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THE HIGH COURT

JUDICIAL REVIEW

2008 1261 JR

2009 56 JR

BETWEEN/

H. I. D. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, E. D.)

AND

B. A.

APPLICANTS

AND

REFUGEE APPLICATIONS COMMISSIONER, THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 9th day of February, 2011.

1. These two cases were heard together because they gave rise to the same two issues of law and were representative of a substantial number of other cases which await determination in the Asylum List. Leave to bring the present applications for judicial review was granted by the Court by two orders of 19th January 2010. In the first above case ("the First Case") leave was granted to seek, *inter alia*, orders of *certiorari* to quash (i) a Report by the Office of the Refugee Applications Commissioner (ORAC) under s. 13 of the Refugee Act 1996 (as amended) ("the Act") dated 20 August 2008 which had recommended to the third named respondent (the Minister) that the applicant minor should not be declared to be a refugee under s.17 of the Act; and (ii) a Direction given by the Minister under s. 12(1) of the Act dated 11 December 2003 that priority be given to the examination and determination of applications of asylum originating in Nigeria.

2. In the second above case ("the Second Case") leave was granted to seek orders of *certiorari* in respect of the same Direction of the Minister and in respect of an appeal decision of the second named respondent ("the RAT",) under s. 15 of the Act dated 25th November 2008 which rejected her appeal against a report and negative recommendation of the ORAC. For the reasons explained in the judgment of the Court of 19th January 2010 leave was refused for this applicant to seek review of that report as well.

3. Leave was granted to seek those reliefs on the same single, two-fold ground as follows:

> "The applicant's claim for a declaration of refugee status under s. 17(1) of [the Act] has not been lawfully determined by means of a procedure which complies the minimum standards required to be met by Council Directive 2005/85/EC of 1st December 2005 in that:
>
> > (a) The processing of the application has been unlawfully prioritised or accelerated as a result of a Direction given by [the Minister] dated 11th December 2003 which is incompatible with the provisions of the said directive and in particular Article 23 thereof;
> >
> > (b) The said procedure deprives the applicant of an effective remedy against the first instance determination of [the] application before a court or tribunal in compliance with the requirements of Chapter V of the Directive."

4. In the parties' submissions the two issues thus raised have been referred to respectively as the "Prioritisation Issue" and the "Effective Remedy Issue". They arise, in effect, out of the need to reconcile the terms of the scheme for examination and determination of applications for asylum established in the Act with the requirements of two subsequent pieces of legislation adopted by the European Community. These are: "Council Directive 2004/83/EC of 29th 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" (the "Qualifications Directive") and the above mentioned directive which has the full title: "Council Directive 2005/85/EC of 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status" (the "Procedures Directive").

5. As the Court summarised in its leave judgment, taken by itself as a piece of national legislation, the Act presents no great difficulty for understanding the significance or effect of the procedures put in place for the reception, examination and determination of applications by asylum seekers or of the functions of the agencies involved. The asylum application is made to the Refugee Applications Commissioner (s. 8) who interviews the applicant, carries out such investigation and inquiry as is needed (s. 11), compiles a report and makes a recommendation to the Minister as to whether the declaration of refugee status should be made or refused (s. 13). If the recommendation made is in the affirmative, the Minister is obliged to grant the declaration under s. 17(1) of the Act. Where the recommendation is negative, the applicant is entitled to appeal to the RAT under section 16. Subject to certain exclusions, the appeal will involve an oral hearing before a member of the Tribunal leading to a decision which will either affirm or reject the ORAC recommendation. Again, if the appeal is successful and the recommendation is positive, the Minister must grant the declaration under section 17(1). If the recommendation is negative, however, the Minister "may" still grant the declaration thus indicating that the Minister retains some degree of discretion under the Act to grant the declaration notwithstanding the negative

recommendation of either the Commissioner or the Tribunal.

6. It is therefore clear so far as the wording of the Act is concerned, that the s. 13 report and recommendation and the Tribunal decision on the appeal are decisive in character only where the recommendation is positive. Where the recommendation is negative, the "determination" of the asylum application under the Act is made by the Minister because it is only his final decision after the exercise of his possible discretion under s. 17(1) which decides the matter.

7. The Procedures Directive was adopted on 1st December 2005 and its Article 43 required that it be transposed by the Member States by 1st December 2007 (or by 1st December 2008 so far as the legal aid requirements of Article 15 were concerned). The Qualifications Directive was implemented by transposition into Irish law by S.I. No. 518 of 2006 entitled "European Communities (Eligibility for Protection) Regulations 2006" which came into operation on 10th October 2006 ("the Regulations"). One of the main effects of the Regulations was to introduce a new form of international protection adopted by the European Community to complement the protection of refugee status accorded by the Geneva Convention of 1951, to be based on the concept of "serious harm" and called "subsidiary protection".

8. It is accepted that no corresponding transposition of the Procedures Directive by means of the normal statutory instrument under the European Communities Act 1972 has taken place. This is not because of any default as such on the part of the State but because the view was taken that the minimum standards for procedures required by the Directive were already catered for and put in place in the arrangements and provisions of the 1996 Act as it then stood together with the Regulations. As counsel for the applicants accepted in the course of submissions, mechanical transposition of a directive by legislative action at national level is not always necessary if existing laws already provide for the objectives sought to be achieved. (See the judgments of the European Court of Justice in Cases 23/84 *Commission v. Germany* [1985] E.C.R. 1661 at para. 23 and 248/83 *Commission v. Germany* [1985] E.C.R. 1459 at paras. 18,19 and 30; see also the analogous observations of the High Court in the judgment in *C.C.D. Teo v. An Bord Pleanála & Others* (Unreported, High Court, Cooke J., 6th February, 2009) at paras. 21 and 22).

9. So far as concerns the first issue, the "prioritisation" of applications, the case made is that the Direction given by the Minister under s. 12(1) of the Act, ("the Direction") to both the ORAC and the RAT to give priority to all applications made by nationals of Nigeria, is unlawful because it is incompatible with the minimum standards of processing and scrutiny required by the Procedures Directive. In particular, it is incompatible with Article 23 which contains, it is said, an exhaustive list of the cases in which Member States may prioritise or accelerate the first instance examination of applications and which does not permit blanket prioritisation of categories of applications by reference only to a single country of origin. The respondents dispute this interpretation of the Procedures Directive and maintain that the processing arrangements and choices in that regard are left entirely to the discretion of the national authorities.

