JUDGMENT OF THE COURT (Grand Chamber)

6 May 2008 *

In Case C-133/06,

APPLICATION for annulment under the first paragraph of Article 230 EC, brought on 8 March 2006,

European Parliament, represented by H. Duintjer Tebbens, A. Caiola, A. Auersperger Matić and K. Bradley, acting as Agents,

applicant,

supported by:

Commission of the European Communities, represented by C. O'Reilly, P. Van Nuffel and J.-F. Pasquier, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

v

Council of the European Union, represented by M. Simm, M. Balta and G. Maganza, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

French Republic, represented by G. de Bergues and J.-C. Niollet, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Tizzano and L. Bay Larsen (Rapporteur), Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2007,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2007,

gives the following

Judgment

1 By its application, the European Parliament seeks, primarily, the annulment of Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13; 'the contested provisions') and, alternatively, the annulment of that directive in its entirety.

2 By order of the President of the Court of Justice of 25 July 2006, the Commission of the European Communities and the French Republic were granted leave to intervene in support of the forms of order sought by the Parliament and the Council of the European Union respectively.

Legal context

Relevant provisions of the EC Treaty

3 The first paragraph of Article 63 EC in Title IV of the Treaty, headed 'Visas, asylum, immigration and other policies related to free movement of persons', provides:

'The Council, acting in accordance with the procedure referred to in Article 67 [EC], shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum …, within the following areas:

…

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection;

…’

4 Article 67 EC, as amended by the Treaty of Nice, provides:

‘1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

— the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

— the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 [EC] and adapting the provisions relating to the powers of the Court of Justice.

…

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251 [EC]:

— the measures provided for in Article 63(1) and (2)(a) [EC] provided that the Council has previously adopted, in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues,

…'

Secondary legislation prior to Directive 2005/85

5 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18) were adopted on the basis of point 1(a) and (b) respectively of the first paragraph of Article 63 EC.

6 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as

persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) was adopted on the basis of points 1(c), 2(a) and 3(a) of the first paragraph of Article 63 EC.

7 Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (OJ 2004 L 396, p. 45) was adopted on the basis of the second indent of Article 67(2) EC.

8 Article 1(2) of that decision provides:

'As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 [EC] when adopting measures referred to in Article 63(2)(b) and (3)(b) [EC].'

9 Recital 4 in the preamble to the decision points out that the decision does not affect the provisions of Article 67(5) EC.

Directive 2005/85

10 Directive 2005/85 was adopted on the basis, in particular, of point 1(d) of the first paragraph of Article 63 EC.

11 According to Article 1, the purpose of the directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

12 Recitals 17 and 18 in the preamble to the directive state:

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

(18) Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, common criteria for designating third countries as safe countries of origin should be established.'

13 With regard to safe countries of origin, recital 19 in the preamble to Directive 2005/85 states:

'Where the Council has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nation-

ality of that country … on the basis of the rebuttable presumption of the safety of that country. In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.'

14 With respect to certain European third countries which observe particularly high human rights and refugee protection standards, recital 24 in the preamble to the directive is worded as follows:

'… Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament.'

15 Article 29(1) and (2) of the directive, headed 'Minimum common list of third countries regarded as safe countries of origin', provides:

'1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.

2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State to submit a proposal to amend the minimum common list.'

16 Annex II to Directive 2005/85, headed 'Designation of safe countries of origin for the purposes of Articles 29 and 30(1)', defines the criteria by which a country may be designated as a safe country of origin as follows:

'A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.'

17 According to Article 36(1) to (3) of Directive 2005/85, headed 'The European safe third countries concept':

'1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.

3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.'

18 The Council did not apply the contested provisions in the adoption of the two lists provided for by those provisions.

The application

19 In support of its application for annulment, the Parliament raises four pleas in law: infringement of the EC Treaty stemming from disregard of the first indent of Article 67(5) EC; the Council's lack of competence to enact the contested provisions; breach of the duty to state reasons for those provisions; and, finally, failure to comply with the obligation to cooperate in good faith.

20 The first two pleas should be examined together, since they are indissociable, as the Advocate General noted at point 11 of his Opinion.

The first two pleas, alleging an infringement of the first indent of Article 67(5) EC and the Council's lack of competence

Arguments of the parties

21 The Parliament submits that, in view of the Community legislation that was already adopted, namely Regulation No 343/2003 and Directives 2003/9 and 2004/83, the adoption of Directive 2005/85 constituted the final legislative stage in the adoption of common rules and basic principles the implementation of which was intended to enable the transition to be made to the procedure laid down in Article 251 EC ('the co-decision procedure'), in accordance with the requirements of the first indent of Article 67(5) EC.

22 Therefore, the subsequent adoption of the minimum common list of third countries regarded as safe countries of origin and the common list of European safe third countries (together: 'the lists of safe countries') should proceed in accordance with the co-decision procedure.

23 By the contested provisions, the Council therefore unlawfully made use, in an act of secondary legislation, of legal bases enabling it to adopt the lists of safe countries by way of a procedure requiring only the consultation of the Parliament.

