

R (NAJIBULLAH SAEEDI)

Claimant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

SUBMISSIONS BY UNHCR

A Introduction

1. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity to intervene by way of written and brief oral submissions, pursuant to the order of Cranston J dated 5 February 2010.
2. UNHCR has previously intervened in a number of cases before the English courts: among others, *Fornah/K v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, and *AH and QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620. UNHCR intervenes both in cases concerning the proper interpretation and application of articles of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) and the 1967 Protocol relating to the Status of

Refugees (“the 1967 Protocol”)¹ and in cases involving the interpretation and application of other legislative provisions concerning international protection. UNHCR also intervenes in cases in other jurisdictions and before the European Court of Human Rights (“ECtHR”), including in a number of cases of particular relevance to the present, e.g. *Xb v. France and Greece*, App. No. 44989/08 and *Sharifi & Ors v Italy and Greece*, App. No. 16643/09 (both pending determination). More generally, UNHCR issues authoritative legal as well as country-specific position papers on the protection of asylum-seekers, refugees and other persons of concern to UNHCR.

3. References herein are, except where otherwise indicated, to tabs in UNHCR’s bundle of documents submitted with these written submissions.

B Scope of Submissions

4. These submissions address the following:
 - 4.1 The EU law framework of the common European asylum system;
 - 4.2 The proper application of Article 3(2) of the Dublin II Regulation²;
 - 4.3 The practice of Greece in relation to asylum-seekers; and
 - 4.4 The obligations of States participating in the Dublin system under international law in light of the situation in Greece.

C UNHCR’s mandate and position in relation to international protection

5. UNHCR has a direct interest in this matter, as the organisation, inter alia, entrusted by the United Nations General Assembly with responsibility for

¹ UNTS No. 2545, Vol. 189, p. 139 and UNTS No. 8791, Vol. 606, p. 267.

² Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for examining asylum applications (Authorities Bundle, tab 1).

providing international protection to refugees and others of concern, and together with governments, for seeking permanent solutions for their problems.³

6. According to its Statute, UNHCR fulfils its mandate inter alia by, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.⁴ UNHCR’s supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of these instruments.
7. In the years following the adoption of UNHCR’s Statute, the UN General Assembly and Economic and Social Committee extended UNHCR’s competence *ratione personae*.⁵ This was done not by amending the statutory definition of “refugee” but by entrusting UNHCR with protecting and assisting particular groups of people whose circumstances may not necessarily have met the definition of the Statute.⁶ This has in practical terms extended UNHCR’s mandate to a variety of situations of forced displacement even in relation to persons who are not, *sensu stricto*, refugees within the 1951 Convention.
8. UNHCR’s supervisory responsibility has also been reflected in legal instruments adopted in accordance with Article 63 of the Treaty establishing the European Community (“TEC”) (new Article 78 of the Treaty on the Functioning of the European Union or “TFEU”). For example, Article 21.1(c) of the Asylum Procedures Directive (2005/85/EC) states that Member States shall allow UNHCR to “present its views, in the exercise of its supervisory responsibilities under

³ Statute of the Office of the United Nations High Commissioner for Refugees (‘UNHCR Statute’), GA Res. 428(v), Annex, UN Doc A/1775, at [1] (1950) (Evidence Bundle, tab 1).

⁴ *Ibid.*, at [8(a)].

⁵ See UNHCR Note on International Protection, submitted to the 45th session of the Executive Committee of the High Commissioner’s Programme, UN Doc. A/AC.96/830, 7 Sept. 1994 (Evidence Bundle, tab 2).

⁶ In such cases, the institutional competence of UNHCR is based on paragraph 3 and 9 of its Statute: Paragraph 3 stating that “The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council”, and paragraph 9 stating that “The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.”

Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure”.⁷

9. In the context of this intervention, it is relevant that the UNHCR Office in Greece carries out monitoring in detention centres for irregular migrants in border areas, and seeks inter alia to assess the conditions of access to the territory and to asylum procedures of persons of concern as part of its work to encourage and assist Greece to enhance its asylum system, and to meet its obligations towards asylum-seekers and people needing international protection. In close cooperation with the Greek Council for Refugees, UNHCR also conducts regular and ad hoc visits to border areas.

