R (on the application of Hagos) v Secretary of State for the Home Department (Dublin returns – Malta) IJR [2015] UKUT 0271 (IAC)

Upper Tribunal

Immigration and Asylum Chamber

Judicial Review Decision Notice

In the matter of an application for judicial review

The Queen on the application of

Binyan Hagos

Applicant

v

Secretary of State for the Home Department

Respondent

Before Mr Justice McCloskey, President of the Upper Tribunal and Upper Tribunal Judge O'Connor

On this application for judicial review and following consideration of the documents lodged by the parties and having heard Mr A Gilbert (of Counsel), instructed by Laurence Lupin Solicitors on behalf of the Applicant and Mr Z Malik (of Counsel) instructed by the Government Legal Department on behalf of the Respondent at hearings conducted on 14 January and 14 April 2015

1) *While the Maltese system for the reception, processing and treatment of asylum seekers has certain frailties and shortcomings, these fall measurably short of fundamental failings or near collapse, particularly in circumstances where the consistent trend is one of progressive improvement and fortification. It suffers from no systemic deficiency.*

2) *The transfer of a young male adult in good physical health, though suffering from mental health problems and asserting a risk of suicide, from the United Kingdom to Malta under the Dublin Regulation will not necessarily violate Article 3 ECHR, Articles 18 or 47 of the EU Charter of Fundamental Rights, Article 33 of the Refugee Convention or the Qualification Directive.*

3) *(Per curiam) The removal of a person to another state contravenes Article 5 ECHR only if the evidence establishes a real risk of a flagrant breach of this provision.*

Judgment

Handed down on 29 April 2015

McCloskey J

This judgment, to which both members of the panel have contributed, consists of six chapters:

i. Introduction.

ii. The Evidence Summarised.

iii. The Applicant's Case.

iv. Discussion.

v. Conclusions.

vi. Order and Ancillary Matters.

I INTRODUCTION

1. The Applicant is a national of Eritrea, aged 27 years. His application for judicial review was the subject of a "rolled up" direction by Upper Tribunal Judge O'Connor, dated 06 October 2014. The proceedings have evolved since they were initiated, in May 2014. Initially, the target of the Applicant's challenge was the Respondent's decision of 01 April 2014 certifying the Applicant's asylum claim on third country and clearly unfounded grounds, in tandem with the subsequent, associated making of removal directions dated 08 May 2014. The proceedings have proved to be organic and, in their subsequent evolution, a further decision of the Respondent, dated 07 January 2015, has overtaken the initial decisions and is now the new target of the Applicant's amended challenge. By the terms of its most recent, updated decision the Respondent has affirmed her initial decision.

2. We summarise the history in the following way:

   (a) The Applicant avers that in 2002 he and his family left Eritrea due to persecution by the authorities on account of their Protestant Christian faith.

   (b) Between 2002 and 2011 the Applicant lived in Sudan. He left this country and travelled to Libya because, he avers, those without a work permit were being pursued by the authorities.

   (c) In February 2012, when he was attempting to leave Libya by boat, he was arrested and detained subsequently for 20 days.

   (d) On 26 June 2012, having escaped from custody, he travelled on a boat which had Italy as its destination but, due to fuel shortage, did not proceed beyond the island of Malta in the Mediterranean Sea.

(e) On 26 August 2012 the Applicant's fingerprints were taken by the Maltese authorities.

(f) During the entirety of his sojourn in Malta, the Applicant was detained in a detention centre, in the course of which he spent around one month in a mental health hospital.

(g) On 19 December 2013 the Applicant was released from detention and given temporary accommodation. Due mainly to the intolerable conditions he left and travelled to the United Kingdom via Italy and France.

(h) On 04 March 2014 he arrived in the United Kingdom, claiming asylum.

(i) On 13 March 2014 the Respondent formally requested Malta to accept responsibility for the determination of the Applicant's asylum claim, in accordance with the Dublin III Regulation. On 01 April 2014 Malta was deemed to have accepted such responsibility and on 10 April 2014 it did so formally.

(j) On 01 April 2014 the Respondent certified the Applicant's case under Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

(k) Representations opposing the Applicant's removal to Malta were then made by his solicitors. By letter dated 05 May 2014 the Respondent, relying particularly on the decisions in NS v SSHD, Cases C-411/10 and C/493/10 and R (EM – Eritrea) v SSHD [2014] UKSC 12 conveyed its decision certifying the Applicant's human rights claim as clearly unfounded under the aforementioned statutory regime.

(l) On 08 May 2014 the Respondent decided to remove the Applicant to Malta and directions were made for this to take place on 19 May 2014.

(m) On 16 May 2014 this application for judicial review was initiated.

(n) By order of Upper Tribunal Judge Kebede dated 23 June 2014, permission was refused on the papers.

(o) Pursuant to the Applicant's request for oral renewal of his permission application, Upper Tribunal Judge O'Connor ordered, on 06 October 2014, that a "rolled up" hearing be convened.

(p) On 07 October 2014 further representations on behalf of the Applicant were made to the Respondent.

(q) On 29 October 2014 the Applicant's further representations were rejected by a further decision of the Respondent.

(r) The Applicant then sought to amend his grounds of challenge.

(s) The Respondent's response was to file revised grounds of defence, accompanied by a supplementary decision letter dated 07 January 2015 which, in effect, maintained the original decision, albeit this became the new, operative decision.

(t) The Tribunal subsequently granted permission to the Applicant to amend his grounds.

3. Pursuant to the evolution and amendments noted above, the Applicant's case, in its reconfigured incarnation, is encapsulated in the final paragraph of his pleading in these terms:

> "*Applying anxious scrutiny, it cannot be said that* [the Applicant's] *claim is 'clearly*

unfounded', or that no rational First-tier Tribunal Judge could conclude that removal to Malta was without a real risk of harm to [the Applicant] *and/or a denial of his fundamental rights ie that the claim fails to show a single 'legitimate view' upon which a Tribunal might consider this mentally ill claimant faced a real risk.*"

We shall examine the particulars and outworkings of this omnibus pleading *infra.*

II. THE EVIDENCE SUMMARISED

4. Focusing firstly on the Applicant's condition and traits, it is convenient to begin with the report of Professor Katona, a Consultant Psychiatrist, which was commissioned for medico-legal purposes in the course of these proceedings and is dated 25 November 2014. It is appropriate to preface this with certain excerpts from the Applicant's statement, dated 23 April 2014, the context being the Applicant's detention in Malta following the refusal of his asylum claim:

> "*I was devastated and severely depressed … I decided to drink from bleach in an attempt to commit suicide because I could not live that life any longer. I lost consciousness and the next thing I recall is waking up in a hospital (Mater Dei Hospital) where I was treated and given some kind of support ……..*
>
> *When I got better I was asked whether I was going to try to commit suicide and I responded that I would if they took me back to detention so I was transferred in* [sic] *a mental health hospital (*Mount Carmel Hospital) *where I stayed for about a month ……*
>
> *I cannot go back to Malta. I have suffered too much there …..*
>
> *I have nowhere to go, no place to stay in Malta. I need support and assistance because of my mental health issues ……*"

This witness statement is now of one year's vintage. There is no more recent statement.

5. The opinion expressed in Professor Katona's report is based on a single interview of the Applicant, conducted on 03 November 2014, together with certain "*subjective documents*", which consisted of the Applicant's statement, the judicial review claim form, the solicitor's pre-action protocol letter, the Respondent's reply, the formal removal documents and the record of the asylum screening interview. The history recounted by the Applicant included an assertion that following his initial detention upon arrival in England he felt stressed and received certain unspecified medication which helped him to sleep. This improvement in his sleep continued and he remained physically well. However, he felt "*increasingly low in mood*". Following some five months in detention he was released. He claimed that being unable to work was "*very stressful*". He reported some recent improvement in his mood following the re-establishment of contact with some friends in London. He claimed that if forcibly returned to Malta he would kill himself.

