Neutral Citation Number: [2016] EWHC 2049 (Admin)

Case No: CO/5201/2015 & CO/5067/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2016

Before :

MR JUSTICE GREEN

- -

Between :

Mr Husain Ibrahimi **Mr Mohamed Abasi**	**Claimants**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Declan O'Callaghan and **Carine Patry** (instructed by **Duncan Lewis & Co.**) for the **Claimants**
Julie Anderson and **Belinda McRae** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 21st and 22nd March and 27th June 2016

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Judgment Approved

Mr Justice Green :

A. Introduction

(1) The issue

1. This case concerns the prohibition on "refoulement". The expression "refoulement" refers to a principle which condemns the rendering of a victim of persecution to his or her persecutor. Generally, the persecutor in question is a state actor. The principle that a person should not be refouled is a fundamental tenet of international law relating to refugees which protects them from being returned or expelled to places where their lives or freedoms may be threatened.

2. The prohibition of refoulement is formally enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention") but it is also found in a wide variety of other instruments of international law and detailed procedures governing its application are included in EU law. Article 33 articulates the prohibition on refoulement and defines the extent of the prohibition on the expulsion or return of a refugee:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

3. In the present case, two asylum seekers challenge decisions made by the Secretary of State for the Home Department ("the Secretary of State" or "the Defendant") to certify their asylum applications on "Safe Third Country" grounds and subsequently to decline their human rights challenges to the safety of their planned return to Hungary. The Secretary of State has certified their claims thereby permitting the Claimants only an out-of-country appeal on human rights grounds. The two Claimants are nationals of Iran. One contends that the Iranian authorities seek him for suspected involvement in an anti-government demonstration. The other contends that he is a convert to Christianity and alleges a history of detention and ill-treatment by the Iranian authorities. Both allege that if they are removed to Hungary they will, in due course, be removed from there to a series of other states and ultimately they will be repatriated to Iran where they will face threats to their lives and freedoms. They also say that even if they are not ultimately removed to Iran they will end up, along the way, being detained in detention or reception centres in Hungary or Serbia or Macedonia or Greece or Turkey in circumstances violating their fundamental right to freedom and liberty.

4. Upon the facts of the case the Secretary of State argues that there is no need to consider the merits of the individual Claimants' contentions for asylum because under the relevant legislation in the EU which governs this area it is Hungary, and not the United Kingdom, that must review their asylum claims. She contends that the system for assessing asylum in Hungary adheres sufficiently to EU and international law for Hungary to be considered a "safe" country where there is no material risk of refoulement or any other violation of the Claimants' fundamental rights.

5. The issue in the present case concerns "*chain refoulement*" because it is alleged by the Claimants that if they are removed from Hungary they will be channelled along a chain of States including Serbia, Macedonia, Greece and Turkey. It is argued that none of these States are "safe" and in all they are at risk of removal to Iran.

6. The legal framework in the EU governing the implementation of the 1951 Convention is contained within a series of instruments commonly known as the "Common European Asylum System" ("CEAS"). That system was originally made up of four instruments: Regulation 343/2003 ("the Dublin II Regulation"); Council Directive 2003/9/EC ("the Reception Directive"); Council Directive 2004/83/EC ("the Qualification Directive") and Council Directive 2005/85/EC ("the Procedures Directive"). The United Kingdom has opted in to all four of these instruments. Each of the instruments has been "recast". The Dublin II Regulation was recast as

Regulation 604/2013 which is now commonly described as the "Dublin III" Regulation. The United Kingdom opted in to the recast Dublin III Regulation (cf Recital paragraph [41]). This entered into force on 19th June 2013 and applies to all applications for international protection lodged with effect from 1st January 2014 (cf Article [49]). However, the United Kingdom has not opted into the recast version of the other three Directives the original forms of which continue to apply.

7. Under the Dublin III infrastructure a two stage process is instituted. As soon as an application for asylum is made in a Member State that State must determine which Member State is responsible for assessing the substantive claim. That process of determination is regulated by Dublin III both in relation to the criteria for allocation of responsibility (as between States) and also in relation to the procedures adopted. However, once responsibility has been accepted for assessment of an asylum claim, and a person is physically present in the State which has responsibility for assessing that claim, the second "substantive" stage commences.

8. When these measures were adopted there was, unsurprisingly, an assumption that they would be effective. Subsequent events have cast this assumption into doubt.

9. The civil war in Syria, turmoil across the remainder of the Middle East and in Afghanistan, a war between Ethiopia and Eritrea, and turmoil in Libya, have all triggered mass movement of persons fleeing strife and heading for the EU. Simultaneously, substantial flows of economic migrants from Africa and elsewhere have also headed north, for Europe. And the position in Turkey has been thrown into turmoil by the failed military coup in July 2016.

10. As of the date of this judgment, approaching 3 million refugees are camped upon the Turkish border with Iraq and Syria. Over 50,000 migrants are kept in camps in Greece. Tens of thousands of persons are heading north across the Mediterranean towards Italy from North Africa. Such are the geo-political features of this mass migration that in the context of access to the European Union the greatest pressure is placed upon those Member States in the South and South East of Europe. These include Turkey and Greece, and as migrants seek to transit away from those States pressure builds in States such as Macedonia, Serbia and Hungary. These are rarely the preferred end destination of the migrants for whom the optimal Member States of destination are those in the North and North East who are perceived to have higher standards of living and better job prospects.

11. This dynamic has created enormous and probably intolerable pressures on the Member States in the southern parts of the EU. I have mentioned the position of Greece and Turkey but Hungary has also borne the brunt of this mass movement phenomenon.

12. Hungary has a population of 9.8m (January 2015). In 2008 Hungary had 3,175 asylum applications. By 2011, this had reduced to 1,695. However, as the crisis in the Middle East increased, the figure rose to 18,900 in 2013 and 42,775 in 2014. In 2015, 177,135 applications were made for asylum to the Hungarian authorities, which was the second highest number of claims in the EU after Germany. By way of comparison, the United Kingdom's population is c. 63.7m (2016). In 2009, it received 31,695 asylum applications which reduced to 24,365 in 2010 but rose to 33,010 in 2014. The dramatic increase in the influx of immigrants into Hungary has caused social and

economic problems for the Government of Hungary. New asylum rules were adopted in August 2015 which were intended to address the growing crisis. These new rules, *prima facie*, introduce a highly accelerated and abbreviated asylum processing system and then substantially curtailed subsequent rights to obtain judicial review of the prior administrative decision.

13. In this context the EU Commission has commenced infraction proceedings against Hungary upon the basis that its new legislation is inconsistent with applicable EU obligations and creates a risk of refoulement contrary to international law. The United Nations Human Rights Commission ("UNHCR") has expressed serious concerns and reservations about developments in Hungary (but to date has not formally recommended that other states refrain from removing migrants to Hungary). The UNHCR has however recommended the cessation of transfers to Serbia, Macedonia, Greece and Turkey.

14. There are two central issues before this Court. First, whether under relevant international law (as reflected in and implemented by EU legislation and case law under Article 3 of the European Convention on Human Rights ("ECHR")) the Claimants would be at risk of refoulement to Iran if removed to Hungary. Second, whether along the way the Claimants would be at risk of detention in circumstances amounting to an unlawful violation of their fundamental right to freedom and liberty (as reflected again in EU law and under case law under Article 5(1)(f) ECHR).

15. The decisions in dispute in the present cases were taken in September and October 2015. In essence the Secretary of State found that there was insufficient evidence of systemic or other failings in the Hungarian asylum system to rebut the strong presumption that Hungary would comply with its legal obligations. For this reason, the Secretary of State concluded that there was no risk to life or freedom by removal to Hungary and the Secretary of State did not proceed to examine the position in other States along the refoulement chain leading, ultimately, to Iran. A very great deal has however subsequently changed. As already observed serious doubts have now been cast upon the effectiveness of the Hungarian asylum and judicial systems by the EU Commission and the UNHCR. And in relation to each of the other potentially affected States the UNHCR recommends a cessation of transfers. The reasoning in the impugned decision letters, on the basis of their own internal logic, would inevitably have been different in the light of the mounting evidence produced by governmental and non-governmental bodies and organisations whose status commands the closest of attention (in particular the UNHCR and the EU Commission).

(2) Conclusions

16. In relation to these issues I have concluded as follows. First, there is a significant risk that the Claimants would be at risk of refoulement if removed to Hungary. I therefore accept the Claimants' submissions in this respect. In each of the States concerned the UNHCR, NGOs and other bodies (such as the European Parliament) whose views command respect have identified systemic and/or operational risks in the asylum and judicial systems which casts into serious doubt the likelihood of the Claimants, were they to be removed to that State, being able effectively to advance their claims to international protection. As such they face a risk of refoulement in those states, which risk applies to transfer to Iran. That is the position as it stands as of the date of this judgment. In my view it is not arguable for the Secretary of State to contend (as she

does) that in effect nothing has changed since she took the impugned decisions. On the contrary a vast amount has changed. This means that the analysis adopted by the Secretary of State in those decisions is a long way out of date. I am also of the view that the resort to broad and sweeping generalisations about presumptions of compliance set out in the original decisions was not justified even at the time because had the Secretary of State conducted analysis into the new Hungarian law changes then (as the EU Commission did at that time) she would have been bound to have concluded that a much more detailed analysis of the situation was called for and she was on notice that there were potentially serious problems arising of out of the new Hungarian law because the UNHCR was already beginning to express real concerns. What is now required is a full blown analysis of risks and safety such as has not to date been conducted, if the Defendants are to justify removal of these Claimants from this jurisdiction. Second, there is insufficient evidence that the Claimants would be at risk of unlawful detention if they were removed to Hungary. I therefore reject the second aspect of the Claimants' arguments. The net effect however is that the applications for judicial review succeed. It is nonetheless right to record that there are some important qualifications to the judgment which, because the position in the States concerned is in a state of almost perpetual flux, hence reflects the position as it stands as of the date of the judgment. This ruling is not therefore a bar to the Secretary of State conducting a far more fundamental analysis of the facts as they evolve and emerge and forming a new conclusion.