10. UNHCR is thus in a unique position to provide independent, objective and up-to-date information as to the situation of asylum-seekers in Greece, having the right of access to asylum-seekers, detention facilities, and the administrative and judicial processes within the country for determining protection claims. In this context the ECtHR in the judgment of *KRS v United Kingdom*,⁸ relating to the situation for asylum-seekers in Greece stated:

“The Court notes the concerns expressed by the UNHCR whose independence, reliability and objectivity are, in its view, beyond doubt. It also notes the right of access which the UNHCR has to asylum-seekers in European Union Member States under the European Union Directives set out above....[T]he Court attaches appropriate weight to the fact that, in recommending that parties to the Dublin Regulation refrain from returning asylum-seekers to Greece, the UNHCR believed that the prevailing situation in Greece called into question whether ‘Dublin returnees’ would have access to an effective remedy as foreseen by art. 13 of the Convention. The Court also observes that the UNHCR’s assessment was shared by both Amnesty International and the Norwegian Organisation for Asylum Seekers and other non-governmental organisations in their reports.”

11. UNHCR has issued three recent position papers containing its views on the treatment of asylum-seekers in Greece in particular:

⁷ See (Authorities Bundle, tab 2). See also recital 15 of the EC Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 30 September 2004 (“Qualification Directive”) (Authorities Bundle, tab 3).

⁸ App. No. 32733/08, 2 December 2008 (Authorities Bundle, tab 15).

- 11.1 Asylum in the European Union: A study of the Implementation of the Qualification Directive, November 2007; (Evidence Bundle, tab 3)
- 11.2 The Return of Asylum-Seekers to Greece under the Dublin Regulation, 15 April 2008; (Applicant's Bundle, doc no.11, folder 1)
- 11.3 Observations on Greece as a country of Asylum, December 2009. (Applicant's Bundle, doc no.62, folder 2)⁹

D EU Framework

12. According to Article 63 of the TEC the European Council shall adopt measures on asylum in accordance with the 1951 Convention and the 1967 Protocol. The four Directives and the two Regulations¹⁰ making up the Common European Asylum System (“CEAS”) as it currently stands, pursue the basic objectives set out by the European Council at its meeting in Tampere in October 1999 and articulated in the TFEU. The Council agreed to work towards the CEAS based on the “full and inclusive application of the [1951] Convention”.¹¹ The Tampere Conclusions state:

“4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.”¹²

⁹ All three position papers should be referred to although these Submissions focus on the most recent in December 2009.

¹⁰ Temporary Protection Directive 2001/55/EC, 20 July 2001 (Authorities Bundle, tab 4); Reception Directive 2003/9/EC, 27 January 2003 (Authorities Bundle, tab 5); Qualification Directive 2004/83/EC, 29 April 2004 (Authorities Bundle, tab 3); Asylum Procedures Directive 2005/85, 1 December 2005 (Authorities Bundle, tab 2); the Dublin II Regulation (EC) 343/2003, 18 February 2003 (Authorities Bundle, tab 1); and Council Regulation (EC).2725/2000, 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention (Authorities Bundle, tab 6).

¹¹ European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, available at:

<http://www.unhcr.org/refworld/docid/3ef2d2264.html>

¹² Ibid.

13. Article 63 TEC has now been replaced by Article 78 of the TFEU.¹³ This article contains the following fundamental principles:

13.1 The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement* (Art. 78(1));

13.2 The policy must be in accordance with the 1951 Convention and its 1967 Protocol. (Art. 78(1));

13.3 The European Parliament and the Council shall adopt measures for a common European asylum system which will include a uniform status of asylum, valid throughout the Union, and a uniform status of subsidiary protection for nationals of third countries (Art. 78(2)).¹⁴

13.4 In addition, Article 80 of the TFEU provides that “the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility.. between the Member States”.

14. The fundamental object and purpose of EU measures in the area of asylum and international protection is three-fold: the reinforcement of the right of freedom of movement in the internal market, by reducing secondary movements of third country nationals; the safeguarding of their rights; and securing minimum and uniform standards in the procedures and reception conditions that apply to asylum-seekers.¹⁵

¹³ See Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union (OJ C115, 9.5.2008).

¹⁴ See (Authorities Bundle, tab 7).