6. Professor Katona diagnosed that the Applicant is suffering from Post-Traumatic Stress Disorder ("PTSD"). The components of this diagnosis included an assessment of moderate depressive symptoms, severe trauma symptoms and very severe distress. The Professor assessed the Applicant's suicide risk thus:

> "[His] *suicide risk would be high in the UK once he had been informed that he was not going to be allowed to stay and would remain so during the removal process and once he was back in Malta or in Eritrea. His suicide risk in the UK would become high if he were detained …..*
>
> *If* [he] *were removed to Malta and was unsupervised in a detention setting then his suicide risk would be very high. His suicide risk under such circumstances*

could be reduced to some extent if reasonable precautions (such as close observation and removal of means) were taken."

He further opined that the Applicant's suicide risk would be "*low*" if he were at liberty in Malta, adding the qualification that he would need treatment for his PTSD there.

7. The Applicant's asylum screening interview was conducted on 05 March 2014, with the assistance of an interpreter. We highlight the following responses to certain questions:

   (a) The harm which the Applicant was fearful of suffering if removed from the United Kingdom was articulated as that of arrest.

   (b) Eritrea was the country wherein he feared persecution.

   (c) He made no mention of Malta when describing his various travels and sojourns.

   (d) He claimed that his fingerprints had not been taken in any other country.

   (e) He asserted that he had suffered depression, apparently in Libya, but "*not now*" and had "*issues sleeping*".

   (f) He stated that he had not claimed asylum previously.

   (g) He claimed that he had last seen his wife in Libya six months previously.

8. The so-called "country" evidence is reasonably voluminous and spans the five year period 2009 – 2014. The resumé which follows is confined to highlighting its more salient aspects, including those which received particular attention in the arguments of the parties.

9. In a report compiled in April 2009, the charity Medecins sans Frontieres ("MSF") denounced the detention conditions of undocumented migrants and asylum applicants in Malta. Most of the immigrants emanated from African countries and the majority were granted humanitarian protection by the Maltese authorities. Only 10% were granted asylum. All had to spend months in detention before determinations were made. MSF criticised the lack of adequate shelter, hygiene and sanitation in the Maltese detention centres. The organisation further complained that access to fresh air was limited and irregular, conditions in "isolation areas" were dire and the food was substandard. The detention conditions had adverse impacts on the physical and mental health of detainees. While primary health care was available, it was very limited and the provision of medication was inadequate.

10. MSF further noted that referral to secondary care involved the Mater Dei Hospital and the Mount Carmel Psychiatric Hospital. However:

> "*In the absence of medical personnel in the centres, the decision to refer someone is taken by the Detention Service personnel. This happens without accompanying translators, unless another detainee is capable, available and given permission by the soldiers on shift to act as translator. Many patients are discharged from hospital without discharge papers or a clear treatment plan which makes the follow up treatment in the detention centres difficult.*"

The MSF report says the following of psychiatric care:

> "*Detained patients who require in-patient psychiatric care are admitted to Mount Carmel Psychiatric Hospital. All detained patients are admitted to a special ward which has individual cells intended only for detained migrants and asylum seekers and which is permanently guarded by a police man. The ward is staffed by one nurse per shift from an agency and not by regular hospital staff …..*
>
> *It offers no possibilities for social interaction between patients and has no*

provision for any activities. Patients spend long periods in solitary confinement. .....

No external visitors are allowed without official permission from police headquarters ….

Translation is not available. As a result, the medical team often has a limited understanding of the patient's history, symptoms and experience …

Consultant supervision is limited to a weekly visit."

MSF was also critical of the arrangements and procedures for the assessment of vulnerable persons and the handling of their cases. The report concluded:

"*Based on first hand experience inside the detention centres, MSF has on several occasions expressed its concerns to the Maltese authorities about the unacceptable conditions in these centres, as well as the delays or failure in the dispensation of medicines and inadequate follow-up of patients with infectious diseases …*

*Despite efforts made by authorities to rehabilitate one of the centres, the response is slow and totally inadequate to ensure that the basic needs of migrants and asylum seekers are met ….. **Conditions fall well below international and national standards and are detrimental to the physical and mental health of people** …* [and] *….. compound the suffering of people who have already fled danger and hardship in their countries of origin and who have survived long and risky journeys over seas.*"

[Emphasis added.]

11. In its later "Special Report", dated July 2009, MSF noted that it had begun providing healthcare and psychological support to undocumented migrants and asylum seekers in Malta in August 2008. It reported the following figures: there were more than 2700 new arrivals in Malta in 2008, signifying an increase in previous figures; almost 50% originated from Somalia; between August 2008 and February 2009 MSF provided 3192 consultations to the whole cohort; the health care which it provided in detention centres was of limited effect due to the seriously substandard living conditions; and about 17% of the health conditions diagnosed were respiratory problems linked to exposure to cold and lack of treatment for infections. MSF was so concerned about the "*appalling*" living conditions in the "*camps*" for detained migrants that it suspended its activities therein and publicly denounced them. It continued to work in "*open centres*" to which successful migrant applicants were transferred.

12. In March 2010 the Jesuit Refugee Service Malta ("JRSM"), a prominent religious order, renowned and respected universally, published a report on the conditions in which the migrant community in Malta existed. It considered, *inter alia*, the Maltese Agency for the Welfare of Asylum Seekers ("AWAS") and the residential and other facilities provided to migrants by this entity. It noted that a system of residential agreements was in place and that such agreements could be terminated for various reasons, making it extremely difficult for displaced residents to reacquire a place in an AWAS open centre. Such persons lost their funding allowance and were liable to destitution. The report noted that the allowance, in any event, was insufficient to cover basic subsistence costs of food, transport and medication. The report made various recommendations.

13. In a further report published in June 2010, the JRSM reported as follows:

    (a) There is no legal time limit on the detention of rejected asylum seekers and illegally staying third country nationals who do not apply for asylum. Official government policy was that detention should not exceed 18 months.

(b) Of the 89 detainees interviewed, almost 80% claimed that their mental health had been adversely affected by detention. Some 65% asserted that access to appropriate treatment was unavailable.

(c) Interviewees also expressed continuing concerns about detention conditions, including hygiene and nutrition.

Summarising, the report states that interviewees complained of increased stress, frustration, loss of appetite, sleep disturbance and feelings of powerlessness. The report made various recommendations designed to address the mischiefs identified.

14. Next, there is a report of Amnesty International ("AI") dated December 2010. This notes that under Maltese legislation any person who arrives irregularly receives a removal order and is subject to mandatory detention, which can extend to 18 months. This is justified by the authorities on security grounds and there is no alternative non-custodial measure. There is a lack of effective legal remedies to challenge detention. Transfers to the "open" centres occur after the maximum detention period expires or following the grant of some form of protection. These are run by AWAS (*supra*). Staffing is inadequate and there are no medical or social care workers. There are complaints of over crowding, poor sanitation, lack of privacy and the absence of recreational activities. Accommodation in one of the centres comprises tents and, in another, metal containers or tents. Jointly these two centres accommodate over 1,000 people. The report describes conditions as "*deplorable*". The monthly subsistence allowance is €130.00. Employment and training opportunities are very limited.