B. The position of the Claimants

17. In the text below I set out the facts relating to the Claimants as they assert them to be. The Secretary of State does not necessarily accept the Claimants' account of the routes they took to arrive in the United Kingdom or as to their claims for asylum. The suspicion on the part of the Defendant is that each Defendant has carefully tailored his account to fit in with the most attractive forensic narrative. I should therefore make clear that in setting out the position of each Claimant below I am not to be taken as expressing any view upon the correctness of these asserted facts.

(1) Mr Husain Ibrahimi

18. The first Claimant, Mr Husain Ibrahimi, is a national of Iran born on 11th May 1989, aged 26. He says that the Iranian authorities seek him for suspected involvement in an anti-government demonstration. He says that he left Iran and travelled to Turkey and then entered Greece on 7th February 2015. He was fingerprinted at Mytilini, Lesbos. He then says that he travelled through Serbia and into Hungary where he was fingerprinted by the Hungarian authorities at Bacsalmas on 16th March 2015. Bacsalmas is a small town situated in the south of the country close to the border with Serbia. Mr Ibrahimi claimed asylum in Hungary and he is recorded as having resided at Nagyfa Reception Centre on 17th March 2015. He managed to cross Europe and enter the United Kingdom on 30th April 2015 where he claimed asylum. He was one of five illegal entrants who were encountered at Cobham Service Station on the M25 in Surrey. He provided no documents to confirm his identity or nationality. He was arrested on suspicion of immigration offences. When he was served with illegal entry papers he claimed asylum. He was subjected to a screening interview on 1st May 2015 as part of his asylum registration process. The account that he gave in interview differs in significant respects from the account he has given in witness statements prepared for the judicial proceedings. In particular, in his early accounts, there is no

reference to the Claimant having travelled through nor having been fingerprinted in Serbia, or ever having passed through Macedonia.

19. A formal request was made to the Hungarian authorities on 6th May 2015 to accept Mr Ibrahimi's asylum application pursuant to the Dublin III Regulation. The Hungarian authorities accepted responsibility for the application by way of a letter dated 20th May 2015. By way of a decision letter dated 3rd June 2015 the Secretary of State refused Mr Ibrahimi's asylum application. She certified his claim. The decision was served upon Mr Ibrahimi on 22nd October 2015. Directions were given for his removal. Mr Ibrahimi submitted a human rights application requesting leave to remain in the United Kingdom on human rights grounds but this application was refused and certified by way of a decision letter dated 2nd December 2015. As of the date of judgment Mr Ibrahimi is not being detained.

(2) Mr Mohamed Abasi

20. The second Claimant, Mr Mohamed Abasi, is also a national of Iran. He was born on 19th April 1986 and is presently aged 29. He says that he is a convert to Christianity and he claims that he was subjected to detention and ill-treatment by the Iranian authorities. He left Iran and travelled through Turkey to Europe. He is recorded as having been fingerprinted in the Hungarian city of Szeded on 25th March 2015. Szeded is a sizeable Hungarian city situated close to the border with Serbia in the south of Hungary. Mr Abasi claimed asylum in Hungary. He is recorded as having resided in Nagyfa Reception Centre on 26th March 2015. However, he was fingerprinted by the Slovenian authorities in Ljubljana on 31st March 2015. He left Slovenia and managed to find his way across Europe and was encountered in the United Kingdom on 7th May 2015. He was encountered with 2 other illegal immigrants at the Cobham Service Station on the M25 in Surrey and he provided no confirmation of his identity or evidence of any permission to enter or remain the United Kingdom. He also was arrested on suspicion of immigration offences and he also claimed asylum upon being served with illegal entry papers.

21. A formal request was made to the Hungarian authorities on 21st May 2015 to accept Mr Abasi's asylum application under Dublin III which request was accepted by way of a letter dated 1st June 2015. The Secretary of State refused Mr Abasi's asylum application and certified his claim by way of a decision letter dated 4th June 2015. The decision was formally served on 6th October 2015 upon Mr Abasi being detained. On 20th October 2015 Mr Abasi submitted further submissions relying upon recent developments in Hungary. The Secretary of State refused his human rights representations and certified his claim by way of a decision dated 20th October 2015. The Secretary of State is suspicious about the evidence now given by the Claimant of this route of travel to the United Kingdom. In particular no reference is made to the Claimant having been in Serbia, or having been fingerprinted there or ever having been though Macedonia. As of the date of judgment Mr Abasi is not being detained.

C. The Decisions in issue

22. The Secretary of State adopted detailed individual decisions relating to each Claimant. In relation to Mr Ibrahimi, on 3rd June 2015, the Secretary of State certified Mr Ibrahimi's asylum application on third country grounds. The decision states that since the Islamic Republic of Iran is not the only country to which the Claimant could be

removed and given that the authorities in Hungary had accepted that Hungary was the State responsible for examining Mr Ibrahimi's application then pursuant to paragraph 8(1)(c) of Schedule 2 of the Immigration Act 1971 the Claimant was returnable to Hungary. Accordingly, the Secretary of State declined to examine his asylum application substantively given that there was a safe third country to which Mr Ibrahimi could be sent. In these circumstances, the Secretary of State certified that the conditions set out in paragraphs 4 and 5 of Part 2 of Schedule 3 of the Asylum & Immigration (Treatment of Claimants, etc) Act 2004 were satisfied. In the light of a letter sent to the Defendant by solicitors acting for Mr Ibrahimi dated 3rd July 2015 the Secretary of State responded on 2nd September 2015. This response amounts to a 51 paragraph rebuttal of the contention that the rights of Mr Ibrahimi would be violated if he were to be removed to Hungary. On 7th September 2015 a Letter Before Action was sent on behalf of Mr Ibrahimi. This was responded to on 11th September 2015 in a 55 paragraph rebuttal which concluded that it remained the position of the Secretary of State that Mr Ibrahimi could and would be returned to Hungary.

23. For present purposes, it suffices to consider the reasoning set out in this document as representing the definitive reasoning of the Secretary of State. The response considers in detail the submission made by the Claimant that Hungary was not a safe state to which individuals could be removed. The essential reasoning of the Secretary of State may be summarised as follows. First, it had to be presumed that the treatment of asylum-seekers in all Member States complied with the requirements of the EU Charter of Fundamental Rights, the 1951 Convention and the ECHR. Second, the presumption could be rebutted by sufficient relevant evidence establishing that the transferring Member State could not be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum-seekers in the transferee Member State amounted to substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment contrary to Article 3 ECHR. Third, the Charter of Fundamental Rights did not lead to a different answer. Fourth, there was insufficient evidence to rebut the presumption of compliance in relation to Hungary. In particular, the Secretary of State rejected as sufficient evidence various documents and reports casting doubt upon the effectiveness and fairness of the Hungarian asylum system: an undated statement from the legal officer with the Hungarian Helsinki Committee; a report from the Cordelia Foundation for the Rehabilitation of Torture Victims; a news article from ABC News entitled "UN Agency as Hungary rushes to tighten asylum rules"; a UNHCR document of 3rd July 2015 entitled "UNHCR urges Hungary not to amend asylum system in haste"; a document from AIDA entitled "Hungary: Application of Dublin Regulations suspended indefinitely"; and Statements of Intent on the part of the ruling party in Hungary that it wished to close its southern border to migration. All of those documents cast doubt upon the ability of the new Hungarian asylum regime including that relating to judicial supervision to protect effectively genuine asylum-seekers.

24. There is, however, no detailed *analysis* of this evidence referred to in the response letter. Instead there is only the blunt and sweeping rebuttal statement:

> "It is not considered that the reports suffice to rebut the significant evidential presumption described above" (ibid paragraph [27]).

25. The Secretary of State cites authority to the effect that whilst reports of "local organisations" are entitled to some weight they carry considerably less weight than the considered reports of bodies such as the UNHCR, the ECRI, LIBE and the US State Department. Importantly, for the present case, it is made clear that the decision might have been different had the Claimants adduced UNHCR or other NGO evidence of systemic failures. The decision is inconsistent in this respect in that whilst it recognises that UNHCR reports are relevant and important it does not go on to acknowledge the fact that the UNHCR had begun to ring alarm bells about the Hungarian system. In paragraphs [33] – [35] the Secretary of State observes as follows:

> "33. Finally, it is noted that neither the UNHCR, nor any other internationally recognised NGO, have stated that there is evidence to suggest systematic failures or serious operational difficulties capable of rebutting the presumption of compliance.
>
> 34. In this context, it is considered that the evidence provided by your client does not demonstrate that systemic deficiencies or serious operational difficulties exist in either the asylum procedures or reception conditions in Hungary, such that the presumption of compliance is rebutted in this instance.
>
> 35. However, it is accepted that, as outlined above, "systemic deficiencies" is only one route by which an applicant can demonstrate the existence of a "real risk" of breach of Article 3 on return. Your client's case has therefore been carefully considered, in order to establish whether or not evidence exists of factors which would give rise to a real risk of breach of Article 3 in his particular case".