¹⁵ See Battjes, *European Asylum Law and its Relation to International law*, 2006, at para 2. (Evidence Bundle, tab 8)

15. In accordance with principles of EU law, the following principles should inform the interpretation and application of the EU instruments on minimum standards, the Dublin II Regulation and Article 3(2) in particular:

15.1 They must be applied in a way so as to ensure effective protection to individuals pursuant to Member States' international law obligations¹⁶ and the right to asylum in particular;

15.2 The preambles, including the recitals to the Directives and Regulations, are important aids in determining the scope and purpose of a directive or regulation, although they yield in the face of a contrary provision in the directive or regulation.¹⁷

E EU Directives and the EU Charter

16. The three Directives¹⁸ which form the set of guarantees for determining and processing claims for international protection are all expressly concerned with minimum standards. It is open to any Member State to introduce or maintain more favourable provisions for third-country nationals or stateless persons who ask for international protection, but it is not permissible for standards to fall below the minimum stipulated by the Directives.

17. Each of these Directives expressly records that it respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ("the Charter").¹⁹ Following the entry into force of the TFEU, the Charter has legally binding force, and may *in general*, in UNHCR's view, be directly invoked before national courts in the Member States. However,

¹⁶ See e.g. *Grad v. Finanzamt Traunstein* [1970] ECR 825, para 5 (Authorities Bundle, tab 12).

¹⁷ Case C-162/97 *Criminal proceedings against Nilson and Ors* [1998] ECR I-7477, opinion paras. 44, 54-5 (Authorities Bundle, tab 13).

¹⁸ Reception Directive 2003/9/EC, 27 January 2003 (Authorities Bundle, tab 5); Qualification Directive 2004/83/EC, 29 April 2004 (Authorities Bundle, tab 3); Asylum Procedures Directive 2005/85, 1 December 2005 (Authorities Bundle, tab 2).

¹⁹ See 2005/85/EC Recital (8); 2004/83/EC Recital (10); 2003/9/EC Recital (5).

given the UK's opt out, the Charter cannot be directly relied on as against the UK but it is apt to have an indirect influence as an aid to interpretation.²⁰

18. Article 18 of the Charter provides that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention...and in accordance with the Treaty establishing the European Community”. It thus incorporates not only the substantive provisions of the 1951 Convention but also the procedural safeguards and minimum standards imported by the Directives referred to above.²¹ Article 19(2) of the Charter further provides that “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

F Dublin II Regulation and international law obligations

19. The Dublin II Regulation is an integral part of the CEAS.²² It establishes a system of determining responsibility, according to specific criteria, for examining an asylum claim lodged in an EU Member State or in Iceland, Norway or Switzerland, which participate in the Dublin system, (hereafter “Member States”). The Regulation aims at ensuring that each claim is examined by one Member State.²³ Among the criteria in the Regulation, responsibility may be attributed to a State to deal with an asylum claim “where it is established, on the basis of proof or circumstantial evidence ... that an [the] asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third

²⁰ Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law”, [2008] Refugee Survey Quarterly, vol. 27 no. 3, page 33 at 51 (Evidence Bundle, tab 9).

²¹ See footnote 18.

²² Dublin II Regulation, Recitals (1)-(4) (Authorities Bundle, tab 1).

²³ The EC has summarised the purposes of the system as “on the one hand, to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum application and, on the other, to prevent abuse of asylum procedure in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his/her stay in the Member States”. COM(2008) 820 final, 2008/0243 (COD), Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), Brussels, 3.12.2008, Explanatory Memorandum, page 3. (Evidence Bundle, tab 10)

country....”²⁴ Asylum-seekers are frequently returned or transferred from other Member States to Greece on the basis of this provision. The Regulation provides that responsibility shall cease 12 months after the irregular border crossing took place.²⁵

20. The Dublin II Regulation itself underscores the primacy of international law obligations. In particular it provides:

20.1 With respect to the treatment of persons falling within the scope of the Regulation, Member States are bound by obligations under instruments of international law to which they are party (Recital (12)).

20.2 The Regulation observes the fundamental rights and principles which are acknowledged in the Charter. In particular it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter (Recital (15)).

