HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 23

on appeal from:[2008] EWCA Civ 464

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Respondent) *v* Nasseri (FC)(Appellant)

Appellate Committee

Lord Hope of Craighead
Lord Hoffmann
Lord Scott of Foscote
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

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Mark Henderson

(Instructed by Bhatt Murphy)

Respondent:
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Lisa Giovannetti

(Instructed by Treasury Solicitors)

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I would dismiss the appeal. I also agree with the observations which have been added by my noble and learned friend Lord Scott of Foscote.

LORD HOFFMANN

My Lords,

2. Mr Nasseri is an Afghan national who crossed into Greece in December 2004 and claimed asylum. The application was rejected on 1 April 2005. By then he may already have been on his way to the United Kingdom, which he entered on 5 September 2005 concealed under a lorry. When detected he again claimed asylum.

3. Council Regulation (EC) No 343/2003 ("the Dublin II Regulation") provides in article 10 that if an asylum seeker has crossed the border from a third country into a Member State, that Member State, and only that Member State, shall be responsible for examining his application. Pursuant to the Regulation, the Home Office asked the Greek authorities to accept responsibility for determining Mr Nasseri's

application. The Greek authorities agreed to do so and he was notified that he would be removed to Greece.

4. Mr Nasseri objected on the ground that there was a real risk that, if sent to Greece, he would be returned to Afghanistan to face inhuman or degrading treatment, contrary to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He adduced evidence, to which I shall return later, for the purpose of showing that his application for asylum would not be properly considered in Greece. In *TI v United Kingdom* [2000] INLR 211, the European Court of Human Rights ("ECHR") decided that the Dublin II Regulation did not absolve the United Kingdom from responsibility to ensure that a decision to expel an asylum seeker to another Member State did not expose him, at one remove, to treatment contrary to article 3 of the Convention.

3. Mr Nasseri submitted that section 6(1) of the Human Rights Act 1998 required the Secretary of State not to act incompatibly with Convention rights and his return to Greece would be incompatible with his rights under article 3.

5. The Secretary of State's response was that by virtue of paragraph 3 of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, a return to Greece is deemed not to be incompatible with article 3:

> 3 (1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed —
>
> (a) from the United Kingdom, and
>
> (b) to a State of which he is not a national or citizen.
>
> (2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place —
>
> (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,

(b) from which a person will not be sent to another State in contravention of his Convention rights, and

(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

6. By paragraph 2, Part 2 applies to a list of countries which include Greece. Paragraph 3(2)(b) therefore creates an irrebuttable presumption that Greece is not a place from which Mr Nasseri will be sent to another State in breach of his Convention rights.

7. Mr Nasseri's answer was that paragraph 3(2)(b) was incompatible with his Convention right under article 3 and the Court should therefore make a declaration of incompatibility under section 4(2) of the 1998 Act. He applied by way of judicial review to quash the decision or, in the alternative, for a declaration of incompatibility. But there is no dispute that, by virtue of paragraph 3(2)(b), the Secretary of State's decision is lawful and cannot be quashed. The only question in issue is whether the Court should make a declaration of incompatibility.

8. The Secretary of State adduced evidence about the way in which asylum seekers returned under the Dublin II Regulation might expect to have their applications considered in Greece, with a view to demonstrating that there was no real risk that Mr Nasseri would be returned to Afghanistan in breach of his article 3 rights. She argued that although (as she freely admitted) the conclusive presumption in paragraph 3(2)(b) might in some other case be incompatible with an asylum seeker's Convention rights, that was irrelevant ("academic", the judge recorded) in the instant case because the presumption coincided with reality. Greece was a place from which he would not be sent to another State in contravention of his Convention rights. Accordingly there was no incompatibility.

9. The judge rejected this submission because in his opinion the mere fact that the Secretary of State was precluded from considering whether there was a risk of unlawful *refoulement* from Greece was in itself a breach of Convention rights. Mr Nasseri accepted, he said, [2008] 2 WLR 523, para 33, that the deeming provision precluded the Secretary of State and the court —

> "from considering whether there is a risk of unlawful *refoulement* on removal of an asylum applicant to Greece. He merely claims a declaration that preclusion of such consideration is incompatible with the Human Rights Convention."