24 According to the Parliament, by creating a secondary legal basis in this way, the Council 'reserved to itself a right to legislate'. However, nowhere does the Treaty provide for the Council to be able to establish new legal bases for the purposes of the adoption of secondary legislation outside the existing procedures for the adoption of legislative acts and implementing measures.

25 The Parliament takes the view that the possible existence of a Council practice of establishing secondary legal bases cannot serve as justification.

26 Referring to the judgment of the Court in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, the Parliament submits that, in the field of legislation, the Treaty applies and it is not possible to alter the procedures it lays down.

27 The Commission takes the view that the secondary legal bases contained in the contested provisions are unlawful.

28 The Community legislature does not have the option of choosing the manner in which it exercises its powers. The institutions may act only within the limits of the powers conferred upon them by the Treaties, which alone determine the procedures for the adoption of legislative acts.

29 According to the Commission, the contested provisions cannot be regarded as reservations of the right to exercise implementing power, available to the Council on the basis of the third indent of Article 202 EC.

30 The contested provisions constitute a twofold procedural abuse: first, in relation to the unanimity rule laid down in point 1(d) of the first paragraph of Article 63 EC at the time of the adoption of Directive 2005/85 and, second, in relation to the co-decision procedure which must replace that rule once Community legislation is adopted which defines the common rules and basic principles governing asylum policy.

31 The Council submits that, on the contrary, nothing in the EC Treaty precludes an act adopted in accordance with the procedure laid down by the applicable legal basis from creating a secondary legal basis for the purposes, inter alia, of the subsequent adoption of a legislative act in that area by means of a simplified decision-making procedure.

32 According to the Council, the use of secondary legal bases is an established legislative technique, which is illustrated in numerous Community acts. The only lesson to be drawn from the judgment in *United Kingdom* v *Council* is that a secondary legal basis cannot result in the procedure laid down by the Treaty becoming more cumbersome, which is not the case as regards the procedure introduced by Directive 2005/85.

33 The Council takes the view that the circumstances of the case called for recourse to be had to a secondary legal basis, and that the first indent of Article 67(5) EC did not preclude this.

34 The instruments constituted by the lists of safe countries fall within an area characterised both by great political sensitivity on the part of the Member States, and by the practical need to react quickly and effectively to changes in the situation of the third countries in question. In fact, those instruments cannot be used effectively unless they are adopted and subsequently amended by means of a procedure such as that introduced by the contested provisions.

35 The Council denies that the secondary legal bases contained in the contested provisions conflict with the co-decision procedure provided for in the first indent of Article 67(5) EC. That provision is applicable only on the twofold condition that the act to be adopted is founded on points 1 or 2(a) of the first paragraph of Article 63 EC and that the Council has previously adopted Community legislation defining the common rules and basic principles governing the issue.

36 With regard to the first of those conditions, the Council observes, in essence, that the lists of safe countries will not be adopted on the basis of Article 63 EC but will be founded on the contested provisions, which provide for a less cumbersome procedure than that used for the adoption of the basic act. The Council adds that, since the Treaty required only the consultation of the Parliament for the adoption of Directive 2005/85, it is hard to find fault with recourse to the contested provisions which provide for the same level of participation by the Parliament.

37 As far as the second condition is concerned, the Council takes the view that, by referring to 'Community legislation', the first indent of Article 67(5) EC does not require the common rules and basic principles to be laid down in a single legislative act and at a specific time. The transition to the co-decision procedure is linked to a substantive, rather than to a formal or temporal, criterion.

38 Since the conditions laid down for transition to the co-decision procedure have not been fulfilled, neither the Parliament's prerogatives nor the institutional balance have been undermined.

39 The French Republic submits that the adoption of the lists of safe countries forms part of Community legislation defining 'the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC. Consequently, even if those lists are required to be adopted on the basis of the Treaty itself and not on the basis of the contested provisions, they should be adopted only after mere consultation of the Parliament.

40 With regard to the general question of the possibility of recourse to a secondary legal basis, the French Republic, like the Council, takes the view that there is nothing in the Treaty that precludes it.

41 Recourse to secondary legal bases is an established practice of the Community legislature. Admittedly, a mere practice cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the Community institutions. However, the case-law shows that the Court of Justice is not necessarily indifferent to the practices followed by those institutions (Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraphs 48 and 49).

42 Finally, as regards the substantive conditions for recourse to secondary legal bases, these are met in the present case. The contested provisions are of great political sensitivity and reflect the practical need to react quickly and effectively to changes in the situation of third countries.

Findings of the Court

43 By its first two pleas in law, the Parliament raises, in essence, the question whether the Council could lawfully provide in the contested provisions for the adoption and amendment of the lists of safe countries by a qualified majority on a proposal from the Commission and after consulting the Parliament.

44 It should be borne in mind that, under the second subparagraph of Article 7(1) EC, each institution is to act within the limits of the powers conferred upon it by the Treaty (see Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraph 49, and the case-law cited).