21. The obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened is a cardinal protection principle enshrined in Article 33 of the 1951 Convention. In addition, international and European human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment.

22. International law obligations in this context include importantly:

22.1 The obligation not to expel or return (*refouler*) a refugee in any manner whatsoever to a territory where s/he would be at risk of persecution. It encompasses any measure attributable to a State which could have the effect of returning a person to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk

²⁴ Dublin Regulation, Art 10(1).

²⁵ Ibid. Despite this provision, it is possible that responsibility may continue if a Member State which is asked to accept responsibility does not challenge the request on the basis that the 12 months have expired.

persecution. This includes refusal of entry at the border, interception and indirect *refoulement*.²⁶

22.2 The obligation not to return a person to a country where there are substantial grounds for believing that he/she will face a real risk of inhuman or degrading treatment or torture, reflecting the non-refoulement obligation arising under Article 3 ECHR (and Article 15(b) of the Qualification Directive). This also extends to Article 2, see e.g. *Gonzalez v. Spain*, App. No. 43544/98, 29 June 1999,²⁷ and to flagrant breaches of other derogable rights under the Convention: see e.g. *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323²⁸; *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64, (2009) 1 AC 1198²⁹. This obligation extends to both direct and indirect refoulement.

22.3 The non-refoulement obligation under Article 3 of the Convention Against Torture. This obligation has attained the status of *jus cogens*.³⁰

22.4 The obligation not to *refoule* an asylum-seeker whose status has not yet been determined by a fair and effective procedure.

23. A reliable assessment of the risk of indirect or “chain *refoulement*” must be undertaken in each individual case, prior to removal to a third country, including pursuant to a readmission agreement. No asylum-seeker should be returned to a third country for determination of his or her claim without sufficient guarantees, in each individual case. This should include guarantees that the person will be admitted to that country; will enjoy effective protection against *refoulement*; will

²⁶ See UNHCR, Note on international protection, 13 September 2001, A/AC.96/951, pp. 5-6 (Evidence Bundle, tab 6). See also Summary Conclusions: The Principle of Non-Refoulement, June 2003. (Evidence Bundle, tab 7) See also UNHCR submission in *T.I. v. the United Kingdom*, 4 February 2000, Appl. No. 43844/98. (Evidence Bundle, tab 5)

²⁷ (Authorities Bundle, tab 14).

²⁸ (Authorities Bundle, tab 8).

²⁹ (Authorities Bundle, tab 9).

³⁰ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Furundžija* (judgment of the Trial Chamber), 10 December 1998, IT-95-17/1-T, para 153 (Authorities Bundle, tab 18)., Dugard and Van den Wyngaert, “Reconciling Extradition with Human Rights”, *American Journal of International Law* [1998] pp 187-212 (Evidence Bundle, tab 11).

have the possibility to seek and (if necessary) enjoy asylum; and will be treated in accordance with accepted international standards.³¹ The prohibition of indirect or “chain *refoulement*” has been recognized by the ECtHR in its decision in *T.I. v. the United Kingdom* and reiterated in the *Abdolkhani and Karimnia v Turkey* judgment.³²

24. The primacy of protection afforded by the 1951 Convention and fundamental principles of human rights was expressly noted by Hickinbottom J in *EW v. Secretary of State for the Home Department* [2009] EWHC 2957 (Admin) at [14]-[15]³³:

“14. However, like the Dublin II Regulation, the Directives do not stand alone. They seek “fully and inclusively” to apply the Geneva Convention, described in the Directives’ Recitals as “the cornerstone of the international regime for the protection of refugees”. In their respective Recitals, they also make clear that they “seek to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members”, observing the principles recognised in particular by the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000. Article 1 of the Charter of Fundamental Rights acknowledges that:

‘Human dignity is inviolable. It must be respected and protected.’

15. The Regulation is also subject to the overriding provisions of the ECHR, to which all signatories of the Dublin II Regulation are also signatories. Therefore, notwithstanding the Regulation, member states are obliged to ensure that removal does not expose the applicant to a real risk of torture or inhuman or degrading treatment, contrary to article 3 (see, e.g., *TI v United Kingdom* [2000] INLR 211, *KRS v United Kingdom* (Application No 32733/08) (unreported, 2 December 2008) (“*KRS*”) and *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23 (“*Nasseri*”) at [36]).”