10. The judge accepted this submission and said, at para 39:

> "Failure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading treatment is a breach of the substantive article and it is that investigation that the deeming provision impedes."

11. He therefore declined to go into the question of whether there was actually a risk of unlawful *refoulement* and made a declaration of incompatibility.

12. In my respectful opinion the judge was wrong in saying that article 3 creates a procedural obligation to investigate whether there is a risk of a breach by the receiving state, independently of whether or not such a risk actually exists. In making this mistake the judge was in good company, because it seems to me that he fell into the same trap as the English Court of Appeal in *R (SB) v Governors of Denbigh High School* [2005] 1 WLR 3372; [2007] 1 AC 100 and the Northern Irish Court of Appeal in *Belfast City Council v MissBehavin' Ltd* [2007] 1 WLR 1420. It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right. In the *Denbigh High School* case, which was concerned with whether the decision of a school to require pupils to wear a uniform infringed their right to manifest their religious beliefs, Lord Bingham of Cornhill said, in para 29:

> "the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."

13. Likewise, I said, in para 68:

> "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?"

14. The other side of the coin is that, when breach of a Convention right is in issue, an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong. That was the basis of the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, in which the question was whether the removal of a migrant would infringe his right to respect for family life under article 8. The Appellate Committee said, in para 11:

> "the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it."

15. There is accordingly, as Laws LJ said in this case in the Court of Appeal ([2008] 3 WLR 1386, para 18) no "freestanding duty to

investigate." It is true that in *Jabari v Turkey* [2001] INLR 136, para 39 the ECHR said that when an individual claims that his deportation will infringe his rights under article 3, "a rigorous scrutiny must necessarily be conducted" of his claim and a similar statement was made (with a reference to *Jabari*) in *Kandomabadi v The Netherlands* (29 June 2004) (Application Nos 6276/03 and 6122/04). But the impersonal passive construction used by the ECHR was in my opinion intended to mean that the ECHR will conduct a rigorous scrutiny of the claim and that unless a Member State has done so, it runs the risk of being held in breach: see the previous authorities of *Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 96 and *Vilvarajah v United Kingdom* (1991) 14 EHRR 248 at paragraph 108. It did not mean that even though there is actually no real risk of treatment contrary to article 3 in the receiving state, a Member State will be in breach because it did not adequately investigate the matter.

16. McCombe J said (at para 36) that he could not understand how it could be permissible for a court to investigate whether it was safe to return Mr Nasseri to Greece when such an investigation is the very thing which paragraph 3(2)(b) is intended to prevent. Mr Rabinder Singh QC also claimed that this was an inconsistency in the argument of the Secretary of State. But in my opinion there is no paradox or inconsistency. Paragraph 3(1) says that the irrebuttable presumptions in sub-paragraph (2) apply for the purpose of a determination of whether a person such as Mr Nasseri "may be removed" from the United Kingdom to Greece, that is to say, may be lawfully removed. There is no dispute that the presumption applies and that accordingly he may lawfully be removed. But the presumption does not preclude an inquiry into whether his article 3 rights would be infringed for the different purpose of deciding whether a provision which makes such a removal lawful would be incompatible with his Convention rights. The declaration of incompatibility has no effect upon the lawfulness of the removal, which is the only purpose for which the statute precludes an inquiry.

17. McCombe J said, in para 36, that the legislation is "either compatible with Convention rights or it is not". It cannot, he said, be incompatible if there is in fact a risk that Greece will return asylum seekers in breach of article 3 rights but compatible if there is no such risk. I do not agree. Section 4 of the 1998 Act provides that a declaration of incompatibility may be made if a provision is "incompatible with a Convention right". That will normally mean a real Convention right in issue in the proceedings, not a hypothetical Convention right which the claimant or someone else might have if the facts were different.