26. The Secretary of State then went on to state that since Hungary was bound by the provisions of EU legislation which laid down minimum standards for reception of asylum-seekers the presumption of compliance meant that there was no reason to suggest that Mr Ibrahimi would be at risk if removed. Further, in relation to the judicial system, in Hungary, the Secretary of State observed:

> "42. ... It is considered that Hungary has a functioning policing and judicial system, and follows the rule of law. Accordingly, upon the reporting by a victim of a crime, the Hungarian police will conduct a thorough investigation and, where sufficient evidence is gathered, prosecute those who carry out unlawful acts. An (sic) Hungary Court will consider the evidence and, when necessary, punish those who are found guilty of such acts. The Hungarian authorities also have a responsibility to protect complainants and witnesses as deemed necessary".

27. In relation to Mr Abasi, although the details of the responses from the Secretary of State differ to take account of differences in the individual particulars of the Claimants, the essential reasoning is the same as that in relation to Mr Ibrahimi. In essence, the Secretary of State, in a response dated 20th October 2015, concluded that it was lawful to decline to assess his asylum application because he could be removed

to Hungary which was a safe country. In particular, in paragraph [27] the Secretary of State noted that:

> "...neither the UNHCR, nor any other internationally recognised NGO have stated that there is evidence to suggest systematic failures or serious operational difficulties capable of rebutting the presumption of compliance".

28. The Secretary of State concluded that the evidence provided by Mr Abasi did not demonstrate that there were systemic deficiencies or serious operational difficulties in either the asylum procedures or reception conditions in Hungary such that the presumption of compliance was rebutted.

29. In the case of both Mr Ibrahimi and Mr Abasi the Secretary of State *continues* to argue (i.e. before this Court) that neither the UNHCR nor any other responsible NGO or governmental body has expressed the view that there are systemic failures or operational difficulties in Hungary which are sufficient to rebut the presumption of compliance with relevant EU and international law. As I have explained in the introduction to this judgment and as I reiterate in the conclusions at the end of the Judgment this is not a sustainable position to adopt.

D. The Date for assessment of the relevant evidence

30. As set out above the position adopted by the Secretary of State in the relevant decisions was that neither the UNHCR nor other relevant bodies had expressed concerns as to the existence of systemic or operational defects or difficulties in the asylum rules and/or detention conditions in Hungary. Regardless of whether that was a justifiable conclusion at the time the decisions were taken since then matters have evolved. As set out below, the EU Commission has initiated pre-formal proceedings against Hungary alleging systemic defects in the asylum process, including judicial supervision thereof. And the UNHCR has expressed serious "*concerns*" about both the asylum processes in Hungary and conditions relating to detention. Nonetheless, the Secretary of State has persisted in her submission that the presumption of compliance on the part of the Hungary remains and there is insufficient evidence to rebut that presumption.

31. In view of this, an issue of potential importance is the date upon which this Court must assess the relevant evidence. In her initial written submissions the Secretary of State strongly argued that the relevant date of assessment was that of the decisions in issue (citing *R (Fardous) v SSHD* [2015] EWCA Civ 931 at paragraph [42] – a case concerning the well-known "*Hardial Singh*" principles as applied to detention pending removal). If this were correct, it would preclude this Court from taking into account in an asylum case subsequent evidence suggesting that there was a material change in circumstances (assuming, *ex hypothesi*, that the Secretary of State was correct in her assessment of the evidence as of the date of the impugned decisions). At an early case management hearing I raised the correctness of the position adopted by the Secretary of State as to the date on which the evidence was to be assessed. In the light of this the Secretary of State has modified her position. She accepts that the task of the Court is to assess the evidence as of the date of judgment. The rationale for this change of position was that the Secretary of State accepted that it would have been open to the Claimants to have adduced to the Secretary of State evidence of a material

change in circumstances requiring the Secretary of State, thereafter, to review her earlier decisions in the light of new evidence. On this basis, Miss Anderson, for the Secretary of State, accepted that the proper and sensible course of action was for this Court to review the up to date evidence.

32. In my judgment, my duty in law is to assess the evidence as of the date of the hearing. I form this view for a number of reasons which may be summarised as follows.

33. In the recent judgment of the Supreme Court in *TN & MA (Afghanistan)* v SSHD [2015] UKSC 40 ("*TN*") the Court stated that the judicial task in relation to an asylum case was not, *prima facie*, comparable to that, for instance, where a Court adjudicated upon the lawfulness of a more routine administrative law decision, such as that arising in the planning law context. At paragraph [72] Lord Toulson, with whom the remainder of the Court agreed, stated:

> "...the question whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on evidence before the Tribunal or Court...".

34. The Supreme Court endorsed the observations of the Court of Appeal in *Ravichandran v SSHD* [1995] EWCA Civ 16; [1996] Imm AR 97 where the Court held that asylum appeals should be determined by reference to the position as at the date of the appellate decision rather than by reference to the factual situation at the time of the original decision against which the appeal was sought. Lord Toulson in *TN* stated (ibid paragraph [38]):

> "This makes good sense and the general policy has not been doubted".

35. Lord Toulson continued that that the subject matter of the litigation was whether the applicant required refugee protection and a court hearing an appeal would be seised of up to date information and judges "*...would not serve the public interest if they were required to ignore matters which they know to have happened after the date of the Secretary of State's decision. The situation might have changed for the better or for the worse*" (ibid). Accordingly, in asylum cases, where the question is whether it is or is not, as a matter of fact, safe to remove an asylum-seeker to a third country, it is the evidence and facts before the Court which matter and not those before the decision maker when the impugned decision was adopted and which may have been based upon an entirely different set of circumstances.

36. In cases involving the ECHR and EU law where proportionality and/or fundamental rights are in issue both the Strasbourg and Luxembourg Courts and the Supreme Court have held that the task of the domestic court is to conduct an exacting investigation of the facts taking into account up to date evidence. So, for example at the level of EU law, in Case C-333/14 *Scotch Whisky Association v Lord Advocate, Advocate General for Scotland* (23rd December 2015) the Court of Justice stated (ibid paragraph [62]) that EU law had to be complied with at all relevant times, including at adoption, or implementation if later than adoption. The Court had to assess the compatibility of the measure upon the date upon which it rendered its judgment (ibid paragraph [63]). In that evaluation the Court was required to take into account "*any*" relevant information, evidence or other material of which it had knowledge under the

conditions laid down by national law (ibid paragraph [64]). Confirmation of the above approach is also found in the decision of the Court in Strasbourg in *MSS v Greece & Belgium* (2011) 52 EHRR 2 ("*MSS*") where the Court ruled that in an assessment of whether in an asylum case a receiving State was, or would be, compliant with Article 3 ECHR a national Court was required to have regard to all the circumstances including the duration, nature and context of the treatment, its physical or mental effects, and, in appropriate cases the sex, age and state of health of the victim and that assessment involved the Court considering the material placed before it in the light of the foreseeable consequences of removal in the light of the general situation in the receiving State. That review had to be "*effective*" in practice (as well as in law) (ibid paragraph [288]). A further illustration is found in *Chahal v United Kingdom* Application 70/1995/576/662 (11th November 1996) which is discussed below at paragraphs [41] – [44]. A similar conclusion was arrived at by the Supreme Court in *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 where the Court held (cf for example paragraph [108]) that in determining whether a decision was proportionate the Court had to decide the matter for itself "*...on the basis of the material before it...*".

37. It is of some significance that Article 46(3) of the recast Procedures Directive 2013/32/EU requires a "*full and ex nunc examination of both facts and points of law*" in asylum cases, i.e. an up to date analysis. The UK has not however signed up to the recast version.

E. The Legal framework

(1) 1951 Convention relating to the Status of Refugees: Article 33(1)

38. The starting point for analysis is Article 33(1) of the 1951 Convention relating to the Status of Refugees (see paragraph [2] above). This prohibits the return of a refugee to a territory where his life or freedom will be threatened. Article 33(1) is considered one of the most basic articles of the 1951 Convention. The UNHCR Note on the Principle of Non-Refoulement (November 1997) states that it is one of the basic provisions "*...to which no reservations are permitted*". Commentators observe that the words "*where his life or freedom will be threatened*" are not intended to lay down stricter criterion than the words "*well-founded fear of persecution*" in the definition of the term "*refugee*" in Article 1A(2). This is said to be evident from the *travaux preparatoires*. The difference in wording was introduced to make it clear that the principle of non-refoulement applied not only in respect of the country of origin but to any country where a person had reason to fear persecution.

39. The principle of non-refoulement has been enshrined in a variety of international measures. It is reflected in Article 3(1) of the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967. At the regional level it has been enshrined in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (cf Article II(3)). Article 22(8) of the American Human Rights Convention, adopted in November 1969, provides, in similar terms:

> "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of

> being violated because of his race, nationality, religion, social status or political opinions".