15. The Commissioner for Human Rights of the Council of Europe ("COE") and his delegation visited Malta for three days in March 2011 for the purpose of examining the reception of migrants, including asylum seekers, access to international protection and durable solutions for migrants. The ensuing report echoes the various shortcomings and deficiencies in both detention and open centres highlighted in the earlier reports summarised above. The issues addressed in the report include the mandatory detention policy operated by the Maltese Government:

> "*The Maltese authorities apply a policy of mandatory administrative detention in respect of all arriving migrants, including asylum seekers. At least initially, detention is therefore imposed indiscriminately on all, including vulnerable groups of people …..*
>
> *The Immigration Act does not establish a maximum duration for administrative detention; therefore, by law, detention is potentially of an unlimited duration. Since 2005 however, the Maltese authorities have been implementing a policy whereby migrants are detained for a maximum duration of 12 months (if they have applied for asylum but have not yet received a final decision on their claims) or 18 months (if they have not applied for asylum or if their asylum claims have been finally rejected).*"

The Commissioner formulated his concerns about this in the following terms:

> "*Detention makes it very difficult for asylum seekers to obtain documents, which may be with the immigration authorities or friends and relatives outside the country. Many applications are initially rejected because they are not substantiated with convincing evidence. However, the Commissioner notes that a considerable number of applicants have had their claims reviewed and been granted protection following the presentation of new evidence, which they could obtain after release. Detention also makes it very difficult for asylum seekers to lodge appeals within the two week deadline prescribed by law. Indeed, the only way for detained asylum seekers to appeal is through the staff at the detention centres or through visiting non-governmental organisations, while the Refugee*

Appeals Board reportedly often rejects appeals filed late."

This report also notes the existence and operation of another Maltese agency, the Office of the Refugee Commissioner ("OCR") and records that this was co-operating fruitfully with UNHCR. The Commissioner noted with pleasure various improvements in Malta's asylum procedures during recent years, while highlighting concerns about the mandatory detention regime, the absence of legal aid, inadequately reasoned decisions by the immigration authorities and lack of access to the case file.

16. A report of the International Commission of Jurists ("ICJ"), published in May 2012, expressed enduring concerns relating to the conditions and facilities in the Safi Barracks Detention Centre; noted that the Marsa Open Centre had undergone improvements and would benefit from further works; recommended refurbishment and improvement in the Hal-Far Reception Centre, while proposing an alternative to this establishment; encouraged the construction of improved reception centres; and proposed primary legislation reducing and defining the maximum periods of detention and linking same with "*effective due diligence in deportation procedures*". Two further reports published in 2012, by Human Rights Watch ("HRW"), reflected many of the concerns and criticisms noted in earlier reports digested in the foregoing paragraphs.

17. The evidence includes several reports generated during 2013. The main themes and contents of these reports are comparable to those of earlier reports (summarised above) and are somewhat repetitive in consequence. Some of the statistics noted in the Asylum Information Database ("AIDA") relate to requests and transfers under the Dublin II regime during the previous year. There were 15 outgoing requests, 1003 incoming requests, two outgoing transfers and 186 incoming transfers. This report also highlights the automatic and arbitrary detention arrangements, the inadequate judicial remedies and the limited access to a Court, including the lack of free legal assistance.

18. In June 2013 the JRSM published another report. This was the culmination of a project designed to study the level of fundamental rights protection available to asylum seekers under the Dublin Regulation and to examine the implementation of the latter. Information was collated from 22 migrants, including returnees, relevant Maltese authorities and certain professionals. The report notes that since Malta is the first point of entry into the EU for the majority of asylum seekers on the island entering irregularly, few are eligible for transfer to another Member State. Those who leave the island and are compulsorily returned at a later date are at risk of prosecution as their conduct may have entailed the commission of a criminal offence, such as travelling with false documents or escaping from lawful custody. Such returnees are also at risk of detention upon re-entry. If their departure from Malta precedes determination of their asylum application, the ORC treats this as implicitly withdrawn. Information about the progress of undetermined asylum applications becomes available only where there is access to legal assistance. JRS Malta is the only NGO regularly present in detention centres providing free legal assistance. The report is critical of the sluggish procedures for decision making under the Dublin Regulation, the lack of clear rules and the inadequate provision of information to applicants.

19. For reasons which will become apparent *infra*, it is also appropriate to draw attention to a report of the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"). This report is dated July 2013 and arises out of a visit to Malta between 26 and 30 September 2011. The issues addressed in the report include conditions at the Corradino Correctional Facility ("CCF"), which appears to be the main conventional prison on the island of Malta. A CPT delegation had previously visited Malta in May 2008, reporting in February 2011. This was the fourth such visit. The recommendations included the implementation of various improvements of material conditions in the prison, together with increased medical and nursing services and care. Returning in May 2011, the CPT delegation noted a significant increase in the prisoner population. It noted with concern that while one of the prison's "Divisions" had been renovated, many other recommendations for the improvement of material conditions made in 2011 had not been implemented. Over-crowding, disrepair and inadequate hygiene were

noted.

20. Whereas the level of service provided by general medical practitioners was unchanged, nursing services had improved. There had been a slight increase in the hours of attendance by psychiatrists and psychologists. The CPT recommended further improvements in these services. It criticised the Mount Carmel Hospital regarding the specific case of a 21 year old mentally ill prisoner who had been discharged from hospital to a "suicide watch" cell in the prison. The report describes health care facilities in the prison as "*generally of a good standard*". It notes that new inmates receive medical assessment within 24 hours of arrival. The report recommends renovation of the prison.

21. The report also criticised the appalling conditions under which foreign nationals were detained in the two warehouses which make up Safi Barracks in Malta. Crowded conditions, woefully inadequate sanitary facilities and insufficient health care services ranked among the most serious shortcomings. It noted some limited improvements in the provision of psychiatric care in the Corradino Correctional Facility, together with the continued availability of a team of three psychologists, while highlighting various limitations in these services. It highlighted one case of a suicidal detainee inappropriately returned from Mount Carmel Hospital to detention. Material improvements in the detention centres were noted. However, conditions in the two warehouses at Safi Barracks remained "*appalling*".

22. With specific reference to the Mount Carmel Hospital, the CPT report expressed "*serious misgivings*" about the management of agitated and suicidal patients. Improvements in the forensic ward, in particular access to outdoor exercise yards and equipment, were noted. On the other hand, the ward had become overcrowded. In the "*irregular migrants ward*", living conditions were described as "*far below any acceptable standard and can only be considered as anti-therapeutic*". The design and facilities of the ten cells were considered "*ante diluvian*". There was no access to fresh air or outdoor exercise. As regards the detention centres generally, the CPT recommended significant increases in the medical and nursing services, comprehensive medical screening of all newly arrived detainees, the regular attendance of a psychiatrist and a psychologist and the prompt dispensing of medicines. The report further records that there had been no change in the governing statutory framework.

23. The proliferation of reports which materialised around this time included one prepared by the UNCHR, published in September 2013. This report, in common with many of its predecessors, highlights the operation of the Immigration Act of Malta whereby the administrative detention provisions apply automatically to asylum seekers in the same way as they affect irregular migrants. Maltese law contains no guarantees to ensure compliance with Article 31 of the Refugee Convention, which provides for the non-penalisation of refugees who enter or stay illegally in the country of refuge. UNHCR opines that avenues to effectively challenge the detention of asylum seekers are inadequate and criticises the inefficacy of the bail system. It suggests that the prevailing law and practice in Malta fails to give effect to the fundamental right to liberty and security of the person enshrined in international and European human rights instruments. The report urges Maltese policy makers and legislators to develop the country's reception system so as to give proper effect to international refugee and human rights law standards. The report contains a considered analysis of the relevant Maltese legislation, namely the Immigration Act and the Refugees Act.