10. The second issue arises out of the apparent dichotomy between the appeal function attributed to the Tribunal under the 1996 Act prior to the Minister's determination of each application under s. 17 on the one hand; and the requirement, on the other, of Article 39 of the Procedures Directive that the Member States provide an effective remedy before a court or tribunal against the first instance determination of asylum applications. In the statement of opposition, the respondents say that the RAT appeal combined with the entitlement to apply for judicial review before the High Court provides the effective remedy required by Article 39. The applicants say that this cannot be so upon a correct interpretation of the Procedures Directive because that remedy must fulfil certain other requirements elsewhere in that directive including, notably, those in Articles 8.3, 9.2, 10.1 and 15 and these are obviously not fulfilled by the High Court procedure.

Background Facts

11. Although the issues arising on the above grounds are issues of law which are capable of being decided independently of the facts in the two cases, it may be helpful to understanding the context to summarise the personal backgrounds and procedures out of which the cases have arisen.

12. In the First Case, the applicant is a minor now ten years of age who arrived in the State with her mother in 2008 and made an application for asylum. Her mother made the claim on her behalf that she feared her daughter would be subjected to circumcision and killed by her father's family or community if returned to Nigeria. She said that another daughter of hers had died as a result of such treatment in 2007. In the report under s. 13 of the Act, dated 15th August 2008, the claim was rejected primarily on grounds of lack of credibility in the mother's evidence, but also on the basis that state protection will be available to them from the police in Nigeria. An appeal against the report to the RAT was lodged and stands postponed pending the outcome of the present proceedings.

13. In the Second Case the applicant is a native of Nigeria and claims to be of homosexual orientation. He arrived in the State in August 2008 and applied for asylum, claiming to have fled persecution in Nigeria because he had been detained and ill treated at the behest of the local chiefs following the discovery of his homosexual orientation. In a report dated the 25th August 2008, the authorised officer of the ORAC gave a negative recommendation on the asylum application upon the ground of lack of general credibility in his account of his history and how he travelled to the State and because it was considered that while homosexuality is illegal in Nigeria, country of origin information, particularly that from the British Home Office, indicated that there are no instances of legal action being taken against consenting adults and that persecution by non state agents could be avoided by internal relocation. The ORAC recommendation was appealed to the RAT and in a decision of the 25th November 2008, the negative recommendation was upheld, upon the grounds that the applicant's evidence was neither plausible nor credible, in attempting to explain contradictions and a finding that he had not suffered any persecution for a Convention reason in Nigeria nor was likely to do so in the event of his return.

The Prioritisation Issue

14. Section 12 of the Act (as inserted by s. 7(g) of the Immigration Act 2003), provides in subsection (1) that the Minister may "subject to the need for fairness and efficiency in dealing with applications for a declaration under this Act . . . where he or she considers it necessary or expedient to do so, give a direction in writing to the Commissioner or the Tribunal or to both requiring either or both of them, as the case may be, to accord priority to certain classes of applications determined by reference to one or more of the following matters . . ." There is then set out in paras. (a) – (n) a series of factors for such classes including at para. (b) "the country of origin or habitual residence of the applicants" and at (e) "the dates on which applications were made".

15. On the 11th December 2003, acting on foot of those paragraphs of s. 12(1), the Minister made a Direction addressed to both the ORAC and the RAT the material paragraph of which reads as follows:-

> "Pursuant to the provisions of s. 12(1)(b) and 12(1)(e) of the Refugee Act 1996 (as amended), the Minister directs you, with effect from the 15th December 2003, to accord priority to asylum applications made on or after the date by persons who are nationals of Nigeria."

16. The Minister has also in accordance with s. 12(4) of the Act made orders designating certain countries as safe countries of origin. Nigeria is not covered by any such order. Under para. (m) of s. 12(1), a prioritisation direction may be given by the Minister in respect of applications by nationals of a country of origin which has been designated as a safe country.

17. As indicated, the ground raised against the measures sought to be quashed in these two cases is based upon the proposition that the asylum applications had been processed in an unlawful manner in that, as applications by nationals of Nigeria, they had been dealt with in accordance with the Minister's Direction under s. 12(1) namely, in priority. In particular, it is alleged in each case that para. (b) of s. 12(1) is unlawful as incompatible with the exhaustive provisions governing the prioritisation or acceleration of examination of asylum applications provided for in the Procedures Directive under Article 23.3 and Article 23.4. In addition to lacking competence to direct priority to be given to a category of applications by reference to the country of origin of the applicants, it is argued that such discrimination on grounds of country of origin violates Article 3 of the Geneva Convention which provides:

> "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

18. Neither applicant points to any aspect of the examination and determination of these applications thus far as demonstrating that the manner in which priority has been accorded has resulted in any mistake, omission or other actual defect in the application of the asylum procedures in these instances. In that regard the chronology of the two applications is as follows:

The First Case:

Arrival in the State April 2008.

Date of application 30th July 2008.

Section 11 interview 13th August 2008.

Section 13 report 15th August 2008.

The Second Case:

Arrival in the State 5th August 2008.

Date of application 5th August 2008.

Asylum Questionnaire 11th August 2008.

Section 11 interview 21st August 2008.

Section 13 report 25th August 2008.

Appeal hearing 4th November 2008.

RAT decision 24th November 2008.

19. While not pointing to any material departure from the steps involved in the examination procedure, the applicants allege that the prioritization nevertheless results in a curtailment of the asylum procedure as follows:

> - The asylum questionnaire must be completed within 6 working days rather than the 7 working days otherwise allowed;
>
> - The s. 11 interview is scheduled for between 9 and 12 working days from the date of application as compared with 15 – 20 working days otherwise;
>
> - The application is normally processed within 8 further working days compared with 17 – 20 days in normal cases;
>
> - The average processing time for a prioritised application is 3 – 4 weeks compared with 22 – 23 weeks otherwise;
>
> - The ORAC report is normally signed by two authorised officers, whereas only one authorised officer signs in prioritised cases;
>
> - Where there is no oral hearing, Nigerian applicants are afforded shorter processing times and are processed before non prioritised appeals;
>
> - Where there is an oral hearing, the appeal is procedurally different in that there is a shorter processing time than otherwise; and
>
> - Tribunal members are apparently paid a fee of €300 (according to the 2007 RAT Annual Report) for an "accelerated appeal" but €575 for a "substantive" oral hearing.