In the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29th June 1967, it is recommended that Member Governments should be guided by the principle that they should ensure that no one "*...shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion*". Equally, Article III(3) of the Principles concerning the Treatment of Refugees adopted by the Asian – African Legal Consultative Committee at its Eighth Session in Bangkok in 1966 stated that no one seeking asylum should, save for overriding reasons of national security or for safeguarding the population, be subject to measures such as rejection at the frontier, return or expulsion which would result in compelling the asylum seeker to return to, or remain in, a territory where there was "*...a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory*".

40. Because of its wide acceptance the considered position of the UNHCR is that the principle of non-refoulement has become a norm of customary international law based upon consistent State practice combined with the recognition on the part of those States that the principle has a normative character.

41. Within Europe this normative principle finds concrete expression in both the ECHR and the Charter of Fundamental Rights. The connection between Article 33 and Article 3 ECHR (and a *fortiori* Article 4 of the Fundamental Charter) is clear since the latter exemplifies, and indeed may be a paradigm example of, conduct which threatens life or freedom or entails persecution. As such Article 3 ECHR is a reflection or embodiment of the principle recognised in Article 33 of the Convention. An early illustration of the recognition of the relationship between Article 3 ECHR and the principle of non-refoulement is found in the case of *Chahal v United Kingdom* (Application No 70/1995/576/662, 11th November 1996). The Court thus stated, having acknowledged the right of Contracting States to control the entry, residence and expulsion of aliens, that:

> "...it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country...".

42. In paragraph [80] the Court stated that:

> "...whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the

> responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion...".

43. In that case the United Kingdom sought to expel Mr Chahal to India upon the basis that his continued presence in the United Kingdom was unconducive to national security. An issue arose as to the point in time which the risk to Mr Chahal should be assessed. Proceedings had been commenced against Mr Chahal to deport him in 1990. The Court recorded that there were differing views on the situation in India and in the Punjab but that it was common ground that the violence and instability in that region had reached a peak in 1992 and had been abating ever since. Accordingly, the date adopted by the Court for its assessment of risk to Mr Chahal if expelled to India was of importance. Mr Chahal contended that the Court should consider the position in June 1992 which was the point in time when the decision to deport him was made final. The United Kingdom, with whom the Commission agreed, argued that because it was the responsibility of the State that was engaged under Article 3 then the act of exposing an individual to a real risk of ill-treatment was the date of the proposed deportation. The Court agreed and stated that the material point in time was that of the Court's consideration of the case. The historical position was of interest only insofar as it shed light upon the current situation and its likely evolution (cf paragraphs [83] – [86]).

44. It is well established in international law that the absence of a formal recognition or declaration of a person as having a refugee status does not preclude that person possessing refugee status and thereby being protected by the principle of non-refoulement. The principle requires that asylum applicants, therefore, be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that they are, in consequence, not refugees. It is also well established that the principle of non-refoulement applies both directly and indirectly. Accordingly, if a State wishes to remove an asylum-seeker to a third country which, in turn, will move that person onwards to a further country, then the first country must adopt an overall view of risk. The question in a given case, where it is possible that an individual may be transferred along a chain to an ultimate destination, is whether, at the outset, it is possible to identify substantial grounds for considering that there is a real risk that the individual *will* be transferred to the *ultimate* destination where that person is at risk.

(2) The general framework in domestic law

45. The content of the domestic legal framework which governs the administrative procedure for asylum and judicial supervision thereof is not materially in dispute and does not raise any specific points which require resolution in this case. I can deal with this very briefly. The framework has been described in a series of recent decisions of the High Court and the practice has arisen to adopt the accounts of Elisabeth Laing J in R *(Tabrizagh & Others) v SSHD* [2014] EWHC 1914 (Admin) at paragraphs [100] – [164] and Lewis J in *R (MS) v SSHD* [2015] EWHC 1095 (Admin) at paragraphs [55] – [97]. This was the approach taken by Kerr J in *R (Hamad) v SSHD* [2015] EWHC 2511 at paragraph [46] and I endorse it.

(3) The Common European Asylum System ("CEAS")/Article 3(2) Regulation 604/2013 ("Dublin III")

46. It is, however, necessary to set out those provisions which directly relate to the assessment to be undertaken by this Court of the risk of refoulement. The EU has established what has been described as a "Common European Asylum System" (CEAS – see paragraph [6] above) which governs claims for asylum and protection. Regulation 604/2013 (Dublin III) establishes 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. Chapter II of the Regulation entitled "General principles and safeguards" lays down the basic principle that Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. Article 3(1) states that the application shall be examined by a single Member State which shall be that State which the criteria set out in Chapter III indicates is responsible.

47. Article 3(2) identifies the test to be applied. It is in the following terms:

> "2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.
>
> Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.
>
> Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III will do the first Member State with which the application was lodged the determining Member State shall become the Member State responsible".

48. Pursuant to Article 3(3) any Member State remains entitled to retain the right to send an applicant to a "*safe third-country*" subject to the rules and safeguards set out in Directive 2013/32/EU (the recast Procedures Directive). This latter measure lays down standards for the reception of applicants for international protection. It accords to applicants a right to move freely within the territory of the host Member State or within an area assigned to them by that State. It also empowers Member States, in appropriate circumstances, to detain applicants in detention centres. Regulation 604/2013 also lays down rules governing detention for the purpose of transfer (cf Article 28).

49. In the present case the Claimants argue that there are "*substantial grounds*" for concluding that there are systemic and/or operational flaws in the asylum procedures

in Hungary and in other states through which the Claimants may be transferred on the way back to Iran. They contend also that these "*flaws*" give rise to a "*risk of inhuman or degrading treatment*" within the meaning of Article 4 of the Charter of Fundamental Rights and Article 3 ECHR, namely because these flaws would lead to a risk of refoulement to Iran where the Claimants may be subject to mistreatment, including threats to their lives.

50. The evidence to be considered under Article 3(2) is directed at "risk". There are three points to make. First, the risk is not as to the existence of mere flaws or weaknesses in the asylum and detention systems of the third state, but, rather, whether those flaws or weaknesses will lead to a violation of Article 3 ECHR (or Article 4 of the Fundamental Charter) and this entails examining the entire refoulement chain reaction which starts in Hungary and ends in Iran. Second, there is an emphasis in Article 3(2) on "*systemic*" flaws. This suggests flaws in the rules and regulations and procedures operating in the third states. Some care is required here because the case law of the Strasbourg Court makes it clear that Article 3 ECHR can be engaged not only by flaws in the system but also operational errors. In particular this has been recognised as important because Article 3 ECHR is engaged even in relation to a state that, in a general sense, operates adequate systems but which in an individual instance has acted, through its official agents, in a degrading or inhuman manner towards a person. The focus on systemic flaws makes sense in a prospective analysis of what *might* happen if a person is removed to a third state because the analysis is *ex ante* and it is not at that stage easy for a Court to conclude that whilst the general system in that third state is adequate the migrant being removed *will* suffer at the hands of some unknown individual official. Though there might, of course, be credible evidence (for instance from the UNHCR) of widespread operational failings which a Court can take account of in the assessment of risk, and indeed it might be that evidence of widespread operational failings can be quite properly categorised as "systemic". The key point is that "systemic" is not a defined term of art and must be construed in context. The cases where operational failings have been identified in case law are usually *ex post* cases where mistreatment has occurred and where the victim seeks redress for that past conduct (this is characteristic of cases under Articles 2 and 3 ECHR involving alleged failures on the part of the police to protect victims of crime: see the analysis of the case law in *DSD & NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) at paragraphs [243] – [313] affirmed on appeal [2015] EWCA Civ 646). The Supreme Court has recognised that Article 3 can be violated by evidence that a person "*would*" (i.e. prospectively) suffer treatment of a non-systemic nature, in *R (EM (Eritrea)) v SSHD* [2014] UKSC 12 at paragraph [42]. Further, it is right to record that the Secretary of State accepts in this case that the "risk" is in relation to both the system and (operationally) the person. Third, although the standard of proof is based upon risk this this does not mean that the evaluative exercise conducted by the court is other than rigorous or that the risk will inevitably be found to exist. There must be "*substantial*" grounds for believing that the risk will eventuate. In my view "*substantial*" means "*real*", i.e. not fanciful or *de minimis*. It requires an overall and thorough review of the facts and evidence. It will, in cases such as this, entail considering evidence as to the structure of third country asylum systems and commentaries by relevant international bodies on those systems. It also requires the Court to examine how those systems are being operated in practice. The analysis inevitably takes into account that the appraisal is of a distant system, that the exercise is counterfactual and prospective (i.e. how a third state might act in the future

if the individual concerned is removed there), and that the exercise is not one capable of precise quantification or computation.

(4) The prohibition on torture or inhuman or degrading treatment: Article 4 of the Fundamental Charter and Article 3 ECHR

(i) Article 3 ECHR & Article 4 of the Fundamental Charter

51. The risk in issue has to be of a breach of a fundamental provision of law. In the context of the EU and ECHR the risk inherent in Article 33 of the 1951 Convention (couched in terms of threats to life or freedom or to well founded fears of persecution – see paragraph [38] above) has been cast primarily in terms of Article 4 of the Charter and Article 3 ECHR. Article 4 is entitled "Prohibition of torture and inhuman or degrading treatment or punishment" and it provides:

> "No one shall be subjected to torture or to inhuman or degrading or punishment".