24. One month later, in October 2013, the European Commission against Racism and Intolerance ("ECRI"), published its report concerning Malta. ECRI operates under the auspices of the Council of Europe as an independent human rights monitoring body specialised in matters of racism and intolerance. The organisation had published three previous reports on Malta, the last dated April 2008. The October 2013 report notes subsequent progress in a number of areas, including new criminal law provisions, several training initiatives, the creation of a Migrant Health Unit, the incorporation in Maltese law of subsidiary protection and the principle of non-refoulement, improvements in the material and living conditions at the Marsa Open Reception Centre and advances in the climate of public

opinion and discourse regarding migrants, asylum seekers and refugees. However, concerns were expressed about the continuing automatic detention of asylum seekers and irregular migrants, the length of detention and the lack of access to a court for appeal or judicial review following exhaustion of the first and second instance appeal mechanisms. ECRI doubted the claims of the Maltese authorities that the appellate body, the Refugee Appeals Board ("RAB"), has the status of an independent judicial authority. Finally, the report echoes the concerns expressed by other agencies about conditions in detention centres.

25. Pausing to take stock, while there is an abundance of reports generated during 2013, the evidence contains only one 2014 report. This is another report of AIDA, published in May 2014. Notably, JRSM is one of the main contributors to this report, which develops the most recent update provided in January 2014. It notes that the Safi Barracks warehouses have been closed for refurbishment. The other immigration detention facilities, totalling two, remain in use, accommodating some 500 detainees. During the year 2013 some 1900 persons had been detained there from time to time. The other main features of this report are the following:

    (a) The time limit of two weeks for appealing first instance asylum decisions to the RAB, with no provision for extension, continues to apply.

    (b) The first instance decision is always written in English, which may constitute an obstacle for some asylum applicants.

    (c) The lack of clear and established procedures for pursuing an appeal continues and the standard appeal notices may not be readily available to everyone.

    (d) Recent trends include increased oral hearings held by the RAB and a significant increase in successful appeals.

    (e) It is possible to challenge decisions of the RAB by judicial review, which does not encompass a challenge to the merits of the asylum decision.

    (f) A limited number of lawyers working with NGOs provide information and legal advice to asylum applicants. While free legal assistance is available at the appeal stage, there are some restrictions on access to the case file and consultation with the appellant.

    (g) The risk of prosecution of those who left Malta irregularly and are returned there continues, entailing remand custody during the whole of the criminal proceedings, access to a legal aid lawyer and a maximum imprisonment term of two years.

26. It is appropriate to interpose here a recent piece of evidence emanating from the JRSM. This consists of an email from a representative of this organisation to the Applicant's solicitors stating, with reference to the Applicant:

> "*He arrived on June 26 2012, was issued with a removal order as per standard practice and detained. He applied for asylum but his application was rejected at first instance. According to our records, he did not file an appeal from this decision. He was therefore held in detention for 18 months. While in detention he had medical problems and was also admitted to Mount Carmel Hospital, the psychiatric hospital, for a short period of time. We do not have a record of the reason for admission …….*
>
> *The conditions in Warehouse, where he was detained for some months, and in the ward at Mount Carmel Hospital are very much as he describes them.*"

Juxtaposing this with other evidence, it seems likely that "*Warehouse*" denotes the immigration detention centre at Safi Barracks. This communication continues:

> "*At this point he would not be returned to detention if he were to be returned to Malta, however he would very likely face prosecution for leaving Malta in an irregular manner. If he is prosecuted he could very well face a term of imprisonment.*"

In the pre-action protocol letter, the Applicant's solicitors, clearly reflecting his instructions, disclosed that he had been provided with an asylum screening form in detention, prompting him to claim asylum and resulting in an interview which the Applicant found unsatisfactory on account of interpretation difficulties. The decision on his application, which was negative, was conveyed in writing, by letter, albeit allegedly without reasons. While the Applicant was aware that he had a right of appeal, it was claimed that he did not exercise this on account of a lack of procedural information and the absence of reasons. The Applicant was not in detention prior to his departure from Malta: he was, rather, accommodated in a "*camp*" providing temporary shelter.

27. The evidence includes a brief report of the Human Rights Council of the United Nations General Assembly, dated March 2014. This contains the response of the Maltese Government to earlier recommendations. Under the rubric "Protecting the Rights of Migrants, Refugees and Asylum Seekers", the Government states that maintenance and refurbishment at the various Detention Centres is "*continuously being conducted*". It noted the deployment of EU funding for certain works and initiatives. The response continues:

> "*Persons who have been detained are given a pamphlet informing them of their rights. They are also informed that they have a right to appeal their removal order and their detention order and that they are entitled to apply for asylum. Asylum seekers are also assisted by interpreters, provided by the Office of the Refugee Commissioner.*"

Regarding medical care, the response states:

> "*Medical checks are systematically carried out for every immigrant upon arrival and vulnerable migrants are provided with alternative accommodation as well as any special attention they may require, such as health care.*"

With regard to the duration of detention:

> "*Most asylum applications are determined at first instance within six months or less, which means that most genuine asylum seekers are not detained for more than six months ….*
>
> *Vulnerable asylum seekers are not subject to the detention requirement.*"

Finally, the introduction of further safeguards is addressed:

> "*Additional safeguards to be introduced by way of transposition of the recast Reception Conditions Directive will further contribute towards ensuring that asylum seekers will not be detained more than is strictly necessary. Implementation of this Directive will entail the introduction of free legal aid in the context of challenging detention.* ***Free legal aid at asylum appeals stage is already available.***"

[Emphasis added.]

This is a reference to state funded legal aid.

28. The Applicant also relies on the following pieces of evidence relating to repatriation attempts by the Maltese authorities:

(a) In 2004, two Somali nationals were forcibly repatriated by the Maltese authorities to Libya, where they were beaten and tortured. Ultimately, the men managed to return to Malta where, in legal proceedings, the Constitutional Court found a breach of Article 3 ECHR.

(b) In 2010, four migrants were returned, apparently summarily, to Libya.

(c) In the same year, a Maltese military vessel intercepted 55 Somalia nationals travelling from Libya, escorting 28 of them to Malta and shipping the other 27 to Libya where they were reportedly beaten and tortured.

(d) There is also a brief AI Report describing incidents related to disagreements between Malta and Italy in 2013.

The Applicant relies on the above evidence in an attempt to establish that if he is returned to Malta he will be at risk of *refoulement*.

III THE APPLICANT'S CASE

29. Our understanding of the main links in the interesting argument developed by Mr Gilbert on behalf of the Applicant is as follows. Article 18 of the EU Charter of Fundamental Rights ("*the Charter*") creates an individual, enforceable right to asylum. The Applicant has been denied the exercise of this right in Malta by reason of shortcomings in the asylum claims process, relating particularly to the absence of free legal assistance, at first instance, adequate information and a reasoned decision. As a result, the decision refusing his asylum claim in Malta contravenes Articles 18 and 47 of the Charter. Recognising that under Maltese law it will be open to the Applicant to make a fresh asylum claim if returned there, or to seek a reconsideration of the earlier refusal decision, it is further contended that there will be a serious risk of a repeated breach of Articles 18 and 47 of the Charter. This is the first limb of the Applicant's case.

30. The second, further or alternative, dimension of the Applicant's challenge is that his enforced return to Malta will expose him to a real risk of treatment proscribed by Article 3 ECHR. The Applicant's case is advanced on two alternative scenarios. The first is that he is likely to be prosecuted for having departed Malta illegally with a resulting conviction, incarceration and a further transfer to the Mount Carmel Hospital on account of his mental condition, thereby exposing him to the risk of suicide described in the report of Professor Katona (see [7] *supra*). The alternative scenario is that the Applicant will not be prosecuted but will be at liberty, resulting in accommodation in one of the open reception centres in conditions contravening Article 3 ECHR.