45 It must be observed, first, that, when adopting Directive 2005/85 in accordance with the arrangements laid down in Article 67(1) EC, the Council had the opportunity to apply the third indent of Article 202 EC in order to adopt measures not essential to the subject-matter to be regulated (see, to that effect, Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 36).

46 Thus, on the assumption that the lists of safe countries are non-essential and relate to a specific case, the Council could have decided to reserve the right to exercise implementing powers, provided that it stated in detail the grounds for its decision (see, to that effect, Case C-257/01 *Commission* v *Council* [2005] ECR I-345, paragraph 50).

47 The Council must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power (*Commission* v *Council*, paragraph 51).

48 In the present case, the Council expressly referred, in recital 19 in the preamble to Directive 2005/85, to the political importance of the designation of safe countries of origin and, in recital 24, to the potential consequences for asylum applicants of the safe third country concept.

49 However, as the Advocate General stated at point 21 of his Opinion, the grounds set out in those recitals are conducive to justifying the consultation of the Parliament in respect of the establishment of the lists of safe countries and the amendments to be made to them, but not to justifying sufficiently a reservation of implementing powers which is specific to the Council.

50 In addition, in the present dispute — which concerns a directive the contested provisions of which reserve to the Council a power which is not limited in time — the Council has not advanced any argument as to why those provisions should be reclassified as provisions on the basis of which the Council has reserved the right to exercise directly specific implementing powers itself. On the contrary, the Council confirmed at the hearing that those provisions confer upon it a secondary legislative power.

51 In those circumstances, no possibility arises of a reclassification of the contested provisions to enable the view to be taken that the Council applied the third indent of Article 202 EC.

52 Second, it should be noted that, in the context of the application of Article 67 EC, the measures to be taken in the areas covered by points 1 and 2(a) of Article 63 EC are adopted in accordance with two separate procedures laid down in Article 67 EC: the procedure for unanimous adoption after consultation of the Parliament or the co-decision procedure.

53 The contested provisions introduce a procedure for the adoption of those measures by a qualified majority on a proposal from the Commission and after consultation of the Parliament; such a procedure differs from those laid down in Article 67 EC.

54 However, it has already been held that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves (see *United Kingdom* v *Council*, paragraph 38).

55 The Treaty alone may, in particular cases such as that provided for in the second indent of Article 67(2) EC, empower an institution to amend a decision-making procedure established by the Treaty.

56 To acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty.

57 It would also enable the institution concerned to undermine the principle of institutional balance which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraph 22).

58 The Council cannot reasonably claim that the adoption procedure laid down by the contested provisions does not conflict with the co-decision procedure on the ground that the lists of safe countries will not be adopted on the basis of Article 63 EC but on the basis of those provisions, which provide for a less cumbersome procedure than that under which the basic act was adopted. Such an argument effectively accords provisions of secondary legislation primacy over primary legislation — in the present case, Article 67 EC, paragraphs (1) and (5) of which must be applied successively in compliance with the conditions laid down to that effect.

59 Nor can the adoption of secondary legal bases be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action.

60 Furthermore, the existence of an earlier practice of establishing secondary legal bases cannot reasonably be relied upon. Even on the assumption that there is such a practice, it cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the institutions (see, to that effect, *United Kingdom* v *Council*, paragraph 24, and Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 21).

61 It follows that, by including in Directive 2005/85 the secondary legal bases constituted by the contested provisions, the Council infringed Article 67 EC, thereby exceeding the powers conferred on it by the Treaty.

62 It must be added that, as regards the future adoption of the lists of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty.

63 In that respect, in order to determine whether the adoption and amendment of the lists of safe countries through legislation or any decision to apply the third indent of Article 202 EC, in the form of a delegation or reservation of implementing powers, fall within paragraphs (1) or (5) of Article 67 EC, it is necessary to assess whether, with the adoption of Directive 2005/85, the Council has adopted Community legislation defining the common rules and basic principles governing the issues covered by points 1 and 2(a) of the first paragraph of Article 63 EC.

64 As regards procedures in Member States for granting or withdrawing refugee status, point 1(d) of the first paragraph of Article 63 EC merely provides for the adoption of 'minimum standards'.

65 As is apparent from paragraphs 10 to 17 of this judgment, Directive 2005/85 adopts detailed criteria enabling the lists of safe countries to be established subsequently.

66 Consequently it must be concluded that, by that legislative act, the Council adopted 'Community legislation defining the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC, and therefore the co-decision procedure is applicable.

67 In the light of the foregoing, the first two pleas in law advanced by the Parliament in support of its application for annulment must be upheld and, accordingly, the contested provisions annulled.

The third and fourth pleas in law, alleging a breach of the duty to state reasons for the contested provisions and failure to comply with the obligation to cooperate in good faith

68 Since the first two pleas in law are well founded, there is no need to examine the third and fourth pleas in law upon which the Parliament relied in support of its application.

Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the Parliament has applied for the Council to be ordered to pay the costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in this case are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Annuls Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status;**

2. **Orders the Council of the European Union to pay the costs;**

3. **Orders the French Republic and the Commission of the European Communities to bear their own costs.**

[Signatures]