G Article 3(2) of the Dublin II Regulation

³¹ See UNHCR, ExCom *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) - 1998. Also, UN High Commissioner for Refugees, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15. (Evidence Bundle, tab 4).

³² *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98, in which the Court stated that “the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.” (Authorities Bundle, tab 16). See also *K.R.S. v. United Kingdom* Appl. No. 32733/08, 2 December 2008 (Authorities Bundle, tab 15) , as well as in *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, Appl. No. 30471/08, paras. 88-89 (Authorities Bundle, tab 17).

³³ (Authorities Bundle, tab 10).

25. The Dublin II Regulation obliges Member States to examine the applications of third-country nationals who apply for asylum and is predicated on a presumption that Member States will respect both the substantive rights of asylum-seekers who are deemed to be their responsibility, and also will examine their claims in a fair and effective procedure including by providing proper reception arrangements.³⁴
26. Where the available evidence shows that the responsible Member State does not respect the substantive rights of asylum-seekers and will not examine their claims in a fair and effective procedure, the Member State confronted with the asylum application should, in UNHCR's view, avail itself of Article 3(2) to examine the application for asylum even if it does not bear responsibility under the criteria laid down in Articles 5 to 14 of the Dublin Regulation. Such an approach ensures that the Member State acts fully in accordance with its primary international law obligations, including under the 1951 Convention/1967 Protocol, under relevant international human rights law, as well as under relevant EU instruments, including Article 78 of the TFEU, the Reception Directive 2003/9/EC, Qualification Directive 2004/83/EC, Asylum Procedures Directive 2005/85, and Article 18 of the Charter in particular.
27. Return under the Dublin II Regulation should not take place when there is evidence showing (1) a real risk of return/expulsion to a territory where there may be a risk of persecution or serious harm; (2) obstacles limiting access to asylum procedures, to a fair and effective examination of claims or to an effective remedy; and/or (3) conditions of reception, including detention, which lead to real risks of violations of Article 3 ECHR. In these cases, UNHCR considers that States should apply Article 3(2) of the Dublin II Regulation, in order to ensure compliance with their international obligations.³⁵
28. It is UNHCR's view that a Member State's duty to guarantee the right to asylum and offer protection against *refoulement* takes precedence over the responsibility-

³⁴ See Dublin II Regulation, Recitals 4, 5, 12 and 15 (Authorities Bundle, tab 1).

³⁵ In certain circumstances, it may be appropriate for States to apply Article 15 of the Dublin Regulation, which provides for bringing "together family members, as well as other dependent relatives, on humanitarian grounds..."

allocation arrangements under the Dublin Regulation. The mechanism provided for under Article 3(2) of the Regulation provides a mechanism to act accordingly.

H The Situation in Greece

29. In the case of Greece, UNHCR has highlighted problems concerning various aspects of the Greek asylum system. These include, firstly, problems concerning access to and the quality of the Greek asylum procedure; and secondly, inadequate reception conditions, including detention, which amount in some cases to inhuman and degrading treatment. These problems in practice give rise to the genuine risk of *refoulement* in the case of Dublin transfers to Greece. As explained below, UNHCR has concluded that there is a genuine risk that Greek practice leads in a significant number of cases to the removal of people to countries where there is a real risk of persecution or serious harm (“chain *refoulement*”). On this basis, it has advised governments to refrain from returning asylum-seekers to Greece under the Dublin II Regulation.³⁶

30. While the new Government of Greece elected in late 2009 is currently working on proposals to set up a new asylum system, these measures have yet to be formulated, legislated and implemented, a process which may take some years.

31. As outlined in greater detail below, access to asylum procedures for people transferred to Greece under the Dublin Regulation is not assured. Moreover, even for those who are able to enter or re-enter the asylum procedure, there are concerns that people who are in need of international protection will not be recognised as such, due to problems in the operation of the Greek asylum procedure.

32. Dublin transferees furthermore face the same problems as other asylum-seekers with regard to access to reception conditions. These conditions are not in line with the minimum standards required by EU legislation. The inadequacies in the

³⁶ UNHCR Position on the Return of Asylum Seekers to Greece under the Dublin Regulation, April 2008 (Applicant's Bundle, doc no.11, folder 1), and UNHCR Observations on Greece as a country of Asylum, December 2009 (Applicant's Bundle, doc no.62, folder 2).

reception conditions are such that there is a genuine risk that the effective pursuit of asylum claims will be hindered or prevented.