31. The Applicant's case has a further, third limb, namely that his enforced return to Malta will expose him to a risk of refoulement, contrary to Articles 18 and 47 of the Charter. The principal remedy sought by the Applicant is an order quashing the impugned decision of the Respondent. The Applicant also seeks a declaration regarding the asserted risk of refoulement.

IV DISCUSSION

32. The European Court of Human Rights has ruled against Malta in three cases during recent years. The first is Massoud v Malta [Application No: 24340/08], which concerned an Algerian national who travelled by boat from Libya to Malta as an irregular immigrant and was detained thereafter in the Safi Military Barracks. He was prosecuted and sentenced to 18 months imprisonment for his role in assisting and procuring other persons to enter or attempt to enter the island. Subsequently he applied for asylum, unsuccessfully and his appeal was dismissed. He was detained throughout the entirety of the asylum process and remained in custody for 1 ½ years subsequently, when his removal order was withdrawn in view of the lack of prospects of his eventual deportation. His complaint about his conditions of detention, advanced under Article 3 ECHR, was rejected for non-exhaustion of domestic

remedies. However, the Court found a breach of Article 5(1) on the ground that there was no protection under Maltese law against arbitrary detention. This judgment was delivered in July 2010.

33. In a further judgment, promulgated in July 2013, in Ahmed v Malta [Application No: 55352/12], the Strasbourg Court found breaches of Articles 3, 5(1) and 5(4) ECHR in a case brought by a national of Eritrea who had fled initially to Sudan and then Libya, entering Malta irregularly thereafter. Notably, the JRSM was active in this Applicant's case during her detention phase, referring her to the AWAS and being thus instrumental in an assessment by the Vulnerable Adults Assessment Team. Taking into account the factors of overcrowding, inadequate ventilation, lack of heat, inadequate outdoor exercise, the lack of female staff and the duration of the Applicant's detention, some 15 months, the Court found a violation of Article 3 ECHR. Reaffirming its earlier decision in Massoud, the Court also found breaches of Article 5(1) and (4).

34. The third in this trilogy of Strasbourg decisions is Musa v Malta [Application No: 42337/12], in which judgment was also given in July 2013. Once again, the Court found a breach of Article 5(1) and (4) ECHR. The Applicant in this case was another irregular immigrant who was detained in Safi Barracks throughout the entirety of the period, 12 months, during which he unsuccessfully applied to the ORC for asylum and failed in his ensuing appeal to the RAB. The total period of his immigration detention was some 18 months.

35. Accordingly, to summarise, the Strasbourg Court has found breaches of Article 3 and Article 5(1) and (4) ECHR against Malta in three successive decisions. These decisions do not, however, amount to sweeping, all embracing condemnations of the conditions for the detention of asylum applicants in Malta and the processing of their protection claims. Rather, it is necessary to be alert to the precise, delineated and fact sensitive context of each of the decisions. Furthermore, regard must be had to their vintage. It is also appropriate to note at this juncture that whereas the Applicant's case was based partly on Article 5 ECHR at an earlier stage, ultimately this ground of challenge was abandoned.

36. As our summary of the evidence in Chapter II above demonstrates, time has not stood still on the island of Malta. With each passing year, the notional graph has been one of gradual improvement in the conditions and processes for the reception, accommodation and general treatment of asylum applicants and the processing of their protection claims. In evaluating the evidence digested above, we take into account that its sources and providers are reputable organisations. We observe further that there was no significant challenge to this evidence on behalf of the Respondent. Broadly, it is both internally and externally consistent and we propose to give effect to it. Inevitably, our particular focus is on the most recent evidence, the impact and context whereof are both shaped and illuminated by the older evidence. Having regard to the Applicant's challenge, summarised above, the particular focus of the Tribunal is on the following discrete topics:

    (a) the conditions provided for and treatment and services available to those in detention in Malta who have psychiatric needs and requirements.

    (b) the current processes and procedures for the consideration and determination of asylum applications, to include fresh applications and requests for the reconsideration of applications refused; and

    (c) the possibility of the Applicant being *refouled* by the Maltese authorities.

37. It is appropriate at this juncture to set out the findings, or evaluative predictive judgments, of the Tribunal upon which we have identified the three issues listed above. First, having regard particularly to the JRSM evidence, which we find cogent and compelling, we consider that the most likely future scenario for the Applicant in the event of being returned to Malta from the United Kingdom is prosecution for the immigration offence which he committed in departing Malta, conviction and punishment by a term of imprisonment of up to 18 months. On this scenario, the Applicant will not be treated – as he was previously – as an irregular

male immigrant who is automatically detained and remains in detention pending determination of his asylum application or removal abroad. He will, rather, be treated and processed as a person who has committed an offence under Maltese law. Taking into account also the psychiatric evidence, this hypothesis places the spotlight on two particular establishments on the island of Malta, namely the Corradino Correctional Facility ("*CCF*") and the Mount Carmel Psychiatric Hospital.

38. At this juncture we remind ourselves of the evidence of Professor Katona, summarised in [6] and [7] above. We consider that the Professor's assessment and opinion would have been more cogent if he had critically evaluated the account given by the Applicant during his asylum interview (see [8] above). Furthermore, we consider that he should have acknowledged that he did not have available to him some obviously significant evidence, namely the records of the Applicant's treatment and medication since his advent to the United Kingdom some eight months previously. We make the further observation that, in our estimation, consultant psychiatrists and other medical experts should almost invariably request material of this kind before finalising their reports. We balance these factors against the experience and expertise of the author, the lack of any conflicting psychiatric assessment and the absence of any challenge to the report on behalf of the Respondent. On balance, we accept the Professor's evaluation of the suicide risk pertaining to the Applicant.

39. The precise terms in which Professor Katona has formulated the suicide risk call for careful attention. We have no doubt that the Professor chose his words with care. The relevant passage is reproduced in [7] above. Notably, Professor Katona did not link the Applicant's suicide risk to the issue of substandard and inadequate detention conditions. Rather, he based his opinion on detention *per se*. He acknowledged further that this risk could be addressed by certain measures, specifically close observation and removal of means. To these measures we consider it necessary to add that of such psychiatric services, care and treatment as are likely to be available to the Applicant in the scenario of incarceration at the CCF and/or transfer to the Mount Carmel Hospital. Furthermore, we consider it at least probable that Professor Katona's report will be made available to the relevant agencies. We have no reason to doubt that the Applicant's solicitors will take appropriate steps in this respect, liaising as necessary – as they have done previously – with JRSM.

40. The main evidence relating to CCF is, as we have noted above, the CPT report based on its visit and survey in 2011. We take into account the vintage of this evidence, which is now approaching its fourth anniversary. The report acknowledges improved and increased nursing services, the designation of two prison officers to assist the nursing and medical professionals, the slight increase in the hours of attendance by psychiatrists and the continuing services provided by forensic psychologists. We acknowledge, of course, the recommendation that reinforcement of the psychiatric and psychological services at CCF be undertaken swiftly. We do not consider that the single, isolated case of the 21 year old mentally ill prisoner who had been transferred to the Mount Carmel Hospital and returned to prison later, with advice from the psychiatrist about appropriate anti-suicide measures, advances the Applicant's case. On the contrary, while noting the CPT's criticism of the discharge of this prisoner from hospital, this evidence specifically addresses one of the recommendations of Professor Katona and provides grounds for the expectation that, as a minimum, comparable measures will be taken vis-à-vis the Applicant if necessary. Furthermore, the case instanced confirms the continuing availability of the Mount Carmel Hospital for prisoners with psychiatric needs. Finally, while the CPT was critical of the material conditions in the hospital's irregular immigrant's ward, it made no specific recommendations in this respect and noted certain improvements, in particular access to outdoor exercise yards and equipment.