20. It is submitted that this shortening of the processing time means that less time is devoted to Nigerian appeals and simplified views are taken of Nigerian appellants. There is thus less time taken in examining the cases, less time in deciding whether additional information is required, less time to obtain such information or make further inquiries and less time to seek the Commissioner's observations than would be the case in non-prioritised appeals. In the First Case for example, the applicant complains that the s. 13 report and recommendation on her daughter's application issued only two days following the s. 11 interview, thus leaving no time to submit further country of origin information or observations. She maintains that the quality of the report thus suffered and suggests that a question put to her as to her entitlement to report any threat to the police was incorrect because FGM was not banned in her state. On this basis it is submitted that Nigerian applicants "are placed at a procedural disadvantage" as compared with other applicants.

21. It is appropriate to examine first the proposition that the Minister's Direction is *ultra vires* because it is incompatible with the provisions of the Procedures Directive. The provisions of the Procedures Directive which are directly relevant to both of the issues

raised in this case can be set out as follows:

Recitals

> (5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.
>
> (6) The approximation of rules on the procedures for granting and withdrawing refugee status should help limit the secondary movement of applicants for asylum between the Member States, where such movement would be caused by differences in legal frameworks.
>
> (11) 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.
>
> (27) 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.

Chapter I General Provisions.

Article 2 Definitions

> (d) "final decision" means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;
>
> (e) "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.
>
> Article 4.1 Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9.
>
> Article 5 Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

Chapter II Basic Principles and Guarantees

> Article 8.2 Member States must ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States must 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 applicants for asylum and, where necessary, in countries through which they have transited, and that such information it 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.
>
> Article 8.3 The authorities referred to in Chapter V must, through the determining authority or the applicant or otherwise, have access to the general information referred to in para. 2(b) necessary for the fulfilment of their task.
>
> Article 9.1 Member States must ensure that decisions on applications for asylum are given in writing.

Article 9.2 Member States must also ensure 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.

Moreover, Member States need not provide information on how to challenge a negative decision in writing in conjunction with the decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.

Article 12.1 Before a decision is taken by the determining authority, the applicant for asylum must be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview. Member States may also give the opportunity of a personal interview to each dependent adult referred to in Article 6(3).

Article 13 sets out the requirements for the conduct of a personal interview including the assurance of conditions of confidentiality and criteria governing the presence of family members or third parties at the interview.

Article 14.1 Member States must ensure that a written report is made of every personal interview, containing at least the essential information regarding the application as presented by the applicant in terms of Article 4(2) of Directive 2004/83/EC.

Article 14.2 Member States must ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.

Article 15 deals with the right to legal assistance and representation.

Article 18 provides that Member States shall not hold a person in detention for the sole reason that he or she is an applicant for asylum and where the person is held in detention the possibility of speedy judicial review must be provided.

Chapter III Procedures at first Instance

Examination Procedure

Article 23.1 Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

Article 23.2 Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time frame.

Article 23.3 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.

Article 23.4 lists in subparas. (a) – (o) fifteen further circumstances in which Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II may prioritised or accelerated. These include such circumstances as the applicant clearly not qualifying as refugee; the application is unfounded because the applicant is from a safe country of origin; the applicant has filed another application for asylum stating other personal data; the applicant has mislead authorities by presenting false information or documents or by withholding relevant information or documents.

Chapter V Appeals Procedures

Article 39 – The right to an effective remedy

Article 39.1 Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or a tribunal against the following:

(a) A decision taken on their application for asylum including a decision: (i) to consider an application inadmissible pursuant to Article 25(2), (ii) taken at the border or in transit zones of a Member State as described in Article 35.1, (iii) not to conduct an examination pursuant to Article 36;

(b) A refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) A decision not to further examine the subsequent application pursuant to Articles 32 and 34;

(d) A decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) A decision to withdraw refugee status pursuant to Article 38.

Article 39.2 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 para. 1.

Annex I

"Definition of 'Determining Authority'" contains a provision with special application to the State worded as follows:

"When implementing the provision of this Directive, Ireland may, insofar as the provisions of s. 17(1) of the Refugee Act 1996 (as amended) continue to apply, consider that:

- 'determining authority' provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee as concerned, mean the Office of the Refugee Applications Commissioner; and

- 'decisions at first instance' provided for in Article 2(e) of this Directive shall 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.

Ireland will notify the Commission of any amendments to the provisions of s. 17(1) of the Refugee Act 1996 (as amended)."

22. In essence, three arguments are advanced as to the illegality of the Minister's Direction as follows:

(a) First it is argued that the Minister acted *ultra vires* the Procedures Directive in making the Direction because its Article 23 in particular contains an exhaustive definition of the circumstances in which the examination of any application for asylum may be prioritised or accelerated;

(b) Secondly, it is contrary to Union law and incompatible with the Procedures Directive as an unlawful discrimination on grounds of nationality to require the prioritisation of a category of applicants on the basis of their country of origin; and

(c) If applications can lawfully be prioritised the power to so direct is vested not in the Minister, but in the Refugee Applications Commissioner as the "determining authority".

23. By way of preliminary remark it should be noted that the Procedures Directive refers to both "prioritisation" and "acceleration" as two distinct concepts without defining either of them. On the face of it, an application is "prioritised" when it is examined earlier than in the order which might otherwise apply to asylum applications as received. "Acceleration" would seem to involve an expediting of the process of examination itself so that (whether taken out of order or not), the time taken for the examination is shorter than would otherwise be the case in arriving at the determination. Clearly, an application could be examined in priority without being accelerated and an application reached in ordinary course could then be accelerated in its examination. The Minister's Direction requires only that priority be given to the applications it covers and the examination of individual applications under the Direction does not involve any necessary reduction in the time to be taken in any of the steps of the examination process. In fact acceleration of the processing of applications is dealt with separately under the Act. Section 13(7)(a) empowers the Minister to direct the Commissioner to investigate specified classes of application in accordance with the procedures referred to in subsection (8) of the section. Where the report in such a case contains a negative recommendation the period for appeal to the RAT is 4 days and not 15 days. It is clear from the evidence in the present cases however that applications coming within the Direction are both taken out of normal order and then processed within a shorter time than would be normal for other applications in the asylum process (see the comparison in paragraph 19 above). This is not the result of the Direction but of the administrative priority accorded to the handling of those applications. No time limit fixed by the Act or in any regulation is thereby curtailed. So far as the information given to the Court is concerned no direction has been given by the Minister to additionally "accelerate" any class of applications by reference to the applicants being nationals of Nigeria. The term "prioritisation" is therefore used in this judgment in respect of these applications as including acceleration only in the sense of the shortened processing time apparently taken as indicated in the affidavit of Majella O'Donoghue filed on behalf of the respondents and reflected in the above comparison. The Direction does not require or bring about any formal abridgement of time periods that would otherwise apply.