Access to asylum procedures

33. UNHCR observes consistent problems facing people transferred to Greece under the Dublin II Regulation (including both those who have applied for asylum in Greece in the past and those who have not) which can hinder or preclude their efforts to register (or re-register) as asylum-seekers, and their access to any full and fair determination of their asylum claims.

34. UNHCR's 2009 position paper, "Observations on Greece as a country of asylum," highlights among others the following problems for Dublin transferees in accessing asylum procedures:³⁷

- Negative decisions issued in absentia so that the applicant upon return is likely to have missed all deadlines for appealing
- In such a case the transferee will be served with a deportation order at the airport, without access at all to the asylum procedure
- Lack of information about the relevant procedures and rights in a language s/he understands, and/or in circumstances where interpretation is not readily available
- The obligation to register or re-register a claim within a short period which, given the practical obstacles to such registration, may prevent transferees from pursuing their claims.³⁸

Since issuance of its 2009 paper, it has come to UNHCR's attention that Dublin returnees to Greece have been facing a further very serious problem, in that their claims are systematically rejected on credibility grounds. The fact that the claimants departed irregularly from the country after making their initial claims is assumed to demonstrate that the claims are not genuine. UNHCR has observed the

³⁷ See pp. 19-20 (Applicant's Bundle, doc no.62, folder 2).

³⁸ UNHCR 2009 paper pp 6-7 (Applicant's Bundle, doc no.62, folder 2).

use of similar wording to this effect in a large proportion of rejection decisions in Dublin cases.³⁹

35. It is clear from this that there is a real risk that transferees will have no effective or meaningful access to the asylum procedure, and some will simply be served with deportation orders without being able to make any claim. This is contrary to Articles 18 and 19 of the Charter, to the Qualification Directive⁴⁰, and to the Asylum Procedures Directive.⁴¹

Compatibility of asylum procedures with EU law

36. The Greek asylum procedure is governed by Presidential Decree 81/2009 which entered into force in July 2009. This Decree introduced a number of changes in the asylum procedure which, in UNHCR's assessment, have a negative impact on efficiency in first instance and will aggravate the already large backlogs. Furthermore, it removes important safeguards, including access to an independent administrative review at the second instance.⁴²

37. Research into the first instance asylum process carried out by UNHCR revealed the following shortcomings in the procedure⁴³:

- Shortcomings in training and expertise of decision makers
- Conflicts of interest between asylum responsibilities and other duties
- Long waiting periods for interviews
- Lack of free legal aid and interpretation
- Inadequate availability and use of country of origin information
- Divergent practices between different Police Directorates

³⁹ By law, the Greek authorities are required to provide copies of asylum decisions to UNHCR. Reasons for rejection cited in recent negative decisions on Dublin cases examined by UNHCR have included: '*the fact of] having been in country X in breach of his/her obligations as an asylum-seeker and having claimed asylum there shows that the claim is abusive*'. A further example stated '*the fact that the claimant did not apply for asylum when he first entered Greece, but only when returned from country Y, shows not only the abusiveness of the claim but also the claimant's wish to reside in the EU using asylum claims in order to achieve this aim*'.

⁴⁰ See Recital (10) (Authorities Bundle, tab 3).

⁴¹ See Articles 15, 16 in particular (Authorities Bundle, tab 2).

⁴² See UNHCR 2009 paper p. 15 (Applicant's Bundle, doc no.62, folder 2).

⁴³ Ibid, p. 15 (Applicant's Bundle, doc no.62, folder 2).

- Insufficient attention to needs of unaccompanied minors

38. As regards the second instance procedure, UNHCR is of the view that there is no independent review available of the first instance decision and therefore the right to an effective remedy is jeopardized. Access to judicial review on points of law before the Council of State is limited by a number of practical and legal obstacles including⁴⁴:

- Complicated procedural rules
- Lack of intermediate protection against deportation
- Lack of free legal aid and interpretation

39. These shortcomings are in breach of the minimum guarantees provided by the Asylum Procedures Directive.⁴⁵ The CEAS, and the Dublin Regulation, are predicated upon a recognition that a Member State has, in appropriate circumstances, a duty to determine a claim for protection made to it.