52. Article 4 of the Charter is in terms, *mutatis mutandis*, identical to Article 3 ECHR. For the purpose of analysis in this judgment I focus henceforth on Article 3 ECHR.

(ii) Summary of principles

53. The legal principles governing whether the return of an asylum seeker to another EU Member State would breach Article 3 has been considered in a number of cases. A convenient place to start the analysis is paragraphs [66] to [72] of the judgment in *Hussein v Netherlands and Italy* Application No 27725/10 [2013] ECHR 1341, read in conjunction with paragraph 249 of the judgment in *MSS v Greece and Belgium* (2011) 52 EHRR 2 ("*MSS"*) as those principles were later summarised in *MS et ors v SSHD* [2015] EWHC 1095 (Admin) at paragraph [72] where Lewis J stated:

> "(1) removal by one State to another may give rise to issues under Article 3 ECHR, and involve the responsibility of that State, where substantial grounds have been shown for believing that the individual concerned, if returned, faces a real risk of being subjected to treatment contrary to Article 3;
>
> (2) the assessment of whether there are substantial grounds for believing that there is such a risk must be a rigorous one and involves the assessment of the conditions in the receiving country against the standards of the ECHR;
>
> (3) the treatment in the receiving state must attain a minimum level of severity to fall within the scope of Article 3 ECHR, and is relative, having regard to all the circumstances including the duration, nature and context of the treatment, its physical or mental effects and, in appropriate cases, the sex, age and state of health of the victim;
>
> (4) the assessment involves a court considering the material placed before it and the assessment should focus on the

> foreseeable consequences of return in the light of the general situation in the receiving state as well as the claimant's personal circumstances;
>
> (5) the mere fact that return means that a person's economic, material or social condition would be significantly reduced would not, absent exceptional humanitarian circumstances, amount to a breach of Article 3;
>
> (6) while Article 3 does not oblige States to provide everyone within their jurisdiction with a home and does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living, the position in relation to EU Member States does not, however, fall to be analysed in that general way as an obligation to provide asylum-seekers with accommodation pursuant to the Reception Directive will have been implemented into the domestic law of the Member State and that Directive does lay down minimum standards (and, one could add, the obligations imposed by the Qualification Directive in relation to BIPs which will also have been implemented into the domestic law of Member States)."

(iii) MSS v Greece and Belgium: destitution / the risk of refoulement

54. The case most oft cited as the leading authority is *MSS (ibid*). This provides guidance on (a) when the conditions of reception on return violate international standards and (b) when flaws in the administrative and judicial procedures governing asylum claims in the transferee State violate international standards.

55. MSS was an Afghan national who was fingerprinted in Greece upon entering but he did not claim asylum there. Having been detained for a week he was released and then spent months living in "*a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live*". His plight was exacerbated by a fear of being attacked and robbed and the improbability of his situation improving in the foreseeable future. At the time there were less than 1,000 places in reception centres in Greece but tens of thousands of migrants needing accommodation. The applicant therefore had no realistic chance of being accommodated or of obtaining employment but due to inaction by the Greek state MSS was destitute for several months on the streets when he was in a particularly vulnerable and desolate position. He was humiliated, fearful and desperate. He encountered official indifference and his overall treatment was inhuman and degrading. The Court found that Greece had in these circumstances violated Article 3 ECHR (see Judgment paragraphs [254] to [264]).

56. The applicant left Greece and travelled to Belgium. This brings me to the second (and for present purposes most relevant) set of findings by the Court which concerned the risk of unlawful refoulement. In April 2009, the UNHCR sent a letter to Belgium requesting that Belgium suspend transfers of asylum seekers to Greece. Belgium however removed MSS from Belgium and transferred him back to Greece. It was argued on behalf of MSS that Belgium was in breach of Article 3 in transferring MSS

to Greece because the administrative and judicial systems in Greece were beset with systemic and operational failings and MSS was thus at risk of not receiving a fair and effective hearing of his claim for international protection. In considering Belgium's responsibility under the ECHR, the Court accepted that there was a presumption of compliance which existed in the absence of evidence to the contrary:

> "… in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community Directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with art. 3 of the Convention".

57. However, there were a number of NGO reports dealing with the position in Greece and in particular chronicling defects in its asylum procedure which the Court considered to be relevant. The Court also attached importance to a letter sent by the UNCHR unequivocally requesting Belgium to suspend transfers to Greece. In those circumstances, and notwithstanding the presumption, Belgium was responsible for a violation of Article 3 by returning the applicant to Greece knowing that there was a risk of him being returned to Afghanistan without his asylum application being properly considered. It is instructive to consider how the Court analysed the risk posed to MSS of refoulement to Afghanistan. The Court adopted the approach of: (i) identifying whether the applicant had a *prima facie* case that he would be subjected to treatment amounting to a breach of Article 3 if he were returned to Afghanistan; (ii) recognising that the responsibility for assessing the actual evidence lay with the national authorities in the transferor State (Belgium); (iii) assessing the evidence as to whether there were structural or other legal defects in the Greek asylum system which meant that MSS would not get a "*serious*" appraisal of his case. The Court confirmed that it was not an answer for a State to say that it had no extant policy of removing persons to Afghanistan. The issue was objective and not subjective and was whether there were sufficient safeguards in the system to "*protect...against arbitrary removal directly or indirectly back to his country of origin*".

58. The Court considered the risk of refoulement not only in the context of Article 3, but also Article 13 ECHR which guarantees a person an effective judicial remedy. The Court concluded that on the basis of UNHCR and European Commissioner for Human Rights reports Greek law was not being "*applied in practice*" so as to safeguard individual rights (see paragraph 300 – cited below). In paragraphs [294] – [300] the Court stated:

> "294. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.
>
> 295. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection

Needs of Asylum-Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).

296. For the Court, this information is *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

297. The Court concludes from this that the applicant has an arguable claim under Article 2 or Article 3 of the Convention.

298. This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.

299. The Court notes that Greek legislation, based on Community law standards in terms of asylum procedure, contains a number of guarantees designed to protect asylum seekers from removal back to the countries from which they have fled without any examination of the merits of their fears (see paragraphs 99-121 above). It notes the Government's assurances that the applicant's application for asylum will be examined in conformity with the law.

300. The Court observes, however, that for a number of years the UNHCR and the European Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin (see paragraphs 160 and 173-195 above)."

59. An important issue in the present case is the probative value to be attached to various source material and its impact upon the refoulement assessment (see paragraphs [23] – [25] above). As to this the Court said as follows in paragraphs [344] – [354] which is relevant not only as to the sources of information but also as to impact of the existence of such reports on the (constructive) knowledge of Member States:

> "344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296-297 above).
>
> 345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the *K.R.S.* case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.
>
> 346. The Court disagrees with the Belgian Government's argument that, because he failed to voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.
>
> 347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.
>
> 348. The authors of these documents are the UNHCR and the European Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.
>
> 349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal

plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008 ...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to

> leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.

60. In view of the fact that the Court considered that a communication from the UNHCR was to carry "*critical importance*" (cf paragraph [349] in the citation above) it is worth setting out the terms of that document in full. It is cited in paragraphs [194] and [195] of the judgment. The document was a letter of the UNHCR of 2 April 2009 sent to the Belgian Minister of Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. The key extracts from the letter were as follows:

> "The UNHCR is aware that the Court, in its decision in *K.R.S. v. the United Kingdom* ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of *refoulement* for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."

The letter then concluded as follows:

> "For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation."

61. Other points of relevance arising from *MSS* include the following:

(i) First, that the fact that a state experiences pressure at its border is not an excuse or justification for violating Article 3: Judgment paragraph [223] and see also Regulation 604/2013 (Dublin III)

Recital 29 which expresses the point that where there is disorder in a State then the risk of a violation is the greater. In other words evidence that a state is under a pressure is a pointer towards the conclusion that the risk is higher of a violation of the rights of an applicant.

(ii) Second, the risk of removal to a state where Article 3 rights might be violated may be direct or indirect, i.e. by direct removal to the state in question or by sequential removal along a chain: Judgment paragraph [321].

(iii) Third, a removing country must make sure through a thorough analysis of the evidence that the intermediary state's asylum procedure affords *"Sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks"* he faces under Article 3: Judgment paragraphs [342], [359], [387] and [388].

(iv) Fourth, the existence of domestic laws and the fact of accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment if, on the facts, reliable sources have reported practices resorted to or tolerated by the authorities which are contrary to the principles of the Convention: Judgment paragraph [353].

(v) Fifth, where the "*general situation*" may be expected to be known to a transferring state the individual "*should not be expected to bear the entire burden of proof*" (paragraph [352]).

(vi) Sixth, in relation to assurances the Belgian Government argued that they had sought and obtained assurances from the Greek Government that Greece would not expose any individual to a violation of Article 3. This was rejected by the Court on the facts. The Court pointed out (paragraph [354]) that the so-called assurances were *pro forma* recitations by Greece that they would apply their laws and they did not address the situation of particular individuals. It is clear that in a proper case an assurance might be effective and would provide strong evidence that the receiving state <u>would</u> respect the rights of the transferred individual. But the value of assurances is fact and context specific and *pro forma* exhortations by the receiving state that they will apply their own laws will not necessarily suffice, especially in the case of a State with a record of non-compliance.