24. A second preliminary observation is also necessary. In asserting the illegality of the Direction the applicants rely primarily upon the provisions of the Procedures Directive and in relation to the present issue, on its Article 23 in particular. They argue, in effect, that the State has failed to transpose the provisions of the Directive correctly, adequately, or at all. They submit that the power of the Minister to make the Direction under s. 12 of the 1996 Act is incompatible with those provisions of the Procedures Directive and in particular with what they say is an exhaustive list of the circumstances for prioritising asylum applications in Article 23.3 and 23.4.

25. What is now Article 288 TFEU (ex Article 249 EC) provides that a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". It is long established in the law of the Union that where a directive addressed to a Member State creates rights in favour of individuals, a Member State which has failed to take the necessary legislative or administrative steps to transpose the directive into national law cannot rely upon its own default in that regard in order to defeat a claim by an individual to assert the right in question, provided the obligation imposed by the directive is clear and precise and its implementation does not involved the exercise of choices or discretion by the Member State in giving effect to the measure. (See for example, amongst many authorities on the point, Case 41/74 *Van Duyn v. Home Office* [1974] E.C.R. 1337). The particular provisions which the applicants seek to invoke in this case do not themselves create rights in favour of individuals. As appears later in this judgment, the provisions relating to prioritisation and acceleration in Article 23 are purely permissive or facultative and contain neither a direction or a prohibition addressed to the Member States as to the types of asylum application which ought and ought not be prioritised.

26. Thus the first argument as to the incompatibility of the Direction with the requirements of the Procedure Directive turns primarily upon the purpose and wording of Article 23 in particular. It is notable that the purpose of the Procedures Directive is not, as such, to create and impose a system for the grant of international protection to refugees in the European Union. That regime already exists in that all Member States of the Union have acceded to the Geneva Convention. Its purpose, as explained in its recitals, is to harmonise at the level of minimum standards, the procedures already in place in the Member States for the examination and determination of asylum applications so as to eliminate discrepancies arising from the different national legal frameworks which would be inconsistent with a Union based on free interstate movement of persons (see recitals 6 and 9).

27. It is also to be noted that one of the principal considerations of the Procedures Directive in this regard is that it is in the interest of both the Member States and asylum seekers that applications are processed "as soon as possible" (recital 11 and Article 23.2) and with an optimum processing period of six months.

28. In laying down minimum standards for the common process of examining and determining asylum applications, the Directive explicitly excludes any purpose or objective of intruding upon or seeking to harmonise the managerial aspects of the asylum process in the Member States. Thus, in recital 11 the autonomy of the Member States in administering the asylum process is acknowledged: "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". This clearly reflects the divergences that may exist between the needs of the different Member States including, for example, those with frontiers to third countries from which large numbers of migrants first arrive upon the territory of the Union as compared with those which, for reasons of distance from such frontiers, language or other factors, may receive far smaller numbers of applications.

29. As regards the wording of the provisions, it is notable that the basic provision in Article 23.1 is mandatory in requiring that applications be processed by the Member States "in accordance with the basic principles and guarantees of Chapter II." The Article is, by contrast, explicitly facultative in providing that Member States "**may** prioritise or accelerate **any** examination" in paragraph 3. Thus, there is no obligation imposed on the Member States to provide for a prioritised procedure of examination as such even for cases which are well founded or involve applicants with special needs. Nor is any express limitation placed on the type of application that may be prioritised. Any examination may be prioritised "including" the two types of application identified as possibly apt for prioritised examination in paragraph 3: "where the application is likely to be well founded or where the applicant has special needs". A further list of fifteen situations which may be dealt with by priority is set out in subparagraphs (a) – (o) of para. 4, but is introduced once again with the permissive: "Member States may also provide . . ."

30. The essential wording of Article 23 therefore contains no express restraint or limitation on the type of application that may be prioritised. The listed instances are not, therefore, exhaustive. Subject to compliance with the basic principles and guarantees of Chapter II, the Member States remain entitled to organise the management of the asylum process to suit their national needs and having regard presumably to the experience of each in the volumes, origins and types of application received. The instances listed in paragraphs 3 and 4 of Article 23 are illustrative of situations in which it may be appropriate or desirable for Member States to expedite the processing of applications either to the advantage of the asylum seeker (under para. 3) or where the application is likely to be rejected (under para. 4). Article 23 neither requires Member States to accord priority to such cases nor does it either expressly or by

implication preclude priority being granted in other cases. The legislative objective is to ensure compliance with the basic principles and guarantees for examining and determining applications and, subject to compliance with that obligation, the Member States remain unfettered in the administrative management of their asylum systems in accordance with their particular national needs and experience.

31. Inherent in the argument against the Direction is the proposition that an asylum seeker has a right not to have the application examined under a prioritised procedure. That argument necessarily involves, in the view of the Court, attributing to the choice between a normal and a prioritised examination procedure a decisional status significantly greater than that of a purely processing consideration as envisaged in recital 11 and as having a legal effect greater than is apparent in the clearly permissive formulation of paragraphs 3 and 4 of Article 23. If paragraph 4 is said to impose a limit on the cases in which a prioritised procedure can be applied, it must follow that paragraph 3 must confer a right on an applicant who claims to have "special needs" or a well-founded case to have the benefit of a prioritised examination. Significantly however, Article 39.1 of the Procedures Directive which prescribes the specific decisions in the asylum process in respect of which a right to an effective remedy before a court or tribunal must be afforded, makes no mention of any decision arising under the provisions of paragraphs 3 or 4 (as implemented) thus strongly indicating that the choice between normal and prioritised procedure in a case does not give rise to any justiciable grievance on the part of an applicant. By contrast the decisions listed in subparas. (a) to (e) of Article 39.1 are all clearly decisions which affect the rights or legal status of an asylum seeker.

