refugee Appeal Tribunal on the ground that the latter body lacks the basic institutional guarantees of independence and impartiality. It is clear from the decision of the Court of Justice in *Wilson* Case C-506/14 [2006] E.C.R. I-8613 that an appeal to a body which lacked such guarantees might well involve an infringement of the right to an effective remedy. This, however, is perhaps just another way of expressing the point which is the subject of a reference from this Court (Cooke J.) to the Court of Justice pursuant to Article 267 TFEU in *D and A (HID) v. Refugee Applications Commissioner* [2011] IEHC 33. As I indicated at the conclusion of the first judgment, I adjourned this aspect of the application pending the outcome of the reference. Even if the Court of Justice finds for the applicants in that case, it does not necessarily follow that this applicant will be entitled to avail of that decision given in particular that she did not raise the point at the time."

33. I then went on to hold that it would be premature to offer any further comment on that question. I pointed out that this aspect of the leave application remained adjourned, so that the question of a certificate in respect of this question simply did not arise. Critically, however, so far as the balance of the effective remedy point was concerned – namely, whether the remedy of judicial

review provided an adequate remedy - I rejected that argument, holding that the adequacy of judicial review had been already dealt with the decision of the Court of Justice in Case C-69/10 Diouf and a series of decisions by the High Court and Supreme Court:

> "Nevertheless, in the light of *Diouf*, the implications of Article 39 have been fully clarified by the Court of Justice. It is now clear that Article 39 merely requires that an effective remedy is available before a court or tribunal in respect of any decision to refuse international protection and that the reasons for that decision can be challenged.
>
> It is abundantly clear from cases such as *ISOF* and *Efe* that the judicial review procedure provides an effective remedy for this purpose. It is equally clear from decisions such as *Meadows* that the adequacy of the reasons for any such administrative decision can be scrutinised and examined in judicial review proceedings.
>
> In these circumstances, it is really impossible to avoid the conclusion that the law in this point has been clarified by a series of judicial decisions, not least by the judgment of the Court of Justice in *Diouf.* Given that the law is now clear beyond any real argument, it would not accordingly be in the public interest that the point should be referred to the Supreme Court."

34. It was on the basis, accordingly, that I refused to grant a certificate for leave to appeal to the Supreme Court. I nevertheless held that the balance of the application must await the decision of the Court of Justice in *HID*. As it happens, the Court of Justice ultimately ruled on 31st January 2013 in *HID* that the RAT provided sufficient guarantees of independence, so that an appeal to that body satisfied the requirements of Article 39.1. It followed, therefore, that when this aspect of the *PM* case was re-entered before me in the wake of that decision of the Court of Justice in *HID*, I held that the question of the effectiveness of the remedy in the context of the requirement of an appeal to be independent tribunal had already been determined by the Court of Justice in its judgment in *HID*: see *PM (Botswana) v. Minister for Justice (No.3)* [2013] IEHC 271.

Contemporary judicial review as an effective remedy

35. The critical point, however, to emerge from the various decisions in *PM (Botswana)* was that the remedy of judicial review also constituted in principle an effective remedy for the purposes of Article 39(1). In essence, the reasons for my conclusion to that effect in *PM (Botswana)* are to be found in one seminal Supreme Court judgment, *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 and two contemporary High Court judgments, *ISOF v. Minister for Justice* [2010] IEHC 457 and *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 798.

36. Much of this case-law was set out by me in more detail in my judgment as a judge of the High Court in *Efe*. It is probably unnecessary here to review this case-law in the same detail as I did in *Efe* and I propose only lightly to refer to some of the case-law on this topic in the course of this judgment. Before doing so, a word about the decision in *Efe* itself may be in order.

37. In that case the applicants – who were asylum seekers from Nigeria - contended that the common law rules of judicial review were unconstitutional on the ground that they failed to provide an effective remedy. I held that the very language of Article 40.3.1 and Article 40.3.2 of the Constitution ("defend and vindicate..") required the courts to fashion an effective remedy in judicial review concerning fundamental rights. Following a survey of the case-law from *The State (Lynch) v. Cooney* [1982] I.R. 337, onwards, I held that contemporary judicial review was sufficiently flexible and expansive to provide an adequate and effective remedy for this purpose.

38. So far as the present appeal is concerned, it may also be convenient to start with the major decision of the Supreme Court in *The State (Lynch) v. Cooney*. That case concerned the reviewability of a ministerial decision under the Broadcasting Acts to the effect that a particular broadcast "would be likely to promote, or incite to, crime or would tend to undermine the authority of the State." Were the Minister's conclusions on this point open to review? That question was answered affirmatively, with O'Higgins C.J. saying that a ministerial decision of this kind ([1982] I.R. 337, 361): "must be one which is *bona fide* held and factually sustainable and not unreasonable."