Reception Facilities

40. UNHCR has stated that accommodation capacity in Greece for asylum-seekers is grossly insufficient and that as a result many have no shelter or other State support. Single adult male asylum-seekers have virtually no chance of benefiting from a place in a reception centre. The centres are generally understaffed and under-resourced, lacking appropriate support services and often offering inadequate material conditions.⁴⁶

41. Registered asylum-seekers do not receive any financial allowance to cover daily living expenses, notwithstanding provision in Greek law and as a result many live in conditions of acute destitution.

⁴⁴ Ibid., p. 17 (Applicant's Bundle, doc no.62, folder 2).

⁴⁵ See in particular Articles 6, 7, 8, 15,16, 17, 23, 24, 39 (Authorities Bundle, tab 2).

⁴⁶ UNHCR 2009 paper pp. 10-11 (Applicant's Bundle, doc no.62, folder 2).

42. These conditions are in breach of the minimum standards required by Article 13 of the Reception Directive. They also would amount to arguable breaches of Article 3 ECHR. In *R (Limbuella) v Home Secretary* [2005] UKHL 66, [2006] 1 AC 396⁴⁷ the House of Lords noted at 402F-G:

“A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.”

43. Under Article 3, ECHR obligations will be engaged, as regards the UK, because the transfer leads to the “treatment” that is prohibited: see *Pretty v. UK* (2002) 35 EHRR 1 at para. 53.

Detention of asylum-seekers

44. Whilst detention of asylum-seekers who arrive in an irregular manner is not mandatory under Greek legislation, in practice they are systematically detained. At several entry points, the period of detention is prolonged if an individual applies for asylum. UNHCR also notes that conditions in administrative detention facilities are generally inadequate with the exception of two centres. Even there concerns arise due to severe overcrowding, lack of well-trained staff, the absence of formalized regulations and financial constraints. In other locations asylum-seekers are detained in unsuitable facilities, such as warehouses and police stations.⁴⁸

45. There are reports of unsanitary conditions, failure to separate men, women and unaccompanied minors, limited access to medical care for detainees, and police violence. The ECtHR recently held in *Tabesh v Greece*,⁴⁹ that the detention of the applicant, an Afghan asylum-seeker for three months in the premises of the Sub-

⁴⁷ (Authorities Bundle, tab 11).

⁴⁸ UNHCR 2009 paper p. 8 (Applicant's Bundle, doc no.62, folder 2).

⁴⁹ App. No. 8256/07, 26 November 2009 (Authorities Bundle, tab 19). See also *SD v Greece*, App. No. 53541/07, 11 June 2009 where the ECtHR held that an asylum-seeker had experienced conditions of detention in Greece that amounted to degrading treatment in violation of Article 3 ECHR (Authorities Bundle, tab 20).

Directorate of the Alien Police of Thessaloniki amounted to degrading treatment within the meaning of Article 3 ECHR. The ECtHR emphasized that, while the applicant was detained there for three months, the premises were designed to hold persons only for a very short period. However, as UNHCR notes this practice continues and police detention facilities are extensively used for detention.⁵⁰

Risk of refoulement to Afghanistan

46. On the available and up to date evidence, there is a real risk that asylum-seekers, including from Afghanistan, who are transferred to Greece under the Dublin II Regulation, will in turn be subject to *refoulement*, through removal to Afghanistan via Turkey. As UNHCR notes the return from Greece to Turkey of persons who may be in need of international protection can occur in several ways. While no Dublin transferees were included in documented cases of deportation from Greece to Turkey, there are no safeguards in place and Dublin transferees are not exempt from practices which result in forced deportation. To the police implementing arrests and detaining persons, Dublin transferees cannot be distinguished, based on their documentation, from other asylum-seekers and are thus exposed to the same risk of removal. During the summer of 2009, UNHCR documented group arrests by the Greek police and group transfers from detention centres in various locations across the country, to detention centres in the Greece-Turkey land border region.⁵¹

47. UNHCR notes that persons removed from Greece to Turkey are at risk of onward removal from Turkey, including to countries where they may face persecution or other forms of serious harm. Cases documented by UNHCR included removal of asylum-seekers from Turkey to Afghanistan and Iraq.⁵²

48. The ECtHR in the judgment of *KRS v United Kingdom*,⁵³ whilst noting UNHCR's unique position to provide assistance, made the following findings:

⁵⁰ UNHCR 2009 paper p. 9 (Applicant's Bundle, doc no.62, folder 2).