41. The CPT report constitutes the most recent substantial evidence relating to CCF and the Mount Carmel Hospital. We have already observed that there is a relative abundance of reports generated during 2013. These were published by a series of reputable organisations: UNHCR, JRSM and AIDA. It appears to us likely that if there were any major concerns relating to the particular services and facilities which we are considering in this

discrete context, these would have been expressed in the reports in question. We graft onto this the evidence which has been provided by JRSM to the Applicant's solicitors for the specific purpose of these proceedings. It is clear from their communication that they were aware of the Applicant's previous admission to Mount Carmel Hospital for psychiatric treatment purposes and were also alert to the suggestion that he had enduring "*mental health problems*". Our analysis of all the evidence impels to the conclusion that the services, facilities and treatment available for the Applicant's psychiatric needs will be as a minimum, those described in the CPT report. Furthermore, we have found as a matter of probability that the relevant agencies and professionals will have Professor Katona's report available to them. We consider it likely also that the Applicant will engage positively with what is offered to him.

42. On the basis of these findings and evaluative predictive judgments, it is necessary to apply the appropriate legal test. This aspect of the Applicant's case is based squarely on Article 3 ECHR, thus engaging the well established test that offending treatment must attain a minimum level of severity, the assessment whereof depends on all relevant circumstances such as duration, the physical and mental effects of the treatment and, if appropriate, the gender, age and state of health of the victim. See, for example Keenan v United Kingdom [2001] 33 EHRR 913, at [108] – [110] where the Court noted in particular that the state has a duty to protect the health of detained persons and, in the case of mentally ill prisoners, it is incumbent on the authorities to take into consideration their vulnerability. Any failings in the discharge of this duty may amount to treatment contravening Article 3 ECHR. See also Ilhan v Turkey [Application No 22277/93] at [87]. We acknowledge that, this being a so-called "foreign" case, the burden of proof on the Applicant is the lower one. Thus he is not required to prove beyond reasonable doubt that he will be subjected to proscribed treatment. Rather, he must establish substantial grounds for believing that if removed to another state he faces a real risk of suffering such treatment. See, for example, Saadi v Italy [2008] ECHR 179 at [129].

43. This being a Dublin Regulation case, we must also consider the leading decisions of the CJEU and the United Kingdom Supreme Court. In NS and ME [2011] EUECJ C-144/10 which concerned Article 4 of the Charter (the equivalent of Article 3 ECHR), the CJEU ruled at [94]:

> "*….. The member states, including the national courts, may not transfer an asylum seeker to the 'member state responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Chapter.*"

See also, to like effect, [106]. The hurdles to be overcome are not inconsiderable. First, the putative transferring State must form a state of mind constituted by the requirement of "*substantial grounds for believing*": a simple suspicion or whimsical opinion or mere reservation will not suffice. Second, the requisite belief must relate to the existence of "*systemic flaws*", ie root and branch deficiencies and failings, in the host State. Third, these systemic flaws must relate to the conditions for the reception of asylum applicants and the processing and determination of their applications. Fourth, the systemic flaws must be of sufficient gravity to subject asylum applicants to inhuman or degrading treatment. All of these hurdles must be overcome in order to successfully challenge a Dublin Regulation transfer decision.

44. The decision in NS was applied by the United Kingdom Court of Appeal in EM (Eritrea) v Secretary of State for the Home Department [2012] EWCA Civ 1336. See, firstly, [46]:

> "*The* [CJEU] *took care (paragraphs 81 – 82) to distinguish a true systemic deficiency from 'operational problems' even if these created 'a substantial risk that asylum seekers may …. be treated in a manner incompatible with their fundamental rights'*."

Second, at [47]:

> "*It appears to us that what the CJEU has consciously done in **NS** is elevate the finding of the ECTHR that there was in effect, in Greece, a systemic deficiency in the system of refugee protection into a **sine qua non** of intervention. What in **MSS** was held to be a sufficient condition of intervention has been made by **NS** into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II.*"

The Supreme Court, however, disagreed with the Court of Appeal's interpretation of **NS**. See [58]:

> "*The Court of Appeal's conclusion that only systemic deficiencies in the listed country's asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in Soering v United Kingdom [1989] 11 EHRR 439. The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR*".

The Supreme Court was alert to the linkage between Article 3 ECHR and Article 4 of the Charter: see [62]. This foreshadowed the following conclusion in [63]:

> "*Where, therefore, it can be shown that the conditions in which an asylum seeker will be required to live if returned under Dublin II are such that there is a real risk that he will be subjected to inhuman or degrading treatment, his removal to that state is forbidden.*"

See [63]. This was followed by an exercise in reconciliation. The Supreme Court recognised that in an Article 3 challenge the supporting evidence would be "*more likely to partake of systemic failings*". However –

> "*… the search for such failings is by way of a route to establish that there is a real risk of Article 3 breach, rather than a hurdle to be surmounted*".

45. While the Supreme Court was satisfied that its decision was harmonious with NS – see [51] to [57] – a conundrum arises by virtue of the decision of the Grand Chamber in Abdullahi v Bundesasylamt [2013] EUECJ C-394/12 (10/12/13), which was not considered in the appeal. There the Grand Chamber held, in [60]:

> "*In such a situation, in which the Member State agrees to take charge of the applicant for asylum …. the **only** way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter ……..*"

[Emphasis added]

There is, therefore, some evident disharmony between the leading decisions of these two senior judicial organs. We consider, however, that it is unnecessary to attempt any *rapprochement,* or reconciliation, in the present case.

46. At this juncture, we remind ourselves that as this is a challenge to a certification decision under the 2004 statutory regime, the question for the Respondent in making the impugned decision was whether the asserted infringement of the Applicant's rights under Article 3

ECHR is so clearly without substance that an appeal to the FtT is bound to fail: see R v SSHD, ex parte Yogathas [2002] 3 WLR 1276. In R (L) v SSHD [2003] EWCA Civ 25, the Court of Appeal formulated the test in these terms:

> "*If on at least one legitimate view of the facts or the law the claim may succeed, it will not be clearly unfounded. If that point is reached, the decision maker cannot conclude otherwise.*"

We further direct ourselves that the facts of the Applicant's case are to be evaluated at their reasonable zenith: EM (Eritrea), at [8]. We are also conscious that our consideration of the present application unfolds in the context of a *soi-disant* "rolled up" hearing.

Article 3 ECHR: Conclusions

47. The focus of this aspect of the Applicant's case is the services and treatment which will be available to him for his psychiatric needs in the event of incarceration following return to Malta. It is contended that these facilities will be so deficient and inadequate that the Article 3 ECHR threshold is overcome. Giving effect to the findings and evaluative predictive assessments which we have rehearsed above, we cannot agree. While it may fairly be said that the psychiatric services and treatment which will predictably be available to the Applicant fall short of the notional ideal and may not emulate those of certain first world states, including some EU member states, the Article 3 threshold is an elevated one and we consider that it is not overcome. We have taken the Applicant's case at its zenith, adopting a view of the facts pertaining to his personal history and present condition most favourable to him. We juxtapose this with the findings and predictive evaluative assessments which we have made. Having done so, we conclude that there is no legitimate view of the relevant facts upon which an appeal by the Applicant to the FtT would succeed. Thus the certification by the Respondent that the Applicant's Article 3 claim is clearly unfounded is unimpeachable.

48. For the same reasons, we conclude that the Applicant's case does not satisfy the systemic deficiencies test. This test too erects a difficult, challenging hurdle which, in our judgment, the Applicant's case falls measurably short of overcoming. While the Maltese systems and arrangements have certain frailties and shortcomings, we consider that these fall measurably short of fundamental failings or near collapse, particularly in circumstances where the consistent trend is one of progressive improvement and fortification.