(iv) UNHCR Reports (and analogous NGO reports) are not dispositive

62. I have explained (*supra*) that UNHCR reports may be strongly influential but it is important also to acknowledge they are <u>not</u> however dispositive. In *KRS v Greece* (2009) 48 EHRR SE8 ("*KRS*") the applicant arrived in the United Kingdom on 11 November 2006 and claimed asylum. He had travelled through Greece before arriving in the United Kingdom and in consequence, a request was made to Greece for it to accept responsibility for the applicant's asylum claim. Greece accepted responsibility on 12 December 2006. On 14 December 2006 the Secretary of State declined to give substantive consideration to the applicant's asylum claim because under domestic law

the applicant could be returned to Greece. The applicant absconded but was subsequently detained in an immigration enforcement operation. Directions were set for the applicant's removal to Greece on 23 May 2008. On 15 May 2008 the applicant's representatives wrote to the Secretary of State for the Home Department requesting that removal be deferred pending the outcome of the *R (Nasseri) v Secretary of State for the Home Department* [2008] EWCA Civ 464 ("*Nasseri*"). The Court of Appeal had given judgment in that case on 14 May 2008 and the unsuccessful party, Nasseri, was to petition the House of Lords for leave to appeal. On 15 May 2008 the Secretary of State responded that the applicant had failed to identify how *Nasseri* was relevant. The Secretary of State said that the concerns that had been expressed by the United Nations High Commissioner for Refugees and others about Greek procedures related to "interrupted" cases, i.e. cases where the applicant left Greece before their asylum claim was decided and where there was a risk that an asylum applicant might not be readmitted into the asylum process in Greece. The present applicant's case did not fall into this category. He was being returned to Greece having originally entered the territory of the EU through that country. There had been no criticism regarding access to the Greek asylum system in those cases. The applicant's solicitors responded that the judgment in *Nasseri* did not justify the drawing of such a distinction. No response was received from the Secretary of State. On 21 May 2008, the applicant brought judicial review proceedings challenging the decision to remove him to Greece. The removal directions set for 23 May 2008 were cancelled. The Secretary of State argued that upon an examination of all of the evidence in relation to Greek practices and procedures, there was no evidence of a risk of unlawful *refoulement* to Greece. Furthermore there were no proceedings pending before the House of Lords in *Nasseri*. On 16 June 2008, the High Court refused the applicant permission to apply for judicial review. Removal directions to Greece were then reset for 14 July 2008. On 10 July 2008 the applicant lodged an application for interim relief with the Strasbourg Court.

63. On 11 July 2008, the Court decided to apply Rule 39 of the Rules of Court upon the basis that the applicant should not be expelled to Greece pending the Court's decision. In a letter informing the United Kingdom of this decision, the Registrar of the Court stated:

> "This indication has been made in light of the UNHCR report dated 15 April 2008 (a copy of which is attached). The parties' attention is drawn to paragraph 26 of the report that states that 'In view of EU Member States' obligation to ensure access to fair and effective asylum procedures, including in cases subject to the Dublin Regulation, UNHCR advises Governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. UNHCR recommends that Governments make use of Article 3(2) of the Dublin Regulation, allowing States to examine an asylum application lodged even if such examination is not its responsibility under the criteria as laid down in this Regulation'.
>
> The Acting President has instructed me to inform you that the Rule 39 measure will remain in force pending confirmation from your authorities that the applicant, if removed to Greece

> and if he so wishes, will have ample opportunity in Greece to apply to the Court for a Rule 39 measure in the event of his onward expulsion from Greece to Iran. Your authorities may wish to avail themselves of any bilateral arrangements under the Dublin Convention with a view to seeking such confirmation."

64. Before the Strasbourg Court the applicant argued that a removal to Greece wold entail a risk of onward refoulement to Iran. The Court considered not only reports from the UNHCR but also reports from other Governmental and NGO sources, including from Amnesty International.

65. The judgment is important in that it considers the extent of a State's responsibly in the context of the mutual obligations owed by Member States who are party to the EU asylum system and also the probative value of different sources of evidence. The Court made clear that the fact that the United Kingdom was part of the overall EU system which involved presumptions that other Member States would adhere to their own responsibilities was not enough. The Court stated:

> "Having regard to these general principles, the Court also considers it necessary to recall its ruling in *T.I. v. the United Kingdom* (dec.), no 43844/98, *Reports* 2000-III that removal 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 the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In *T.I.* the Court also found that the United Kingdom could not rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States established international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there could be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999 I).
>
> The Court finds that this ruling must apply with equal force to the Dublin Regulation, created within the framework of the "third pillar" of the European Union. Returning an asylum seeker to another European Union Member State, Norway or Iceland according to the criteria set out in the Dublin Regulation, as is proposed in the present case, is the implementation of a legal obligation on the State in question which flows from its participation in the asylum regime created by that Regulation. The Court observes, though, that the asylum regime so created protects fundamental rights, as regards both

> the substantive guarantees offered and the mechanisms controlling their observance."

66. In relation to the probative value of different sources, and in particular reports of the UNHCR, the Court held:

> "The Court notes the concerns expressed by the UNCHR 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. Finally, the Court notes that the weight to be attached to such independent assessments of the plight of asylum seekers must inevitably depend on the extent to which those assessments are couched in terms similar to the Convention (see, *mutatis mutandis*, *NA.*, cited above, § 121). Accordingly, the 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 Article 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."

67. However, the UNHCR report was not dispositive because, in effect, it had to be read in the context of the specific facts of the case which were that in actual practice removals to Iran simply did not occur:

> "The Court notes that the present applicant is Iranian. 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, a factor which Lord Justice Laws regarded as critical in reaching his decision (see above). In reaching this conclusion 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 and referred to in the letters provided to the Court by the Agent of the Government of Greece through the United Kingdom Agent.

> In addition, if Greece were to recommence removals to Iran, the Dublin Regulation itself would allow the United Kingdom Government, if they considered it appropriate, to exercise their right to examine asylum applications under Article 3.2 of the Regulation."

68. In the event therefore the Court held that the United Kingdom would not breach Article 3 if the applicant were removed to Greece. One aspect of the reasoning was that Greece could be expected to adhere to its normal EU and international law obligations. Some caution is required when examining this authority, since it predates *MSS* where the approach of the Court hardened towards Greece given subsequent reports as to the deficiencies in the Greek asylum system and a persistent inability to adhere to accepted legal norms. But it remains relevant in that: (i) it makes clear that it is not a complete answer for the Secretary of State to say that other Member States of the EU (Hungary and Greece on the present facts) will adhere to their EU and/or international law obligation which are incorporated into the Dublin III regime; (ii) it provides guidance on the circumstances when the probative value of UNHCR reports will be limited; and (iii), it provides practical illustrative guidance on the problem of securing removals to Iran.

69. UNHCR reports must thus always be read in their proper factual and evidential context. So for instance if a report identifies shortcomings but recognises the existence of improvements then this might even be a reason for treating the report as evidence in favour of removal. In *Hussein v Netherlands and Italy* Application No 27725/2012; [2013] ECHR 1341 the Strasbourg Court stated at paragraph [78]:

> "78. Taking into account the reports drawn up by both governmental and non-governmental institutions and organisations on the reception schemes for asylum seekers in Italy, the Court considers that, while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece* ..... The reports drawn up by the UNHCR and the Commissioner for Human Rights refer to recent improvements intended to remedy some of the failings and all reports are unanimous in depicting a detailed structure of facilities and care to provide for the needs of asylum seekers …... The Court would also note the manner in which the applicant was treated upon her arrival in Italy in August 2008, in particular that her request for protection was processed within a matter of months and accommodation was made available to the applicant along with access to health care and other facilities. Against this background, the Court considers that the applicant has not shown that her future prospects if returned to Italy, whether taken from a material, physical or psychological perspective,

> disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3 …..There is no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy or that, if she encountered difficulties, the Italian authorities would not respond in an appropriate manner to any request for further assistance."

(v) The approach adopted by the domestic Courts

70. The approach set out in domestic jurisprudence is very similar to that set out by the Strasbourg court. The most recent articulation is that of Lord Kerr in *EM (Eritrea) v SSHD* [2014] UKSC 12 ("*EM (Eritrea)*"). In *EM (Eritrea)*, Lord Kerr, with whom the other members of the Court agreed, summarised the position as follows. First, the test for determining whether a return of an asylum seeker to another country would involve a breach of Article 3 was whether substantial grounds had been shown for believing that the person concerned faced a real risk in the country to which he or she was to be removed of being subjected to treatment contrary to Article 3 ECHR: see judgment paragraphs [3] and [58]. Second, where the Secretary of State had certified a claim to be clearly unfounded, such a certificate could only be issued if the assertion that the return to that third country would constitute a violation of the person's rights under Article 3 ECHR was clearly unfounded: see judgment paragraph [6]. If, therefore, on one legitimate view, a tribunal could properly consider that there were substantial grounds for believing that there was a real risk of the person facing treatment contrary to Article 3, the Secretary of State could not lawfully certify that the claim was clearly unfounded and the certificate would be quashed. Third, the approach to be adopted by a Court is as follows: (a) there is a significant evidential presumption that a Member State of the EU will comply with its obligations under EU law and international law and a claim that return would involve a real risk of a breach of Article 3 was to be assessed against that presumption: judgment paragraph [64]; (b) the presumption could be rebutted where there were substantial and widespread systemic or operational failures to comply: paragraphs [41], [66] and [67]; (c) the presumption could be rebutted where it was shown on the particular facts (the "*practical realities*" – paragraph [68]) that there were substantial grounds for believing that there was a real risk that the individual applicant would face treatment contrary to Article 3 if returned; (d) the court must examine the evidence in each individual case and this would involve a rigorous assessment of "*what happens on the ground*" (paragraph [68]), the situation in the receiving country, the foreseeable consequences of sending a person to the receiving country, the individual's personal circumstances, including his or her previous experience there: judgment paragraphs [68] to [70]. Fourth, in conducting this enquiry particular regard should be paid to the facts reported by the UNCHR and the value judgments to which the UNCHR had arrived. They form a part of the overall examination and, by implication, other reports and material may also need to be considered: Judgment paragraphs [71] and [72] and [74].