32. In the judgment of the Court, accordingly, the wording of Article 23 is wholly inconsistent with an intention on the part of the Union legislature to impose upon Member States an obligation to refrain from according priority to any case other than those listed in paras. 3 and 4 of Article 23. Having expressly acknowledged the organisational autonomy of the Member States in recital 11 and having used the permissive language quoted above in paragraphs 3 and 4, it is not possible to attribute to Article 23 the interpretation suggested by the applicants. Furthermore, given the emphasis placed on the ideal of expedition in the asylum process, it would be inconsistent with the objective of the Directive to interpret these provisions as precluding the Member States granting priority to cases upon the sole ground that they were not listed in those paragraphs. Insofar as the Procedures Directive confers rights which may be invoked against an asylum authority by an asylum seeker, they are the rights to have the application examined according to the steps prescribed in Chapter II including personal interview, written report, access to legal assistance and representation etc. and have these carried out according to the criteria and standards laid down as regards individual treatment, objective and impartial examination and by personnel with the requisite specialist knowledge and access to information as to the situation in countries of origin. Even where an application is likely to be well founded or the applicant has special needs, no entitlement to priority or accelerated treatment is conferred. Under Article 23.2 Member States are to ensure that the procedure is concluded as soon as possible, but "without prejudice to an adequate and complete examination". A target period of six months for the decision is set, but when that period is exceeded the entitlement of the applicant is not to a positive decision by default but to be informed of the delay. Under Article 8.1 the Member States are required to ensure that applications "are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible".

33. The applicants next argue that the Minister's Direction is unlawful because it requires the asylum process to discriminate on grounds of nationality. It is undoubtedly true that the Direction has the effect of requiring applications made by nationals of Nigeria to be processed in a manner which differs from that of non- Nigerian applicants. In the literal and non-pejorative sense of the word therefore there is "discrimination" in that a distinction is made between those cases and all others. It is also true that "discrimination on grounds of nationality" is prohibited as a fundamental principle both in the application of the Geneva Convention (Article 3 –"country of origin") and in European Union law (Article 18 TFEU (ex Article 12 EC) and at least in its application since entry into force, and as "ethnic origin", Article 21 of the Charter of Fundamental Rights; it is to be noted that each of the decisions sought to be quashed in these proceedings pre-date the entry into force of the Charter).

34. It does not follow, however, that the making of a distinction by reference to nationality of individuals concerned is unlawful for that reason alone. The difference of treatment may be objectively justified (see for example Case 138/02 *Collins v. Secretary of State for Work and Pensions* [2004] E.C.R. I-2703 at para. 73). Particularly in the context of refugee procedures, distinctions based on nationality or country of origin may be both necessary and justified. Thus, as recitals 17-21 and Articles 29 and 30 of the Procedures Directive recognise, certain countries may be designated "safe countries of origin" thereby creating a specific procedural hurdle for applicants from such countries in the form of a rebuttable presumption that they do not have a well founded fear of persecution. This is a discrimination based on nationality which has a material procedural consequence and yet it is lawful.

35. What is prohibited in EU law is a differentiation of treatment based on nationality for which there is no objective justification. The distinct treatment of nationals of a safe country is lawful because it is objectively justified by the fact that the country in question has been found to meet the criteria set out in Annex II of the Procedures Directive and is therefore regarded as generally and consistently free of persecution, torture and inhuman or degrading treatment.

36. So far as the distinction in the examination of applications by nationals of Nigeria is concerned, the difference is one of administrative processing only and not one which alters the application of the substantive provisions of either the 1996 Act or the Qualifications Directive. Those applications are dealt with earlier and more quickly, but they are still treated in full compliance with the criteria, principles and guarantees applicable to all applications including those of Chapter II of the Procedures Directive. Although, as indicated in para. 19 above, the applicants claim to have been placed at a "procedural disadvantage" as a result of the shorter processing times, neither applicant has pointed to any specific omission, illegality or departure from those principles and guarantees in the conduct of their cases to date. The Court notes in this regard that in the First Case, the notice of appeal to the Tribunal lodged on the 9th September 2008 lists eight grounds of appeal, none of which raises any issue as to the effect of the expedited processing of the s. 11 interview or the s. 13 report. In the Second Case no issue was raised in the concluded appeal which turned upon any factor claimed to be the result of an inadequacy or reduced standard caused by the acceleration or prioritisation of the examination before the ORAC.

37. It follows that the different manner in which Nigerian applications are managed on foot of the Minister's Direction has no impact on the rights which the asylum seeker is entitled to assert, whether under the Convention, the 1996 Act or by reference to the Qualifications Directive or the Procedures Directive. The substantive process of examination and determination of the application is the same for all applications. This view is not altered by the various procedural differences pointed to by the applicants including, for example, the fact that a prioritised s.13 report is signed by one rather than two authorised officers. From the point of view of the validity of the first instance decision it is the substantive quality and completeness of the examination which counts. If it can be shown to contain a material error or to otherwise fall short of the minimum standard required, the defect falls to be dealt with in the appeal whether there are one or two signatures.

38. Insofar as there is undoubtedly an organisational difference in the processing of Nigerian applications, the Court is satisfied that it has its own objective justification in the particular needs of the State as outlined in the evidence on behalf of the Minister.

Applications by Nigerian applicants have over a substantial number of years constituted the single largest category of applicants by country of origin. They accounted for 31% of the all applications in 2000 rising each year to 39% in 2003. The vast majority of such applications were decided to be unfounded. It is perhaps significant in this regard that according to the evidence on behalf of the Minister, a number of other Member States apply forms of priority or "fast track" procedures to applicants from Nigeria in particular.

39. Clearly, administrative decisions as to how a case load of this nature is best managed and how limited resources are best applied are matters exclusively for the decision of the Minister. Obviously, the reception, accommodation and support of large numbers of claimants constitute major administrative and economic burdens for the State. If practical experience demonstrates that theses burdens can be alleviated by managing and processing applications in a particular way the Minister is entitled to put in place the appropriate arrangements, provided there is no departure from the principles, guarantees and standards required to be met by the 1996 Act and the two directives. In the judgment of this Court, accordingly, there is discrimination in the sense of a difference in treatment, but it is not unlawful because it is one of managerial organisation and not of substance and has objective justification in experience in dealing with this category of application and in the particular needs of the State in processing the asylum applications received here.