18. The structure of the 1998 Act suggests that a declaration of incompatibility should be the last resort in a process of inquiry which begins with the question raised by section 6(1), namely whether a public authority is acting in a way which is incompatible with a Convention right. If the answer is no, that should ordinarily be the end of the case. There will be no need to answer the hypothetical question of whether a statutory provision would have been incompatible with a Convention right if the public authority had been infringing it. On the other hand, if the answer is yes, the next question is whether, as a result of primary legislation, the public authority "could not have acted differently" or was acting "so as to give effect to or enforce" such primary legislation: see section 6(2). If the answer is yes, the public authority will not be acting unlawfully. In answering this question, the court is required by section 3 to interpret the primary legislation, so far as it is possible to do so, in a way which is compatible with Convention rights. If, despite such interpretation, the primary legislation makes the infringement of Convention rights lawful, the court may then make a declaration of incompatibility under section 4(2).

19. The making of a declaration of incompatibility, like any declaration, is a matter for the discretion of the court: see *R (Rusbridger) v Attorney-General* [2004] 1 AC 357. I would not therefore wish to exclude the possibility that in a case in which a public authority was not, on the facts, acting incompatibly with a Convention right, the court might consider it convenient to make a declaration that if he had been so acting, a provision of primary legislation which made it lawful for him to do so would have been incompatible with Convention rights. But such cases, in which the declaration is, so to speak, an obiter dictum not necessary for the decision of the case, will in my opinion be rare. In the present case, such a declaration is quite unnecessary because the Secretary of State admits that if removal to Greece would infringe Mr Nasseri's rights under article 3, the conclusive presumption in paragraph 3(2)(b) would be incompatible.

20. The judge, as I have said, refused to accept the Secretary of State's invitation to examine the evidence and decide whether removal to Greece would actually infringe Mr Nasseri's article 3 rights. That was done for the first time by the Court of Appeal, ([2008] 3 WLR 1386), which rejected the judge's reasoning that the Secretary of State had infringed a "freestanding duty to investigate". Mr Nasseri submitted to the Court of Appeal that if it was against him on this point, it should remit the question of fact to the Administrative Court. But the Secretary

of State did not agree to this course. She argued that the judge should have resolved the question and that the Court of Appeal was in as good a position as the Administrative Court to do so. Laws LJ (who gave the only substantive judgment, with the concurrence of Sir Anthony Clarke MR and Carnwath LJ) accepted this submission, examined the evidence and decided that removal to Greece would not infringe Mr Nasseri's rights. The Court therefore allowed the appeal and discharged the declaration of incompatibility.

21. This finding of fact appears to me to have been the basis upon which the Court of Appeal decided that no question of incompatibility arose. But there was also some discussion in the judgment of Laws LJ as to whether the Secretary of State had the power, or perhaps the duty, to keep the situation under review in order to decide whether to promote primary legislation to have Greece taken off the list in Part 2 of Schedule 3. So far as it might be suggested that the Secretary of State was under a legal duty to do so, I would not agree. Neither the Secretary of State nor anyone else can be under a justiciable duty to promote primary legislation: see section 6(6) of the 1998 Act. But I do not understand Laws LJ to have said this. He ended by saying, in para 42:

> "the list system renders the United Kingdom's compliance with article 3 of the [Convention] fragile. In the absence of individual examinations of the merits of individual cases by those responsible for specific executive and judicial decisions in those cases, the whole weight of compliance falls on the measures and systems in place for monitoring law and practice in the listed states, and does so in circumstances where government has no discretion to take a state off the list, but must seek main legislation."

22. I read this not as a statement of law but as a comment on the practical realities. The list system means that unless the Secretary of State chooses to keep an eye on what is happening in listed countries and, if appropriate, invite Parliament to amend the list, she runs the risk of a declaration of incompatibility if the presumption produces the wrong result. But Parliament was entitled to create a system of adjudication under which she took her chance that this might happen. Parliament must have been aware when it passed the 2004 Act that *TI v United Kingdom* [2000] INLR 211 created such a possibility. Furthermore, Laws LJ was by no means the first to point it out. At first instance, McCombe J drew attention to a warning given by Ouseley J in

evidence to the Select Committee on Constitutional Affairs and a similar warning by the Joint Committee of both Houses on Human Rights: see [2008] 2 WLR 523, 531. But Parliament must have decided that the administrative convenience of having the list in primary legislation, to avoid administrative law challenges to the procedure for consideration of article 3 rights, or to the non-exercise of a discretionary power to remove a country from the list, outweighed the risk that there might be cases in which a court found that a listed country was in fact unsafe and made a declaration of incompatibility. It removed the decision-making process from administrative law and left only the bare Convention question of whether article 3 would in fact be infringed.