71. Lewis J in *MS* (ibid) observed, in the light of *EM (Eritrea):*

> "As is to be expected, different courts express themselves in different language, reflecting their differing judicial traditions. But in substance, the approach adopted by the Supreme Court

> involved recognising that Member States can be presumed to be complying with their obligations under EU law and international law. That can be rebutted in one of two ways. First, it may be rebutted in the case of all asylum seekers if there were sufficient evidence of substantial operational difficulties in the receiving state. Secondly, while the presumption would be the backcloth for considering individual cases, there may be situations where, on the individual facts of the case viewed against the overall situation (even if that situation did not rebut the presumption in all cases), there were still substantial grounds for believing that there would be a real risk on return. The European Court of Human Rights has taken a similar approach. In *MSS v Greece*, for example, it effectively considered that the circumstances were such that the assumption that an EU Member State was complying with its obligation was rebutted. In *Tarakhel*, the overall situation did not lead to the conclusion that all removals to Italy needed to be stopped. Nevertheless, the situation of the individual applicants' needed to be assessed against the overall situation to determine if, on the facts, there was such a breach."

(5) Article 5(1)(f) ECHR

72. I turn now away from the risk of refoulement to the risk of unlawful detention. Article 5(1)(f) ECHR is relevant because it concerns detention and, in the present case, the Claimants argue that if at any point in time they are removed to a third country and detained but then cannot be removed because of Article 3ECHR or analogous reasons then there would no longer be a proper, justifiable, basis for their detention and its persistence would then be a breach of Article 5(1)(f) ECHR. It is thus a subsidiary or secondary aspect of the Claimants more fundamental refoulement case and only arises if the Claimants succeed on the logically antecedent risk of refoulement ground because it is only then that a risk could arise that detention would be unlawfully prolonged. Article 5(1)(f) ECHR provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) The lawful arrest or detention...of a person against whom action is being taken with a view to deportation...".

73. Article 5(1)(f) is essentially procedural. It is concerned only with whether steps are being taken by the state "*with a view to removal*". It is not concerned with the correctness of the underlying reasons for the removal since these are dealt by other provisions of Article 5. In *Chahal* (ibid) the Strasbourg Court confirmed that Article 5(1)(f) did *not* demand that the detention of a person against whom action was being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing. It was pointed out that the provision

provided a different level of protection from that provided in Article 5(1)(c) which provided as a further exception to the prohibition on the deprivation of liberty:

> "(c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so...".

74. In *Chahal* (ibid) the Court stated at paragraph [113]:

> "The Court recalls, however, that any deprivation of liberty under Article 5 para 1 (f) will be justified only for as long as the deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para 1 (f)...".

75. In *Saadi v UK* [2008] 47 EHRR 17 at paragraph [72] the Court emphasised that Article 5(1)(f) incorporated a test of proportionality but also reiterated that the legitimate objective which had to be determined for the purposes of the proportionality test was linked only to the period when deportation proceedings were in mind:

> "72. Similarly, where a person has been detained under Article 5(1)(f), the Grand Chamber interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing (*Chahal*...paragraph 112). The Grand Chamber further held in *Chahal* that the principle of proportionality applied to detention under Article 5(1)(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held (paragraph 113) that "any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible..."".

76. Later in paragraph [74] the Court elaborated upon the circumstances when detention would be considered arbitrary and/or disproportionate:

> "74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from

their own country"...; and the length of detention should not exceed that reasonably required for the purpose pursued".

77. In determining whether detention is, in a given case, arbitrary the Court has acknowledged the importance of national law. In *Tabassum v United Kingdom* (Application No 2134/10) at paragraph [16] the Court stated that where the lawfulness of detention was an issue, including whether a procedure prescribed by law had been followed, the Convention referred essentially to national law. It requires adherence to substantive and procedural rules of national law. The Court emphasised, however, that adherence to national law was not *per se* sufficient and it still had to meet the requirement of non-arbitrariness by reference to factors such as those laid down in *Saadi* (ibid).

F. The position in Hungary

78. I turn now to the analysis of the situation in each of the states where it is said the Claimants are at risk of removal to/from with the consequential risk of Iran being the eventual destination. As set out in the introduction to this judgment in each case the essential argument of the Claimants is that either (i) the states in question have legal systems which are systemically and/or operationally defective and which therefore give rise to the real risk of removal (ultimately) to Iran and/or (ii) that if in each state they *do* (contrary to expectation) have a fair hearing the outcome will be that they will not be capable of being removed but that they will then risk remaining in detention in an unjustified manner contrary to Article 5(1)(f) ECHR. It is right to record that the core of the Claimant's case in relation to all the States concerned is with the risk of refoulement and the Article 5(1)(f) issue is very much a secondary argument.

79. The position of Hungary is thus relevant, not because it is considered that the Claimants would be at risk of a violation of Article 3 *in* Hungary, but because of the risk of removal from Hungary *to* a third State where onward removal is contemplated which creates a risk of ultimate repatriation to Iran.

80. In the text below I consider, first, the implications of the criticisms made by the EU Commission of Hungarian asylum law; and secondly, the position of the UNHCR towards the same laws and regulations. I have included as Annex 1 to the judgment a document prepared by the Claimants setting out source material in relation to the Hungarian asylum system, with particular regard to the risk of onward transfer to Serbia. I invited the Secretary of State to annotate the document so that her position was recorded. The Annex reinforces and adds further detail to the analysis below. I would add that in the text below I have not analysed every single possible criticism of the Hungarian laws but have concentrated upon those which, in my view, go to the core of the refoulement issue which is whether in Hungary the Claimants would have an effective chance to advance their claims for international protection either at the administrative or judicial levels.

(1) The position of the EU Commission

81. It is apparent from press releases issued by the EU Commission that the Commission has opened the pre-formal litigation procedure with Hungary in relation to its new asylum rules upon the basis that the Commission considers that the laws are in breach of the CEAS. With the agreement of the parties, the Court wrote to the EU

Commission in February 2016 requesting information relating to infringement procedures initiated by the EU Commission against Hungary in relation to asylum related matters. By letter of 29th February 2016, with commendable speed, the Commission replied. It pointed out that pursuant to Article 4(3) on the Treaty of European Union ("TEU") the Community institutions were required to respect the principle of "*sincere cooperation*" in their relations with the judicial authorities of EU Member States and that, in consequence, this Court's request for access to documents was to be treated positively. In consequence, the Commission provided to the High Court the exchange of correspondence and submissions between itself and Hungary in which the Commission articulated its concerns as to the compatibility of the new Hungarian legislation with applicable EU law, and the response of Hungary to those concerns. For the purpose of this judgment the Commission added only one condition which was that access to the documents was not granted "*erga omnes*", i.e. on an open ended basis, and that the grant of access to the High Court did not render the documents public documents. They remained confidential documents passing between the Commission and a Member State. It is clear from the letter provided by the Commission that the Court was, nonetheless, permitted to disclose the documents to the parties to the litigation and of course use those documents as part of the process of resolving this dispute. The duty of sincere cooperation arises under Article 4(3) TEU but it was first expressed in terms which meant that national courts could seek the practical assistance of EU institutions in the case of Case C-2/88 *IMM Zaartveld* [1990] ECR I-3365. This articulated, as a general principle of law, that the institutions of the EU owed an obligation to cooperate with the Member States, including with their judicial authorities.

82. The general position of the Commission in relation to the legislative changes introduced in Hungary has been made the subject of a variety of press releases issued by the Commission and there is a fair amount of information in the public domain about these proceedings. It is thus possible to identify the matters in issue between the Commission and Hungary. In this judgment I have, where possible, adverted to the position as set out in the public domain. Though, I have also, where necessary, elaborated upon this by reference to the legal arguments passing between the Commission and Hungary although these reflect the submissions which the parties to the litigation have in any event made. It is important to recognise that the views of the Commission remain those, in effect, of a public prosecutor. They are not the definitive legal positions laid down by any Court. In general terms it is the responsibility of a national court to attribute due weight to the opinion of the EU Commission. It is also, however, important to ensure fairness and to record the counter-submissions of Hungary. It is not necessary for the purposes of this judgment to arrive at any definitive conclusion as to the legality or otherwise of the new Hungarian law. That will, unless the case is compromised by agreement between the EU Commission and Hungary, be resolved in due course by the Court of Justice in Luxembourg.

83. I should record, formally, the gratitude of the High Court to the EU Commission. It has enabled considerable light to be shed upon the facts as they exist in Hungary and as to the competing legal contentions about the legality of the Hungarian legislation.