40. The final argument raised in relation to the prioritisation issue is that the Minister's Direction has been made by the Minister and not by the "determining authority", namely the ORAC or the Tribunal. In the judgment of the Court this argument is unfounded. The power of the Minister to give the Direction lies in s. 12(1) of the 1996 Act and is not, as already indicated above, incompatible with or precluded by any provision of the Procedures Directive. Insofar as Article 23 of the Procedures Directive recognises the utility of prioritisation and acceleration it is addressed to the "Member States" without designating whether such decisions are to be made by a "determining authority". Article 4.1 of the Procedures Directive requires that Member States "shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive . . ." The procedures attributed to the determining authority (or authorities) are the substantive procedures involving the examination and determination of the asylum application. As already indicated above, the choice of particular categories of application for prioritisation or acceleration is an organisational aspect of the processing of applications as reflected in recital 11. In the judgment of the Court nothing in the Directive precludes that function being discharged or retained by the Minister as provided for in s. 12(1) of the Act.

41. For sake of completeness the Court would add that after the hearing in these cases it came to its attention that a request for a preliminary ruling under Article 267 TFEU (ex Article 234 EC) had been made to the Court of Justice by the Administrative Tribunal of the Grand Duchy of Luxembourg on a question concerning the interpretation of Article 39 of the Procedures Directive in the context of a national law which excluded any appeal against a decision to apply an accelerated procedure to an asylum application (Case 69/10 *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*). Having invited and heard additional submissions from the parties in relation to the issues raised in that case the Court considered that it was unnecessary to further postpone this judgment. The Court notes however that in a statement of observations on that reference published on 21st May 2010, the UNHCR accepted that the Procedures Directive allows accelerated procedures to be applied to all asylum applications. It also accepted that the relevant exclusion in the Luxembourg law – "providing no remedy against the decision to channel asylum claims into accelerated procedures, but only against the final decision – may be consistent with Article 39 [of the Procedures Directive] and Articles 6 and 13 ECHR, this is the case only so long as accelerated procedures afford the applicant access to all procedural safeguards essential for the enjoyment of the right to an effective remedy." (At paragraph 50.) Such is the position, in the view of the Court under the 1996 Act and, as pointed out above, neither applicant in these cases has demonstrated that any aspect of the actual first instance examinations of the applications had failed to comply with the principles and guarantees of Chapter II of the Directive let alone had done so in a manner which was incapable of being rectified by the appeal to the RAT.

42. For all of these reasons the Court considers that the challenge to the legality of the Direction is unfounded.

The Effective Remedy Issue

43. As already indicated above, Chapter V of the Procedures Directive, dealing with "Appeals Procedures" provides in Article 39 for "the right to an effective remedy". Member States are required to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a series of decisions including "a decision taken on their application for asylum". The definitions in Article 2 of the Directive distinguish between "decisions at first instance" which are taken on applications by the "determining authority", described as "any quasi-judicial or administrative body" responsible for examining applications and a "final decision", which is defined as a "decision on whether the third country national . . . be granted refugee status . . . and which is no longer subject to a remedy within the framework of Chapter V . . ." Thus the right to an effective remedy in Article 39 lies against the first instance decision on the application by a determining authority.

44. As already indicated and as explained in the evidence on behalf of the Minister, when the original proposal for the Procedures Directive was under consideration in the Council and Ireland had indicated its intention to exercise its entitlement to opt in, as provided for in Article 3 of the Protocol on the Position of the United Kingdom and Ireland annexed to the Treaty on European Union, concern arose as to whether the "recommendation" made by the Commissioner in a s. 13 report could be regarded as a "decision" by a "determining authority". This was because, as the 1996 Act stood, s. 13 required a recommendation and report by the ORAC while it fell to the Minister to make the "decision" under s. 17(1). Hence the negotiation and inclusion of the provision in Annex 1 quoted above. The effect, accordingly, is to accommodate without the need for amendment, the provisions of the 1996 Act relating to the functions of the ORAC and the "first instance decision", to the procedures envisaged in the Directive. Thus, the Commissioner is effectively deemed to be the "determining authority" for the purpose of the decision at first instance and the recommendation is treated as being decisive in character notwithstanding the fact that in 1996 Act, it is the Minister who makes the decision under section 17(1).

45. The wording of Annex I of the Procedures Directive is enabling in character: "When implementing the provision of this Directive, Ireland **may**, insofar as the provisions of section 17(1) of the Refugee Act 1996 (as amended) continue to apply, consider etc." Although the wording is permissive and the Procedures Directive has not been "implemented" by formal transposition, the Court considers that in order to give effect to the provision of Union law and the intention of the measure, it should approach the interpretation of the 1996 Act in light of the interpretative provision of the Annex. Insofar as the present issue concerns the entitlement of an asylum seeker to an effective remedy by way of appeal against the decision taken on a first instance examination of the application, the provision is sufficiently clear to be capable of direct effect since the expiry of the transposition period. So long as s. 17(1) remains without amendment, the State has no discretion but to treat the ORAC report and recommendation as the first instance decision. There can be no doubt therefore, in the judgment of the Court that, as a matter of Irish law, the Court is entitled and obliged now to construe those provisions of the 1996 Act in a manner which is compatible with the interpretative provision of the Annex. The Court thus accepts as correct the applicants' submission that, for the purpose of the Procedures Directive, the ORAC is the designated Determining Authority which takes the first instance decision and that it is in respect of those decisions that the Article 39 remedy must be provided. Indeed this issue is not really in dispute between the parties given that the respondents too

contend that in the light of the interpretative provision of Annex I, the ORAC falls to be treated in national law as the determining authority for decisions at first instance and the RAT appeal as the "effective remedy" for the purpose of Article 39.

46. In their submissions the applicants maintain that neither the right of appeal to the RAT from the ORAC report nor the availability of access to the High Court by way of judicial review satisfies the State's obligation to provide a right to an effective remedy in the sense of Article 39. It follows from what has just been held however that this latter issue does not arise. Insofar as judicial review forms part of the Irish legal framework of the asylum process, access to the High Court comes within the concept of "onward appeals or reviews provided under national law" recognised in the Procedures Directive: see Article 15.3(a) for example. It follows that the "final decision" for the purpose of the definition in Article 2 is, in the context of the 1996 Act, the appeal adjudication of the RAT.