23. All of this is however irrelevant to the question in this appeal, which is whether the Court of Appeal was right in the reason it gave for discharging the declaration of incompatibility, namely, that removal to Greece would not infringe Mr Nasseri's article 3 rights.

24. The Dublin II Regulation, pursuant to which the Secretary of State proposes to remove Mr Nasseri, is part of an attempt by the European Union to co-ordinate its asylum laws with the eventual objective of having a Common European Asylum System, under which there will be a common procedure and uniform status, valid throughout the Union, for those granted refugee status: see recitals (2) and (5) of the Regulation. A key provision of the Regulation is that whichever Member State an asylum seeker first enters, whether by land, sea or air, is responsible for examining his application. If he moves on to another Member State, he may be sent back without substantive consideration of his case. There is a fingerprinting system ("Eurodac") to enable the authorities of Member States to detect multiple applications.

25. In addition to the Dublin II Regulation, the Council of Ministers has issued several directives intended to introduce greater uniformity into the treatment of asylum seekers. Directive 2003/9/EC ("the Reception Directive") lays down minimum standards for the reception of asylum seekers: the information with which they should be provided, documentation they must be given, material reception conditions and so on. Directive 2004/83/EC "("the Qualification Directive") concerns the minimum standards for the qualification and status of applicants as refugees and Directive 2005/85/EC ("the Procedures Directive") prescribes minimum standards for the procedures for granting and withdrawing refugee status.

26. In the case of Greece, the effect of the wars in Afghanistan, Iraq and various parts of Africa has been greatly to increase the numbers of migrants entering its territory. In its report *Stuck in a Revolving Door* (November 2008), p 19, Human Rights Watch said that Turkey "effectively funnels migrants travelling overland from the Middle East and South Asia to Greece, while Africans are increasingly coming into Greece via Egypt." The choice of Greece by migrants is partly the result of more effective coastal surveillance by other Mediterranean Member States such as Italy and Spain. Irregular boat arrivals in Spain in 2007 were half what they had been in the previous year, while those in Greece, which has 18,400 kilometres of coast line, including islands close to Turkey, increased by 267%.

27. Many such arriving migrants do not claim asylum, either because they are confessedly economic migrants or, more usually, because they want to move on and apply in another Member State without the fingerprinting which would provide evidence that they first entered through Greece. In recent years, however, stricter controls by other Member States have reduced these possibilities and increasing numbers of migrants have, for want of other options, applied for asylum in Greece. The number of applications increased from 4,500 in 2004 to over 25,000 in 2007.

28. The effect of these changes in patterns of migration and the Dublin requirement that Greece should be responsible for all asylum seekers who enter the European Union through its territory has placed a considerable strain upon its administrative and humanitarian resources. Its procedures for dealing with asylum seekers have for the past few years been troubling the United Nations High Commission for Refugees (UNHCR), the European Commission (which is responsible for the enforcement of the Dublin II Regulation and the various asylum directives) and non-governmental human rights organisations, both Greek and international.

29. In the period between 2005 and 2008 there was particular concern about the treatment of asylum seekers returned under the Dublin II Regulation. Article 20.1 of the Procedures Directive provides that a Member State may assume that an applicant has abandoned his application for asylum if he has left without authorisation the place where he lived without contacting the competent authority within a reasonable time or has not complied with reporting duties. Paragraph 2 provides that an asylum seeker who reports again to the competent authority after a decision to treat his application as abandoned is entitled

to request that his case be reopened, but Member States may impose a time limit for such an application. There is also a general requirement that Member States must ensure that such a person is not removed contrary to the principle of *non-refoulement*.

30. In Greece the relevant domestic law until last year was Article 2 of Presidential Decree no 61/1999, which provided that in the case of the arbitrary departure of an asylum seeker from his stated or assigned place of residence, a decision could be made declaring the procedure for examination of his claim "interrupted". If he reappeared within 3 months of the decision and proved that his absence was due to *force majeure*, his claim would be examined on the merits. Otherwise it would remain dismissed. In the case of most applicants sent back under the Dublin II Regulation, the three month period had expired by the time they were returned to Greece.