Article 18 CFR: Conclusions

49. We turn to consider what we have identified above as the second central element of the Applicant's challenge, namely a contention that his enforced return to Malta would infringe his rights under Articles 18 and 47 of the Charter, having regard to various shortcomings in the Maltese process and procedures for the consideration and determination of asylum claims. The ingredients of this challenge are, in brief summary, the asserted inadequacies relating to the provision of information to asylum claimants and the availability of free legal advice. The Applicant also attacks the independence of the appellate body, the RAB. In mounting this discrete challenge, it was acknowledged by Mr Gilbert on behalf of the Applicant, that the NS systemic deficiencies test must be satisfied by him.

50. It is important to identify the likely scenario to which this aspect of the Applicant's challenge is directed. The unspoken premise is that the Applicant will, following return, either make a fresh asylum application or ask for reconsideration of the extant refusal decision. We consider that there is a sufficient evidential foundation for the suggestion that both possibilities are viable, to which we add that the Mr Gilbert did not argue the contrary.

51. The Applicant's case is that his enforced return to Malta will generate a serious risk of violating his rights under Article 18 of the Charter. This provides, under the rubric "Right to Asylum":

"*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*"

The cornerstone of Mr Gilbert's argument is that Article 18 establishes an individual right to asylum. He also invoked the Procedures Directive (2005/85/EC). Mr Gilbert appeared to argue initially that Article 18 creates something of an absolute right to asylum, to be contrasted with Article 14 of the Universal Declaration of Human Rights, which (merely) provides that everyone has the right to seek and to enjoy asylum. However, he was disposed to accept the Tribunal's suggestion that any right to asylum established by Article 18 can only amount to a right to be granted asylum where the relevant qualifying conditions under the Refugee Convention and Protocol are satisfied. Given this, together with the clear nexus, acknowledged in the argument, between Article 18 and the Geneva Convention and Protocols, it is far from clear that the former confers any new or additional right of the kind canvassed. However, without deciding this issue conclusively, for present purposes we are disposed to accept the Applicant's contention that he has a right to have his asylum claim assessed in accordance with fair and efficient procedures which include the provision of appropriate information and legal advice and an effective remedy, as the UNHCR has contended in its intervention before the CJEU in Halaf v Bulgarian State Agency for Refugees [C-52811].

52. Returning to the factual framework of the Applicant's case we turn to consider, firstly, the material facts bearing on his unsuccessful claim for asylum in Malta during his sojourn there. The Applicant was clearly possessed of sufficient information to know that he could claim asylum and he proceeded to do so. The processing of his claim included an interview in person and the services of an interpreter. We note the Applicant's reservation about the quality of this particular service. The Applicant also received a document described as a "*screening interview form*". The decision refusing his application was in writing and was provided to him. It was, ultimately, conceded that the Applicant understood the decision. Though aware of his entitlement to appeal, he did not pursue this. He did not receive legal advice. However, it is clear that he was known to the JRSM, one of the NGOs which provides free legal advice to detained immigrants. This organisation has records relating to the Applicant, including a specific note that he did not appeal against the asylum refusal decision. We infer from the information about the Applicant which this organisation retains that there was direct interaction between the two of them. We consider it likely that this included either some legal advice or, as a minimum, the possibility of receiving same. Focusing on the later stages of the process, since the Applicant did not pursue an appeal no question of providing him with legal advice at that stage would have arisen. We find that this would have been available had he appealed.

53. Assuming, without deciding, that the various due process rights canvassed on behalf of the Applicant derive from Article 18 of the Charter, we now turn to project future probabilities. The contention we are required to determine is that the Applicant will, following return, be denied these entitlements. This is based on the premise that he will seek to re-open the earlier refusal decision, to pursue a late appeal or to make a fresh application. The evidence about whether the second of these possibilities is available to him under Maltese law is vague. However, it is accepted on his behalf that the first and third possibilities are available to him. It is appropriate to emphasise that, in this future scenario, the Applicant will have had the benefit of his previous experience and any lessons to be learned thereby. Furthermore, he has been in receipt of relevant legal advice during his sojourn in the United Kingdom. The services provided by his lawyers here have included direct contact with the JRSM. As a result, the Applicant's particular case now has a certain profile. It is to be expected that his solicitors will alert the JRSM to the Applicant's return to Malta. We consider it highly likely that in this scenario and assuming that the Applicant is detained afresh to be prosecuted and/or following conviction, he will have access to the JRSM and will receive legal advice and support in pursuing one or more of the options identified above. Furthermore, it is probable that the Applicant will be further assisted in the presentation of his claim by the availability of the written statement and written representations prepared by his English solicitors.

54. Based on the analysis above, we consider that in the predictable future scenario in which the Applicant will find himself following return to Malta, he will not be denied the various due process rights canvassed on his behalf. The final element of this discrete challenge involves a contention that the Applicant also derives from Article 18 of the Charter a right of access to an independent Court or Tribunal in any challenge to an adverse first instance decision and that the RAB is not such a judicial body.

55. The mechanism for submitting a further application to the OCR (Refugee Commissioner) is, according to the evidence, enshrined in Maltese law, in Articles 4 and 7A of the Refugees Act. An appeal lies to the RAB (Refugee Appeals Board) against any adverse decision of the OCR. At this stage state funded legal aid becomes available, as documented in the AIDA May 2014 Report. The suggestion that the appellate body, the RAB, may not provide an effective remedy due to lack of independence emanates from one source only, namely ECRI (whose report is digested in [23] above). We consider the limitations of this evidence self-evident. It is based upon a briefly expressed opinion of this organisation. There is no evidence of the relevant legislation and/or arrangements and policies relating to the creation of the RAB, the appointment of its members and its relationship with the executive. Furthermore, ECRI expresses its opinion in diffident terms: it is "*not convinced*" that this is an independent and impartial judicial body satisfying the Procedures Directive .

56. Having highlighted the limitations of this single piece of evidence, we take into account that the opinion expressed by ECRI in its report is not echoed in the reports of any of the other reputable and knowledgeable organisations who have prepared comparable publications, in particular IRJ, AI, UNHCR and JRSM. Furthermore, the ECRI opinion fails to acknowledge the information contained in the most recent evidence, namely the AIDA 2014 report, that it is possible to challenge decisions of the RAB by judicial review and, further, that several cases of this kind have been brought. We are alive to the (familiar) description of judicial review as a remedy which does not have the characteristics of a full appeal on the merits. We also accept that the RAB may not necessarily convene an oral hearing in every case. We take into account also the evidence of increasing success rates in appeals to the RAB. Having considered all the evidence – and the absence thereof – bearing on this discrete issue, we conclude that the Applicant has failed to discharge the burden of proving that the RAB, by reason of its composition, is incapable of providing an effective remedy.

Risk of Refoulement: Conclusions

57. The third, and final, limb of the Applicant's case is that to return him to Malta under the Dublin Regulation would be unlawful as it would expose him to a real risk of *refoulement* by the Maltese authorities. As noted above, this discrete challenge was canvassed under the aegis of Article 18 of the Charter. We record that an incompatibility challenge was initially floated but later withdrawn by Mr Gilbert. In determining this issue, we take as our starting point Maltese legislation. The principle of *non-refoulement* is enshrined in legislation, Article 14 of the Refugees Act. This is recorded in the UNHCR 2013 Report, where the following is noted:

> "*The practical effect of this provision is the de facto suspension of removal proceedings. The immigration authorities halt all removal proceedings once an individual expresses his/her wish to apply for asylum in Malta by filling in the Preliminary Questionnaire and submitting it to the Office of the Refugee Commissioner.*"

Furthermore, Malta has, of course, ratified the relevant international instruments which incorporate this protection, including in particular Article 33(1) of the Refugee Convention and Article 19 of the Charter, which prohibits collective expulsions and further provides:

> "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.*"

58. The disparate evidential foundation on which this aspect of the Applicant's case rests includes an account contained in the AI Report of 2010 documenting an asserted failure by the Maltese Armed Forces to ensure that all members of a group of 55 Somalis travelling in a dinghy from Libya were able to reach the island of Malta, in circumstances where some 27 were allegedly apprehended by a Libyan vessel and brought back to Libya. We note that the facts of this incident are controversial. Another incident is documented in the ICJ Report, describing the return of four migrants to Libya. While the information bearing on this incident is minimal, ICJ suggests some unspecified "*involvement*" of the Maltese authorities. The same report also documents an incident in July 2013 involving the promulgation of an interim measure by the European Court of Human Rights which, ICJ contends, prevented the possible removal of a group of 102 people from Malta to Libya. Again, the information relating to the intentions and conduct of the Maltese authority is rather threadbare and, further, there are contradictory reports about the access which UNHCR had to members of the group. What is clear is that the Maltese authorities gave full effect to the Strasbourg Court's interim ruling and, further, admitted all of the immigrants to its asylum procedure.