39. Pausing at this point, it may be said that the *Lynch* test readily satisfies the requirements of *Diouf* to the effect that "the reasons which led the competent authority to reject the application for asylum as unfounded… may be the subject of a thorough review by the national court." This was particularly so given that the deciding authority was in effect obliged by the *Lynch* test to demonstrate that the factual basis of the decision was, in its material respects, soundly-based and that the reasons for the conclusion were accordingly justifiable.

40. If, however, the decision in *Lynch* suggested that the courts had to be satisfied that administrative decisions of this kind had to be factually sustainable and reasonable, the subsequent decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 held that the courts could not review a decision of the planning authorities on grounds of reasonableness save where it was clear that there was "no relevant material" on which the decision could have been based. Enunciating the test for judicial review, Finlay C.J. observed ([1993] 1 I.R. 39, 70):

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

41. As I observed in *Efe* regarding the inter-action of the two decisions ([2011] 2 I.R. 798, 809):

> "For some reason *Lynch* was not referred to in *O'Keeffe*, despite the former's seminal status as an absolutely critical decision dealing with the reviewability of ministerial and, by extension, administrative decisions. Perhaps it is for this reason that in some respects these two decisions cannot be easily aligned. If the former decision required that a ministerial decision must be shown to be factually sustainable before the opinion of the Minister could be upheld, this seems at odds with the latter decision inasmuch as it decided that the courts could not interfere - at least in the specialist sphere of planning law - with an administrative decision save in the "no evidence" type cases."

42. One might add in passing that the *O'Keeffe* test would not satisfy the requirement of *Diouf*, since with such a narrow standard of review – so that the court was confined to asking whether there was any relevant evidence by which the decision had been taken - it would be all but impossible for the courts to subject the reasons given by the decision maker to a thorough review.

43. One way or another, however, it was the decision in *O'Keeffe* which actually dominated the judicial review landscape for the next two decades or so. It is hard to avoid the conclusion that the decision prompted the courts subsequently to take a very limited view

of the scope of judicial review. A striking example of this approach is to be found in the judgment of O'Sullivan J. in *Aer Rianta cpt v. Commissioner for Aviation Regulation* (High Court, O'Sullivan J., 16th January, 2003) where he enunciated the relevant test for judicial review in the following terms:

> "the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."

44. If this were indeed the test for judicial review, it would have to be said that it would fail the *Diouf* standard by some distance, again given the practical impossibility of subjecting the reasoning of the decision-maker to a thorough review if this were indeed the appropriate standard of review.

45. Returning now to the narrative regarding the general standard of review, all of these questions were comprehensively examined by the Supreme Court in *Meadows* in January 2010. In this case the Court concluded that the general proportionality principle applied to judicial review of administrative decisions. This seminal decision was not, perhaps, quite as ground-breaking as might first appear, since it was perfectly clear that for quite some time there was increasing judicial unease with the manner in which O'Keeffe had come to be applied in practice: see, *e.g., Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, [2004] 2 I.R. 573; *I. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 180, [2008] 1 I.R. 208 and *Clinton v. An Bord Pleanála* (No. 2) [2007] IESC 19, [2007] 4 I.R. 701.

46. The importance of *Meadows* is nonetheless really two-fold. First, it is plain that a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights. Second, it is equally clear that the *O'Keeffe* test has been re-interpreted and clarified to take fuller account of the earlier judgment of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642. In *Keegan* Henchy J. had stressed that the courts could intervene to quash on reasonableness grounds where the conclusion simply did not follow from the original premise.

47. In *Meadows* Fennelly J. explained these developments in the following terms ([2010] 2 I.R. 701 at 827):

> "I prefer to explain the proposition laid down in the *Keegan* and *O'Keeffe* cases, retaining the essence of the formulation of Henchy J in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive', to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence. This does not involve a modification of the existing test as properly understood. Rather it is an explanation of principles that were already implicit in our law."

48. While the difference is, in some respects, a question of semantics - as Fennelly J. acknowledged ([2010] 2 I.R. 701, 825) - there is nonetheless a clear difference in principle between saying on the one hand that a decision is unreasonable because there is "no relevant material" for the conclusion reached, while on the other quashing a decision because it does not flow from the original premises of the decision maker - the very point which McKechnie J. had made in both *Holland* and *Neurendale.* It will be a rare case indeed where there is absolutely no evidence to support a particular proposition. By contrast, there may well be many instances where there is some evidence to justify a particular decision, but where the ultimate conclusion simply does not flow from the original premise (*Keegan*) or nonetheless falls to be quashed for lack of proportionality (*Meadows*).