47. It is important to point out nevertheless, that the availability of access to judicial review is not wholly irrelevant to the concept of an effective remedy when the State's compliance with the Procedures Directive is considered. Both the "decision" of the ORAC and the adjudication of the RAT on appeal are susceptible to challenge by way of judicial review and it is the combined efficacy of all remedies available within the administrative and judicial systems of a Member State which falls to be assessed when compliance with Article 39 is under scrutiny. As already cited above, recital 27 of the Procedures Directive explains: "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." This corresponds closely to the position of the European Court of Human Rights in relation to the right to an effective remedy under Article 13 of the Convention. *The Strasbourg court in C.G. & Ors v. Bulgaria* (2008) 47 E.H.R.R. 51, said in this regard (at para. 55 of its judgment): "The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. In certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13."

48. It is true that in a series of judgments the High Court has indicated that it will not systematically entertain applications for judicial review of ORAC reports where the appeal is available and is more suitable to the issues to be raised (*B.N.N. v. Minister for Justice* [2008] I.E.H.C. 308; *A.D. v. Refugee Applications Commissioner* [2009] I.E.H.C. 77). Nevertheless, the report of the Commissioner retains its status as an autonomous decision susceptible to judicial review in those cases where it may be suitable and convenient to resolve issues of law or competence prior to any appeal (*N.A.A. v. Refugee Applications Commissioner* [2007] I.E.H.C. 54). Thus, the character of the RAT appeal as an effective remedy within the overall Irish administrative and judicial structure is enhanced by the fact that in appropriate and suitable cases an applicant may not be required to have exclusive recourse to it if some net issue of jurisdiction, interpretation or law can first be resolved by judicial review. Indeed, the first of the present cases is one in which the applicant has had the benefit of this approach.

49. So far as concerns the general proposition advanced on this issue there can be no doubt therefore that, approached in this manner, the appeal to the RAT against the deemed decision of the ORAC does provide a remedy by way of appeal capable of overturning the negative "recommendation" and resulting in positive outcome for the asylum seeker.

50. Furthermore the remedy takes the form of a full appeal on both matters of fact and law in which the appellant can put forward specific grounds by way of challenge to the ORAC report, advance legal submissions and offer new information including new or up to date country of origin information. Save for cases in which it has been excluded in one of the circumstances listed in s. 13(6) of the 1996 Act, the appellant is entitled to be heard in person by the Tribunal member. Even in appeals without oral hearing the appellant is entitled to introduce his or her own new written testimony and that of other witnesses. It is not a requirement of the remedy prescribed in Article 39 of the Procedures Directive that an appeal by way of *de novo* rehearing be provided. Indeed, it is noteworthy that it is clear from paragraphs 3(a) and 4 of Article 39 that an appeal may take place when the appellant is no longer personally present in the Member State and be by way of re-examination of the first instance decision rather than by way of *de novo* rehearing. It is also to be observed that the power of the Tribunal under s. 16(6) of the 1996 Act to require further information or enquiries from the ORAC meets the objectives envisaged in paragraphs 2(b) and 3 of Article 8 of the Directive. Contrary to the suggestion made in argument, the Court does not consider that this in some way compromises the RAT as an independent tribunal. The ORAC is responsible for the first stage examination of the asylum application and is equipped with the specialist resources and facilities required for that purpose. It is represented at Tribunal hearings by a "presenting officer" to assist in the re-examination of its report and act so far as necessary as a legitimus contradictor in respect of matters put in issue by an appellant. Where, in order to reach a conclusion on a disputed issue or a matter of doubt, the Tribunal member directs that the ORAC conduct further enquiries or obtain further information, the RAT is doing no more than ensuring that the full examination of the asylum application is thorough and complete. The objective of the Procedures Directive is to ensure that the examination of applications culminating in the "final decision" is carried out according to the prescribed principles and standards and the investigative or inquisitorial obligation is not exclusive to the first instance stage. It is perhaps a failing of the common law mindset that conceives any remedy before a "court or tribunal" as necessarily one of an exclusively adversarial character by way of *de novo* rehearing.

51. It is submitted on behalf of the applicants, however, that the appeal provided for in the 1996 Act to the RAT against the s. 13 report nevertheless fails to comply with the requirement of Article 39 for the following specific reasons:

> (a) The RAT is not a "court or tribunal" within the meaning of Article 267 TFEU (ex Article 234 EC) as envisaged in recital 27;
>
> (b) Its decisions are not binding but are subject to the discretionary powers of the Minister under s. 17;
>
> (c) The Tribunal does not satisfy the criterion of independence vis-à-vis the ORAC because of the organisational and functional links that exist between those two bodies and the Minister;
>
> (d) The Tribunal is not protected against external intervention or pressure because of the rules governing the appointment, remuneration, terms of service, dismissal are not such as to guarantee the independent judgment of the members;
>
> (e) The powers given to the Minister over the constitution and organisation of the Tribunal in Schedule 2 to the 1996 Act are such that the chairperson and members of the Tribunal are not independent of the Minister; and
>
> (f) The Minister has power to intervene in a manner which materially affects the procedures of the Tribunal by virtue of his powers under ss. 12, 16(2B)(b) and 16(11) of the Act.
>
> *Arguments (a) & (b): "Court or Tribunal" within the Meaning of Article 267 TFEU*

52. The Court of Justice under this Article has jurisdiction to give preliminary rulings on questions as to the interpretation of the Treaties and the validity and interpretation of, *inter alia*, acts of the institutions referred to it by "any court or tribunal of a Member State". Extensive case law exists as to the essential characteristics laid down by the Court of Justice as to when a referring body at national level will be regarded as a court or tribunal for this purpose. While a court or tribunal so designated in national law will usually be so regarded, the concept is one of Union rather than national law so that a body may qualify as a court or tribunal under the Article while not so regarded in the relevant national system (see for example Case 246/80 *Broekmeulen v. Huisarts Registratie Commissie* [1981] E.C.R. 2311 at para 11). In general terms a body will be so regarded by the Court of Justice where it is shown to be: a) established by law (*Broekmeulen*); b) has permanent and independent existence (Case 54/96 *Dorsch Consult v. Bundesbaugesellschaft Berlin* [1997 E.C.R. I-4961 at paras. 24-25); c) has the function of determining disputes and has binding jurisdiction (*Dorsch Consult* at paras 27-29, 37); d) applies the rule of law and (though not necessarily exclusively) an *inter partes* procedure similar to that of a court of law (*Dorsch Consult* at paras. 22-38).