59. We have also considered the evidence relating to another substantial group of immigrants in August 2013. It is evident that the main feature of this particular event was an impasse between the Maltese and Italian Governments, which was quite speedily resolved. Finally, we have considered the two decisions of the Maltese Constitutional Court relating to the forcible repatriation of two Somali nationals to Libya and the case of two Turkish nationals of Kurdish origin (both documented in the JRSM 2013 report). The context is further illuminated by the evidence that by 2013 the numbers of irregular immigrants arriving in Malta from Libya had increased to some 2,000 per annum. In the same year, the Maltese authorities made over 2,000 asylum and subsidiary protection decisions. One report noted that arrivals equated to approximately 45% of the annual Maltese birth rate. The island has a population of 428,000 approximately.

60. We have subjected all of this discrete collection of evidence to critical scrutiny and have taken into account its quality and vintage. Having done so, and taking the Applicant's case at its reasonable zenith, we consider that he has not established that he will be at real risk of *refoulement* by the Maltese authorities. There is no evidence that Malta has engaged in this conduct vis-à-vis any other person returned under the Dublin Regulation. Furthermore, there is no special feature pertaining to the Applicant which would trigger this risk. While the demands and challenges confronted by the Maltese Government are undoubtedly acute, the eyes of the international community are firmly fixed on this small Mediterranean island and we consider it highly unlikely that the Maltese authorities would engage in egregious conduct of this kind. We note further that the concern upon which this element of the Applicant's case is based has not been voiced by UNHCR, AI or JRSM. Furthermore, we agree with Mr Malik that, in this context, we must be alert to the statement of the Supreme Court in <u>EM (Eritrea)</u> that it is "*of obvious significance*" that UNHCR has not recommended the suspension of returns under the Dublin Regulation to Italy: see per Lord Kerr at [74]. We conclude that the strong evidential presumption that, vis-à-vis the Applicant, Malta will comply with its relevant international obligations in this respect and all others raised is not displaced by the evidence upon which he relies.

61. We reiterate our assessment above of the most likely future scenario following the Applicant's return to Malta. This will entail prosecution for an immigration offence, likely imprisonment in consequence, the re-opening of his earlier asylum application or the presentation of a fresh application and the consideration and determination thereof by the Maltese authorities in accordance with the conditions which we have predicted. There is no realistic possibility that the real risk of *refoulement* canvassed by the Applicant will eventuate.

<u>Article 5 ECHR</u>

62. As noted above, while the Applicant's case was previously based in part upon Article 5 ECHR, this ground was ultimately abandoned. Conscious, however, that there are other live

cases in which this issue arises, we consider it appropriate to add the following, albeit *obiter*.

63. The removal of a person to another state viz a so-called "foreign" case is unlawful if it is established that this will result in detention contravening Article 5 ECHR. The test is whether "*a real risk of a flagrant breach*" of Article 5 has been established by the evidence; see Othman v United Kingdom (Application No 8139/09) at [233], decided in 2012. The threshold is clearly an elevated one:

> "*A flagrant breach of Article 5 would occur only if, for example, the receiving state arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial.*"

Where returns under the Dublin Regulation are concerned, national courts must give effect to the principle of mutual confidence, the related strong evidential presumption of compliance by EU Member States with international obligations and the systemic deficiencies test, which requires "*substantial grounds*" to be established. This is the effect of the decisions of the CJEU in NS and Abdullahi (*supra*).

64. One of the stand out features of this Applicant's case is that he has already had an application for asylum processed and determined in Malta and he was in so-called "administrative" detention in connection therewith. We recognise that there may be other cases in which persons to be returned to Malta under the Dublin Regulation have not yet had their asylum applications determined. The substantial body of evidence which we have considered suggests that, as a matter of strong probability, such persons, unless they are children or considered vulnerable, will be similarly detained. In such cases, Judges will doubtless take into account, and scrutinise, the trenchant claims of the Maltese Government that such detention is justified. It will also be necessary to recognise the high hurdle established by the "*real risk of a flagrant breach*" test. Judges will also be alert to the notable statement of Mitting J in MB (And Others) v SSHD [2013] EWHC 123 (Admin), at [33], that a real risk of administrative detention for a period of some months –

> "*….. would fall far short of the circumstances considered by the Strasbourg Court in Othman to amount to a flagrant denial of Article 5 rights.*"

In the particular circumstances of this Applicant, the most likely future scenario which we have predicted will entail detention before trial and imprisonment post-conviction, which would of course be lawful under Article 5.1(a) or (c) ECHR. We assume that this is why the Article 5 challenge was not ultimately pursued in this case.

VI CONCLUSIONS AND ORDER

65. We conclude as follows:

(i) The Applicant has failed to displace the principle of mutual confidence and to rebut the strong evidential presumption that Malta will, in the event of his return there under the Dublin Regulation, comply with its relevant international obligations, in particular those under Article 3 ECHR, Article 18 of the Charter and Article 33 of the Refugee Convention. Furthermore, recalling that this is a challenge to a clearly unfounded certification decision, we are satisfied that there is no legitimate view of the facts, both undisputed and as we have found them, whereby an appeal to the FtT would succeed.

(ii) Further or alternatively, giving effect to the somewhat different test promulgated by the Supreme Court in EM (Eritrea), the Applicant has failed to satisfy the Soering test, that is to say he has not demonstrated a real risk that he will suffer treatment outlawed by Article 3 ECHR.

66. We order as follows:

(a) Permission to apply for judicial review is granted.

(b) The application is dismissed.

(c) Subject to further representations we give effect to the general rule that costs follow the event by ordering that the Applicant pay the Respondent's costs, to be assessed in default of agreement and taking into account the nature of the hearing which has been conducted.

Signed :

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: **23 April 2015**

Footnote

An application for permission to appeal to the Court of Appeal was refused, on the ground that that this decision involves the application of established legal rules and principles to a fact sensitive matrix.

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

GLOSSARY

AI	Amnesty International
AIDA	Asylum Information Database
AWAS	Agency for the Welfare of Asylum Seekers (Malta)
CCF	Concerned Citizens Foundation
COE	Council of Europe
CPT	Council of Europe Committee for the Prevention of Torture (etc)
ECRE	European Council on Refugees and Exiles
ECRI	European Commission against Racism and Intolerance
HRW	Human Rights Watch
ICJ	International Commission of Jurists
JRSM	Jesuit Refugee Service Malta
MSF	Medecins sans Frontiere
NGO	Non-Governmental Organisation
OCR	Office of the Commissioner for Refugees (Malta)
PCF	The People for Change Foundation
RAB	Refugee Appeals Board (Malta)
UNHCR	United Nationals High Commissioner for Refugees