⁵¹ UNHCR 2009 paper p. 4 (Applicant's Bundle, doc no.62, folder 2).

⁵² *Ibid.*, p. 5 (Applicant's Bundle, doc no.62, folder 2).

⁵³ App. No. 32733/08, 2 December 2008 (Authorities Bundle, tab 15).

48.1 It found as a matter of evidence that Greece was not then currently removing people to inter alia Afghanistan, so that it could not be said that there was a risk that the applicant would be removed there on arrival in Greece.⁵⁴

48.2 It noted that the Dublin Regulation was one of a number of measures agreed in the field of EU asylum policy and had to be considered alongside the relevant EC Directives. It held: “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...”⁵⁵

48.3 There was 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 ECHR without being afforded a real opportunity of applying to the ECtHR for a rule 39 interim measure.⁵⁶

48.4 Greece as a Contracting State had undertaken to abide by the ECHR and to secure to everyone within their jurisdiction the rights and freedoms defined therein.⁵⁷

49. UNHCR’s most recent position paper provides independent background material that adequate safeguards and effective access to protection are not available in Greece which can ensure respect for the rights of Dublin transferees under international law. Dealing with each of the findings above in turn, UNHCR would note the following:

49.1 There is evidence that Greece has engaged recently in removing individuals to Turkey and from there they have been removed to Afghanistan;⁵⁸

⁵⁴ Ibid, at p. 17.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid, at p. 18.

- 49.2 The new legislative framework adopted in July 2009 has been evaluated by UNHCR and has not helped alleviate concerns and indeed the situation has notably deteriorated with respect to efficiency in the asylum system;⁵⁹
- 49.3 Given the risk of *refoulement*, the lack of safeguards afforded to asylum-seekers, the lack of access to asylum procedures and to the possibility of a fair and effective determination of asylum claims as well as the lack of free legal aid and interpretation, as evidenced by UNHCR,⁶⁰ it cannot be presumed that Greece is abiding by its legal obligations under, inter alia, the EU Directives, and, with all due respect, in UNHCR's view, it is not.
- 49.4 Further, in the absence of a fair and effective asylum procedure, lack of legal aid and interpretation and an effective remedy with suspensive effect, there are very considerable difficulties for an asylum-seeker in making a rule 39 interim application from Greece preventing onward removal, thereby hindering his right of individual petition under Art 34 ECHR: see *Mamatkulov v. Turkey* (2005) 41 EHRR 25. Moreover, in the event a rule 39 request can be made, this does not have automatic suspensive effect in each and every case.
- 49.5 More recent ECtHR decisions against Greece have highlighted the serious shortcoming within the asylum system in operation there including violations of Articles 3 and 5 during detention: see e.g. *SD v Greece* and *Tabesh v Greece*.⁶¹

I Conclusions

50. In view of Greece's failure to meet the minimum standards set by the EU Directives, the breaches of ECHR rights including Article 3 in particular in relation to the reception and detention of asylum-seekers, and also the real risk of

⁵⁸ UNHCR 2009 paper pp. 4-5 (Applicant's Bundle, doc no.62, folder 2).

⁵⁹ *Ibid*, p. 15 (Applicant's Bundle, doc no.62, folder 2).

⁶⁰ *Ibid*, pp. 6-7, 15-17 (Applicant's Bundle, doc no.62, folder 2).

⁶¹ See para. 45 above and (Authorities Bundle, tab 20 & tab 19).

indirect refoulement in breach of Article 3, it is UNHCR's view that the UK should apply Article 3(2) of the Dublin Regulation and not return asylum-seekers to Greece. Such an approach would ensure that the UK complies with its obligations under international law and guarantees the right to asylum as set out in Articles 18 and 19 of the Charter.

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Matrix
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