49. The current (*i.e.*, post-*Meadows*) law was admirably summed up Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457. Here the question was whether it was necessary for this Court to give a certificate of leave to appeal to the Supreme Court under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in order to clarify aspects of *Meadows*. Cooke J. concluded that the law in this regard had been settled "with sufficient clarity" by the decision in *Meadows* so that a certificate was unnecessary. Having referred to the passage from the judgment of Fennelly J. which I have just quoted, Cooke J. continued:

> "Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary.)
>
> In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection. In other words, if the High Court has a constitutional obligation to vindicate personal constitutional rights in the face of administrative or quasi judicial decisions; and if it has by default a statutory duty under the European Convention on Human Rights Act 2003 to ensure protection under the Convention for rights not otherwise guaranteed by the Constitution, so be it. The remedy of judicial review under Ord. 84 of the Rules of the Superior Courts is sufficiently comprehensive and flexible in the exercise of the jurisdiction of the High Court to ensure that both of those objectives are met. The mistake is to confuse the jurisdictional rules and procedural incidents of the judicial review remedies with the manner which the criteria for the review fall to be applied. The common law remedies of judicial review and judicial

> practice in their application have, in the view of this Court, evolved differently in the constitutional framework of this State (and particularly under the influence of the judgment of the Supreme Court in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317), as compared with other common law jurisdictions and particularly that of the United Kingdom both before and since the enactment there of the Human Rights Act 1998. Nevertheless, the potential for evolution of the criteria can be seen as reflected in, for example, judgments such as that in which the House of Lords in the United Kingdom held in the context of judicial review procedures in that jurisdiction involving the application of the criterion of proportionality under the Convention that , "…no shift to a merits based review" is required but "the intensity of review is greater than was previously appropriate , and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence…*" and thus goes "beyond that traditionally adopted to judicial review in a domestic setting." (See the speech of Lord Bingham of Cornhill in *R(SB) v Governors of Denbigh High School* [2007] 1 A.C. 100, 116). In this jurisdiction the Supreme Court has, of course, rejected the need to alter the "intensity" or the level of review applied by the Court in judicial review in this way. It remains the case however, as illustrated by the passage cited from the judgment of Fennelly J. [in *Meadows*] that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own. Thus, while the judicial review remedies remain unchanged – although significantly more flexible and comprehensive in the reform of Order 84 in 1986 – and the procedural and evidential rules for their application are constant; the criteria by which they are applied are capable of evolving in order to accommodate rights to protection such as those created by the Constitution or the Act of 2003. By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense."

50. Having reviewed the case-law in *Meadows* and *ISOF*, I then concluded this part of the judgment in Efe by saying ([2011] 2 I.R. 798, 819-820):

> "In summary, therefore, it is clear that, post-*Meadows* at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows*-style proportionality analysis…. Against that background, it is clear that the common law rules of judicial review satisfy the constitutional requirements of Article 40.3.1 and Article 40.3.2 in that they must in particular provide an adequate remedy to vindicate constitutional rights."

51. In the light of this trilogy of case-law – *Meadows*, *ISOF* and *Efe* – it is clear that what might be termed modern, post-*Meadows*-style judicial review will satisfy the effective remedy requirements of Article 39.1 of the Procedures Directive. As I have already stated, what is clear from the judgment in *Diouf* that what is necessary is that "the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review." Whatever might have been the situation within the narrow and artificial confines of *O'Keeffe*, it is clear from other important authorities that the decision of the Minister must satisfy the requirements of factual sustainability (*The State (Lynch) v. Cooney*) and the reasons for that decision can furthermore be fully scrutinised within the parameters of the judicial review procedure (*Meadows*). There is, in any event, well-established case-law whereby the court can quash in judicial review for material error of facts: see generally, Daly, "Judicial Review of Factual Error in Ireland" (2008) 30 *Dublin University Law Journal 187; Hill v. Criminal Injuries Compensation Tribunal* [1990] I.L.R.M. 36; *AMT v. Refugee Appeal Tribunal* [2004] 2 I.R. 607; *L. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 362 and *HR v. Refugee Appeal Tribunal* [2011] IEHC 151.