31. In November 2004 the UNHCR issued a note drawing attention to these procedures and expressing anxiety that their application might lead to the removal of asylum seekers without any examination of their claims on the merits and contrary to the principle of *non-refoulement*. It recommended that sending States first obtain assurances from the Greek authorities that applicants in "interrupted" cases would be permitted to continue the procedure and that in any event they would be entitled to have their applications examined on the merits and if necessary to appeal.

32. The UNHCR returned to the same issue on 30 November 2005, when it recorded that the Greek authorities appeared to have done nothing to improve their procedure for dealing with "interrupted" claims. The situation continued to deteriorate. In February 2008 Norway suspended removals to Greece under the Dublin II Regulation. In March 2008 the European Commission commenced infraction proceedings against Greece for failing to comply with its obligations under the Dublin II Regulation by refusing to process the applications of returned migrants. On 15 April 2008 the UNHCR issued a statement of position, advising governments to refrain from returning asylum seekers to Greece under the Dublin II Regulation until further notice. In April 2008 Finland suspended removals to Greece.

33. In response to this barrage of criticism, Greece enacted a new refugee law on 11 July 2008 which allowed asylum seekers returned

under the Regulation to reopen their cases. It also transposed the Procedures and Qualifications Directives.

34. These domestic legislative changes had not yet taken place when this appeal was before the Court of Appeal in March 2008 or the reserved judgment given in May 2008. Laws LJ described the evidence available at that time as somewhat exiguous. He had the UNHCR note of November 2004 and a report from Amnesty International in February 2008. The court was told of the suspension of Dublin returns by Norway. After the argument, the Court received a copy of the April 2008 UNHCR report. Laws LJ said that there were clearly concerns about the conditions in which asylum seekers might be detained in Greece but it was not suggested that they amounted to ill-treatment of such severity as in themselves to involve a breach of article 3 by a returning State. The relevant legal procedures were also "to say the least, shaky" but the important question was their practical outcome. The critical point in his opinion was that there had been no actual deportations or removals to Afghanistan, Iraq, Iran, Somalia or Sudan and no reports of unlawful *refoulement* to any destination. Accordingly there appeared to be no real risk that Mr Nasseri would be returned to Afghanistan contrary to his Convention rights under article 3.

35. On 2 December 2008, after the judgment of the Court of Appeal, the European Court of Human Rights delivered judgment in *KRS v United Kingdom* (Application no 32733/08). KRS was an Iranian national who entered the United Kingdom on 11 November 2006 and claimed asylum. He had travelled through Greece and the Greek authorities notified the United Kingdom authorities under the Dublin II Regulation that they accepted responsibility for dealing with his case. The Secretary of State ordered his removal. He applied for judicial review of this decision and on 16 June 2008 the High Court, following the decision of the Court of Appeal in this case, dismissed the application. KRS then applied to the ECHR for an indication under Rule 39 of its Rules of Court, requesting that he not be returned to Greece until his claim for a breach of article 3 had been determined by the ECHR. The United Kingdom applied for the indication to be lifted on the ground that the application was "manifestly ill-founded".

36. The ECHR referred to the UNHCR position of 15 April 2008, reports from Norwegian and Greek human rights non-governmental organisations and the February 2008 report from Amnesty International. It reaffirmed the decision in *TI v United Kingdom* [2000] INLR 211 that Member States are obliged, notwithstanding the Dublin II Regulation, to

ensure that removal does not expose the migrant to torture or inhuman or degrading treatment. But the Court nevertheless concluded that the Rule 39 indication should be lifted and the application declared to be manifestly ill-founded. It gave four principal reasons. The first was the one which Laws LJ had regarded as critical:

> "On the evidence before it, Greece does not currently remove people to Iran (or Afghanistan, Iraq, Somalia or Sudan – see *Nasseri* above) so it cannot be said that there is a risk that the applicant would be removed there upon arrival in Greece"

37. Secondly, account had to be taken of the new Greek asylum law and the European directives which had been transposed into Greek law:

> "the Court would also note that the Dublin Regulation, under which such a removal would be effected, is one of a number of measures agreed in the field of asylum policy at the European level and must be considered alongside Member States' additional obligations under Council Directive 2005/85/EC and Council Directive 2003/9/EC to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption must be that Greece will abide by its obligations under those Directives. In this connection, note must also be taken of the new legislative framework for asylum applicants introduced in Greece."