53. Having regard to those general criteria, in the judgment of the Court there can be no doubt that the RAT is a "court or tribunal" for the purposes of Article 267. It is established on a permanent statutory basis in the 1996 Act (as amended); its jurisdiction is compulsory and its decisions on appeals are binding. In the case of positive rulings they are binding on the Minister as well as on the ORAC and the appellant. If the Minister retains a residual discretion in the case of a negative recommendation to nevertheless grant a declaration under s. 17(1) it can only be exercised in favour of the appellant and thus gives rise to no ground of complaint of infringement of any right or entitlement. An effective remedy is only needed in order to rectify such a complaint. For this reason the ground suggested at (b) above is also unfounded. The Minister has no discretion to deprive an applicant of the benefit of a positive recommendation either at first instance or at appeal.

Arguments (c)–(f): Independence of the RAT

54. The remaining arguments to the effect that the RAT appeal does not satisfy Article 39 are based upon the proposition that the Tribunal is not established as an entity which is independent of the ORAC and the Minister because of what are said to be a series of the statutory provisions creating organisational and functional links and which render it susceptible to interference or influence by them. Thus, it is pointed out that both the Commissioner and the RAT chairman are members of the Refugee Advisory Board and report to the Minister on the operation of the Acts in that capacity (s. 7A of the Act). As mentioned above, the ORAC is said to be "a party" to an applicant's appeal. It is a determination of the ORAC under s. 13(5) or (8) which obliges the RAT to dispense with an oral hearing on appeal. Reference is made in detail to the establishment provisions of the RAT in Schedule II to the 1996 Act to suggest that the Minister's powers in respect of the nomination and fixing of the terms of appointment, remuneration and other aspects of office tenure of the Chairman and members of the Tribunal are such as deprive it of independence. So far as the discharge of the functions of the RAT is concerned, the powers of the Chairman in allocating cases and assigning classes of business are pointed to as indicating that the independent judgment of individual members in proceedings before them is open to external pressure or influence. It is complained that the ordinary members of the Tribunal are remunerated on a case by case basis rather than paid a salary or daily rate.

55. In the judgment of the Court all of these arguments are unfounded and misconceived. In the first place the RAT has been established by Act of the Oireachtas as a body explicitly declared by it to be independent. Section 15(2) expressly provides: "The Appeal Board shall be independent in the exercise of its functions under this Act." Secondly, as a statutory body exercising delegated administrative and quasi-judicial functions it must be funded from the exchequer and as such it must necessarily be accountable through its officers and members to a department of Government for the expenditure of its funds and the discharge of its functions. In this regard the provisions in Schedule II of the Act governing its establishment, functioning and the appointment, remuneration and organisation of its officers, members and staff are not materially different from those of many other statutory bodies and tribunals with analogous roles in different fields. It was argued that other such statutory bodies such as the Competition Authority or an Bord Pleanála are required by their statutes to be independent in the discharge of their functions and yet would not satisfy the criteria of Article 267. A body does not so qualify, however, because it is independent: independence vis-à-vis the parties to its proceedings is, as pointed out above, but one of the required characteristics. The example of the Competition Authority is of course in any event misplaced as the Authority does not decide competition rule infringements but brings the complaint or prosecution before the appropriate court.

56. In the judgment of the Court, when the quality of independence of an administrative or quasi-judicial tribunal is in issue it is the independence of the decision-maker vis-à-vis the parties to the proceeding before it which falls to be considered. In this connection it is significant that in the case of the RAT, the decision-makers are barristers and solicitors of at least five years professional standing and experience who are otherwise in private practice and who are engaged on a case by case basis to determine appeals. As such their status in practical terms is more independent of the Minister and the Commissioner than might be said to be the case if they were full-time, pensionable employees of the Department of Justice and Law Reform.

57. Although the arguments under this heading have been heavy in innuendo to the effect that the basis on which the RAT is established, its members appointed and its work organised deprives it of independent status, no evidential basis has been demonstrated as to why it should be assumed or concluded that the objective, impartial and independent judgment of the decision makers is compromised or jeopardised. Contrary to the suggestion made, the fact that some individual Tribunal members may be shown to have earned more in a given year than others does no more than indicate different levels of individual availability or willingness to accept particular workloads and does not constitute proof that "remuneration varies dramatically" thereby raising an inference of untoward influence or the compromise of the independence of judgment of the high earners. Given that the ordinary Tribunal members are paid on a case by case basis, the remuneration rates are uniform and it is the case load and thus the earnings which vary.

58. Implicit in the arguments in this ground and in the references to "level playing fields" has been the proposition that an asylum seeker faces an adversary in the Commissioner and/or the Minister and that the tribunal lacks independence because of the organisation, managerial or statutory links described in paragraph 54 above. This implication is misconceived and conflates distinct considerations. First, while it will frequently be a characteristic of a body which satisfies Article 267 that it determines disputes in an *inter partes* form of procedure, that is not an absolute criterion of Union law (*Dorsch Consult* at paras. 22-38) and such a procedure does not in any event connote an exclusively adversarial form of proceeding to the exclusion of any inquisitorial or investigative function typical of an asylum process. Secondly, it is not an essential ingredient of an effective remedy for the purpose of Article 39 that it be available only by means of an exclusively adversarial court procedure. Thirdly, although as already mentioned, the procedure before the RAT on appeal involves the contribution of the Commissioner through the "presenting officer" the Commissioner is not a party to the proceeding as an adversary with an interest in defeating the asylum claim (see in this regard the judgment of this Court in *X.C.L. v. Refugee Appeals Tribunal* [2010] I.E.H.C. 148). In this regard it is important to recall an important principle of asylum law. The determination of an asylum application does not have as its purpose or outcome the discretionary grant or refusal of refugee status by the Minister. It is not for example analogous to the exercise of his discretion on an application for a certificate of

naturalisation under the Irish Nationality and Citizenship Act 1956. An asylum seeker is a refugee as and when the circumstances defined in the Geneva Convention arise and apply. The determination of the asylum application is purely declaratory of a pre-existing status. Thus no court or tribunal concerned in providing an effective remedy in the asylum process is involved in adjudicating on an adversarial dispute as to the entitlement to have a discretion exercised or a benefit granted by a party who opposes it. It is concerned with determining whether the examination of the asserted circumstances have been fully, correctly and lawfully investigated and the right assessment reached.

59. For all of these reasons the Court finds that the second limb of the ground for which leave was granted has not been sustained.

60. It follows that the reliefs applied for in the two cases must be refused.