52. In his judgment in the present case Barr J. found that the essence of the reason why the judicial review remedy was not, in his opinion, an effective remedy within the meaning of Article 39.1 was because that it was not a remedy which was "capable of reversing the first instance refusal" in the sense of substituting its own decision for that of the original decision-maker. Barr J. also drew attention to the other limitations inherent in the judicial review process, such as the fact that the court could only annul the decision and remit the matter for further consideration. He also observed that the court was further confined to the information which was before the decision maker at the time of the decision, before adding:

> "It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision."

53. All of this is in its own way true. But, perhaps, with respect, this passage may be thought to underplay the scope of contemporary, post-*Meadows* judicial review. While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality (as in *Meadows*) or where the decision simply strikes at the substance of constitutional or EU rights: see, *e.g., S. v. Minister for Justice* [2011] IEHC 92; *O'Leary v. Minister for Justice* [2012] IEHC 80. The court can further examine the conclusions reached and ensure that they follow from the decision-maker's premises. The court can further quash for material error of fact.

54. While it is true, therefore, that judicial review cannot be equated with an appeal *simpliciter*, it seems clear from *Diouf* that this is not what Article 39.1 requires. It is, after all, at least implicit in Recital 27 to the Procedures Directive and Article 39.2 that each Member State must remain free to organise its own supervisory procedures. Article 39 is not, therefore, prescriptive regarding the choice of remedy and it is open in principle, therefore, to each Member State to choose as between some form of appeal on the one hand and judicial review on the other. In any event, the Court of Justice said as much in *Diouf* in holding that Article 39 did not require Member States to provide for a "specific remedy."

55. To this Article 39 imposes only one – albeit, critical - requirement, namely, that the remedy in question must remain an effective one. As *Diouf* itself makes clear, this means that the supervisory jurisdiction of the High Court must be ample enough to ensure that "the reasons which led the competent authority to reject the application for asylum as unfounded… may be the subject of a thorough review by the national court."

56. I accept that the "no relevant material" standard prescribed by the Supreme Court in *O'Keeffe* would not satisfy the *Diouf*

requirements, since in practice it would not be possible to subject the reasons given by the decision maker to a "thorough review" by the judicial review judge if that were indeed the applicable test. Nevertheless, for the reasons essentially set out by Cooke J. in *ISOF* and by me as a judge of the High Court in *Efe*, I consider that *O'Keeffe* test can no longer be applied to judicial review applications in asylum matters such as the present one in which the protection of either constitutional rights or EU law rights are engaged. The Supreme Court has, in any event, made this clear: this, at least, is the clear implication of major post-*O'Keeffe* decisions such as *Clinton* and *Meadows*. Even if that were not so, this Court's duty of loyal co-operation with the requirements of EU law would, in any event, require us to ensure that our domestic law of judicial review is remoulded in this manner in order to accommodate the requirements of Article 39.1.

57. Subject, nevertheless, to these quite critical considerations, I nevertheless am of the view that Barr J. fell into error in concluding that the remedy of judicial review was *in itself* an ineffective remedy for the purposes of Article 39. I accept, of course, that the remedy of judicial review has inherent limitations of the kind identified by Barr J.. Where I respectfully part company with Barr J. is that I do not see that these limitations (*e.g.*, no power to substitute findings of facts for those of the decision-maker and a power of annulment only) as otherwise depriving judicial review of the character of an effective remedy. What *is* critical is that - as *Diouf* makes clear - the judicial review court can subject the reasons of the decision maker to thorough review. For the reasons I have endeavoured to state, I believe that this task can be performed by the High Court using contemporary judicial review standards as explained by the recent authorities.

Conclusions
58. In conclusion, therefore, I am of the view that the fact that the applicant may challenge the validity of any decision of the Minister to refuse to admit her to the asylum process in accordance with s. 17 of the 1996 Act (as amended) by way of judicial review means that the State has provided her with an effective remedy within the meaning of Article 39 of the Procedures Directive.

59. The corollary of this conclusion, of course, is that the High Court must ensure that, in the words of the Court of Justice in *Diouf*, the reasons which led the Minister "to reject the application for asylum as unfounded… [must] be the subject of a thorough review by the national court." As, for the reasons I have just stated, there is no reason why this cannot be achieved by the High Court in judicial review proceedings by reference to the *Meadows* principles (as explained in cases such as *ISOF* and *Efe*), it is clear that contemporary judicial review does indeed provide an effective remedy for the purposes of Article 39.

60. It follows, therefore, that for these reasons I would allow the appeal of the Minister against the decision of the High Court.