38. Thirdly, an asylum seeker faced with the possibility of unlawful *refoulement* could apply for a Rule 39 indication directed to the Greek government rather than the United Kingdom government:

> "[T]here is nothing to suggest that those returned to Greece under the Dublin Regulation run the risk of onward removal to a third country where they will face ill-treatment contrary to Article 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such."

39. Fourthly, if the complaint was not about *refoulement* but about the conditions under which a returned asylum seeker would be held in Greece, that should be taken up with the Greek authorities and, if unsuccessful, before the ECHR by way of complaint against Greece. It was not a basis for proceedings against the United Kingdom.

40. Mr Rabinder Singh submitted that little weight was to be attached to the *KRS* decision because the ECHR did not invite submissions from his client and the UK government did not inform the Court that this case was under appeal to the House of Lords. I cannot see how either of these matters can affect the validity of the Court's reasoning. The Court said that it was aware that rule 39 indications had been given in 80 cases of migrants which the United Kingdom proposed to remove to Greece. It is not the practice in this House to invite representations by the parties to other cases which may be affected by one of its decisions and I cannot see why the ECHR should have done so. KRS was represented by London solicitors and the ECHR presumably received submissions on his behalf. It is not suggested that they could have adduced any evidence which has not been put before the House on Mr Nasseri's behalf. As for the appeal to this House, there seems to me nothing which the ECHR could have gained from waiting for its decision.

41. The *KRS* case appears to me to confirm the validity of the conclusions reached by Laws LJ in the Court of Appeal, which rested principally upon the fact that there was no evidence that anyone returned under the Dublin II Regulation had been removed to Iran, Afghanistan, Iraq, Somalia or Sudan. The ECHR also appears to have been of the opinion that there are limits to the extent to which one Member State of the European Union can be expected to police the asylum policy of another. The European Commission is responsible for enforcing the obligations of Member States under the Dublin II Regulation to process asylum applications which are their responsibility and to give effect to the asylum directives. Other Member States are entitled to assume – not conclusively presume, but to start with the assumption – that other Member States will adhere to their treaty obligations. And this includes their obligations under the European Convention to apply article 3 and give effect to the Rule 39 indications. There is no evidence that in respect of applicants returned under the Regulation, Greece has not done so.

42. Mr Rabinder Singh said that although asylum seekers in Greece may have rights under domestic law, European law and the Convention,

it is in practice difficult to enforce them. Lawyers prepared to act for asylum seekers are few and there is a shortage of interpreters. In a recent report dated 4 February 2009 which Mr Rabinder Singh applied for leave to introduce as additional evidence, Mr Hammarberg, the Commissioner for Human Rights of the Council of Europe, said (in paragraph 10) that despite the new legislation of July 2008, he regretted to have to express "serious concern at the lack of evidence indicating any positive developments in the practice relating to refugee protection."

43. The position in Greece appears to be, as Laws LJ suggested, that the practice for dealing with asylum applications may leave something to be desired and very few applicants are accorded refugee status. If, as is usually the case, their applications are rejected, they are given a document directing them to leave the country and their continued presence there is uncomfortable. But there is no evidence, either in the documents before the Court of Appeal or the new evidence tendered to the House, that any Dublin returnee is in practice removed to another country in breach of his article 3 rights. Even if the rights of a person in such a situation to apply for a Rule 39 direction are regarded as a mere make-weight, I agree with Laws LJ that the absence of any evidence that such removals occur is of critical importance.

44. Mr Rabinder Singh said that the Secretary of State was wrong to rely upon the fact that returned asylum seekers, directed to leave Greece, might stay there contrary to Greek law. I do not know whether the status of the Convention, the Regulation and the directives in Greek domestic law would make staying there a breach of Greek law or not. It may be that the asylum seeker would be entitled to say that the refusal of his application is contrary to European and Convention law and that his failure to remove himself is not unlawful. But the Secretary of State is not concerned with Greek law. Like the operation of the Greek system for processing asylum applications and the conditions under which asylum seekers are kept, that is a Greek problem. The Secretary of State is concerned only with whether in practice there is a real risk that a migrant returned to Greece will be sent to a country where he will suffer inhuman or degrading treatment. I agree with Laws LJ that there is no evidence of such a risk and would therefore dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

45. My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann and am in respectful agreement with his conclusion that this appeal should be dismissed and with his reasons for reaching that conclusion. I want, however, to add just a few words of my own.

46. In October 1999, at Tampere, the European Council agreed to work towards the establishment of a common European asylum system. Member States agreed that the system should include "… a clear and workable determination of the state responsible for the examination of an asylum application" (Tampere Conclusion para. 14). One of the mischiefs sought to be addressed was the practice of many asylum applicants to make multiple, successive asylum applications, applying first in State A and then, on failure of that application, in State B, and so on. The proposed solution was to formulate rules identifying the Member State to take the primary responsibility for dealing with each asylum applicant. If an application were to be made in a Member State other than that identified by the rules as having the primary responsibility for dealing with the asylum applicant, the applicant could forthwith be sent to the responsible state without the need for any other member state to address itself to the merits of the asylum application.

47. The Tampere agreement led, *inter alia*, to Council Regulation 343/2003 "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." Article 3.1 of the Regulation says that the asylum application of a third-country national "… shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible" (see also Article 3.2 and 3.3).

48. Mr Nasseri is a third-country national and it is not in dispute that, pursuant to the criteria set out in Chapter III of the Regulation, Greece is the Member State responsible for dealing with his asylum application. Whether this is because Greece was the first EU Member State into whose territory he irregularly entered (Article 10.1) or whether Greece was the first Member State with which he lodged an asylum application

(Article 13) is not clear to me but does not matter. The responsible Member State (in this case Greece) is obliged to "take back … an applicant … who is in the territory of another Member State without permission" (Article 16.1(c) or (e)) and Greece has agreed to take back Mr Nasseri.

49. It is, in my opinion, important for the purposes of this appeal, and in particular for the purpose of understanding the human rights context in which section 33 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and Schedule 3 to that Act came to be enacted, to bear in mind that every Member State of the European Union is, and has to be, a signatory to the European Convention on Human Rights. Adherence to the Convention is a condition of membership of the European Union. The point is underlined by Recital 2 to the 2003 Council Regulation -

> "… The European Council at its special meeting in Tampere … agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention …, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals."

50. This background explains the language in which section 33 of the 2004 Act introduces Schedule 3.

> "(1) Schedule 3 (which concerns the removal of persons claiming asylum to countries *known to protect refugees and to respect human rights*) shall have effect" (emphasis added).

It explains, also, why the countries listed in paragraph 2 of Schedule 3 as "safe countries" are so listed. All are signatories to the Convention. And all EU Member States, including of course Greece, have obligations binding on them under international and domestic law to

observe the human rights guaranteed by the Convention to those within their respective territories.

51. Insofar, therefore, as paragraph 3(2)(b) of Schedule 3 requires an EU Member State to be treated as a place

> "from which a person will not be sent to another state in contravention of his Convention rights"

the paragraph is stating no more than the 2003 Council Regulation takes for granted and that the Secretary of State, too, is in my opinion entitled to take for granted. If there were convincing evidence indicating that, in breach of its obligations under the Convention or as an EU member, Greece was not a "safe country" to which an asylum seeker from Afghanistan could be removed, the Secretary of State would have to consider whether to remove Greece from the "safe country" list. But unless and until that were done the legal efficacy of the removal provisions in Schedule 3 would remain, although a court before which a challenge to a removal direction was brought might have to consider whether a section 4 declaration of incompatibility should be made. And for that purpose, in full agreement with the reasoning of my noble and learned friend, the judge would be entitled and bound to consider any evidence adduced in support of the incompatibility contention. The contention could not be based simply on the statutory requirement that, in effect, it be assumed that Greece, or any other EU Member State, was a safe country.

52. As to the evidence in the present case for the proposition that the removal of Mr Nasseri to Greece would be in breach of his Convention rights on the ground that Greece would not respect those rights, I respectfully agree with, and can add nothing to, Lord Hoffmann's reasons for concluding that it would not. I, too, would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

53. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

54. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would dismiss the appeal.