84. In the text below I have identified the principal criticisms made of the Hungarian legislation by the Claimants in this case. Those criticisms are reflected also in the documents provided by the EU Commission.

85. In October 2015 the Commission sent a letter to Hungary setting out "preliminary concerns and questions" in relation to the amendments to the law relating to the processing of asylum decisions and judicial review.

86. Hungary sent a detailed response in November 2015. Hungary set out the context to the legislative changes. It explained that for a considerable period of time several thousand persons had crossed, illegally, into Hungary with the object of travelling to Germany, Sweden, France or the United Kingdom. It was explained that the individuals did not present themselves to the official border crossing but instead sought to cross at the so-called "green zone" at the Serbian-Hungarian border in order to avoid being registered in Hungary since they considered Hungary to be nothing more than a transit country. As of November 2015 Hungary estimated that in excess of 300,000 individuals had unlawfully crossed the border and were seeking transit through Hungary to third countries within the EU. The basic position of Hungary was that the amendments to its legislative regime were a proportionate and lawful response to the growing crisis and represented a balance between ensuring law and order within Hungary, preserving the sovereignty of the State, protecting the State borders, and complying with EU and international obligations.

87. In the text below I provide a summary of the main issues arising the purpose of which is to apply the test of "risk" in the 1951 Convention, in ECHR case law, and in Article 3(2) Regulation 604/2013. In the text below I have concentrated only upon those aspects of the Hungarian legislation likely to be most relevant to the position of the Claimants in the present case.

88. **Limitations upon the ability of applicants for judicial review to adduce relevant evidence / Abbreviated timetable for resolution of applications for judicial review**: Under Section 53(2a) and (4) of the Hungarian Asylum Act (as amended) it is not possible to present new facts or evidence in a petition for judicial review challenging a decision rejecting an application for asylum. Further, any petition for review is to be determined by a Court within 8 days of receipt and is to be based upon the available documents. The review conducted by the Court is based upon an assessment of facts and law based upon the date of the decision of the authority. The Claimants argue that, properly construed, the Hungarian law precluded new facts or evidence being presented in the context of a judicial review of the decision of the asylum authority and that the review is based only upon facts and law existing as of the date of the decision. The Commission takes the same position and referred to Article 46(3) of the Procedures Directive 2013/32/EU which provides that Member States shall ensure that "*...an effective remedy provides for full and ex nunc examination of both facts and points of law...*". The Commission was of the provisional opinion that the Hungarian law was in breach of Article 46(3) because a court reviewing a decision of an asylum authority should be in a position to evaluate new evidence in order, *inter alia*, to prevent the breach of the non-refoulement principle.

89. **Absence of an automatic suspensory effect of challenges to asylum decisions**: Article 332(2a) of Act III of 1952 on the Code of Civil Procedure provides that the submission of a petition for judicial review has no automatic suspensory effect upon the enforcement of the decision though this was without prejudice to the right of an applicant, in the petition, to request suspension on a case by case basis. Article 53(2) of the amended Asylum Act provided that the absence of the suspensive effect of a

negative asylum decision was subject to exceptions under Sections 51(2)(e) and (7)(h). These, respectively, provided exceptions in relation to applications for judicial review where there was a third country qualifying as a safe third country and where the decision concluded that the applicant either entered or had remained within Hungary unlawfully.

90. The Claimants argue that if they are removed to Hungary and the authorities seek to remove them to Serbia upon the deemed basis (set out in the new Hungarian law – see below) that the adverse decision will not be suspended pending judicial review and that in practice the chances of an application for suspension prevailing are very small. The opinion of the Commission was that these provisions provided for no automatic suspensive effect of appeals against negative asylum decisions except in the two limited exceptional cases identified above. In all other cases the suspensive effect could only be requested by the applicant. The Commission was of the view that this was in breach of Article 46(5) of the Procedure Directive which provides for a general obligation to ensure that appeals automatically triggered suspension of the decision without the applicant being required to make a request for suspension. Article 46(6) of the Procedure Directive does provide exceptions for a closed list of cases. However, the exclusion of automatic suspensive effect in the Hungarian law went beyond this list of limited cases. Further, the Commission observed that the exclusion of automatic suspensory effect applied only where the procedural safeguards indicated in Article 46(7)(a) and (b) of the Directive were respected. These applied to rights of interpretation, legal aid, a minimum period of time (of one week) to prepare an application to the court, and an obligation on the part of the court to review both facts and law. Accordingly, for both of these reasons, the failure to confer an automatic suspensive effect was considered to be in breach of the Directive. The opinion of the Commission supports the arguments of the Claimants.

91. **The absence of a right of an applicant for judicial review to a personal hearing:** The Claimants argue that in practice they will be denied a proper, personal, hearing and will lose the critical chance to explain their position and their fears of refoulement to a Court. The Commission was also concerned at the absence of a right of an applicant for judicial review to a personal hearing. Article 53 of the Act LXXX of 2007 on asylum, as amended by Act CXL of 2015, provided that courts should determine applications for judicial review within 8 days of receipt of the application on the basis of the documents then available to it. The court was also required to include a complete examination of facts and law as of the date of the decision. The Act provides for a personal hearing only if "*necessary*". The Commission concluded that the absence of a right to a personal hearing breached Article 46 of the Procedure Directive which confers upon applicants the right to an "*effective remedy before a court or tribunal*". This was to be read in conjunction with Article 47 of the Charter of Fundamental Rights which underscored the right to an effective remedy and to a "*fair and public hearing within reasonable time*". Further, everyone was entitled to the right to be advised, defended and represented in such proceedings. The Commission was of the view that the Hungarian law failed to respect the fundamental right to a hearing since it did not foresee, as a rule, the holding of a personal hearing. The failure was exacerbated because pursuant to Section 53(5) of Act LXXX of 2007 on Asylum as amended by Act CXL of 2015 no legal remedy existed against the court's decision. The Commission recorded that Hungary had acknowledged in exchanges with it that in judicial review procedures the personal hearing of the

applicant was "*optional*" and that a hearing would only be ordered by the court, *ex officio*, upon the applicant's request "*only if deemed necessary*". The Commission recorded that in practice, i.e. operationally, a personal hearing was generally considered unnecessary. The view of Hungary was that personal hearings were necessary only where the court did not find statements made in the course of the earlier administrative procedure before the asylum authority sufficient for the purposes of the taking of a well-founded decision. The Commission was unconvinced by this argument and concluded that the guarantee of a public hearing in the determination of rights was an essential feature of the concept of a fair trial and was closely linked to the principle of adversarial proceedings and the equality of arms. Moreover, the Commission considered that an oral, personal, hearing in cases of this particular nature was important because courts were required to gain a subjective impression of an applicant and to enable that applicant a right to explain his or her personal circumstances. It was of legal significance that such judicial proceedings were of "*crucial importance*" to the applicant from a personal perspective.

92. **The conferral upon courts' secretaries of competence to act in judicial review procedures**: The Commission was of the opinion that the conferral upon courts' secretaries of competence to act in judicial review procedures conducted at the border, which included the taking of decisions upon the merits of cases, was a violation of EU law. Section 71/A of the Act LXXX of 2007 with regard to procedures conducted at the border, as amended by Act CXL of 2015, provided that where a person submitted an application before entering the territory of Hungary, in the transit zone, a court's secretary was empowered to act including in relation to the adoption of a decision upon the merits of the case. The hearing could also be conducted remotely by the court's secretary using a telecommunication network if the hearing took place from a location outside of the transit zone. The Commission was of the opinion that the conferral of adjudicatory powers upon court's secretaries was inconsistent with the right of an applicant to an effective remedy before the court or tribunal contrary to Article 46 of the Procedures Directive and Article 47 of the Charter of Fundamental Rights. The Commission observed that this constituted a procedural novelty even in Hungarian law pursuant to which court's secretaries were, in some circumstances, entitled to take measures and decisions *other than the judgment*. However, under the new laws the jurisdiction of court secretaries to take substantive asylum decisions was established. The Commission expressed concern at the fact that under Hungarian law there was a difference between court's secretaries and judges with regard to safeguards instituted to guarantee personal independence. A court's secretary qualified as a "*justice employee*". The independence of the court's secretary could thus be compromised by the fact that they were subject to an employment hierarchy, that their terms of employment could be terminated upon three months notice or less, and that the court's secretary had to follow instructions concerning the fulfilment of duties and could refuse to perform them only in well defined and exceptional circumstances. The conclusion of the Commission was that the new law unlawfully permitted non-judges whose independence was compromised to take substantive decisions on asylum applications. In the present case the Claimants contend that this demonstrates a lack of commitment on the part of the Hungarian State to a system of judicial supervision characterised by genuine impartiality. In practice the position of the Claimants would, most likely, be addressed by the ordinary judiciary, but, it is said, this is reflective, along with the other complained of aspects of the new law, of a

deliberate State policy to weaken the ability of genuine asylum-seekers to protect their rights.

93. **Hungary – Serbia**: A high percentage of immigrants arrived in Hungary via Serbia. An underlying concern of the Commission (echoed in these proceedings by the Claimants) is that Serbia is deemed to be a "safe" country under Hungarian law and, accordingly, the asylum and judicial system was geared towards removing migrants from Hungary to Serbia without there being any proper or effective analysis of whether, in actual fact, Serbia is "safe". Serbia has, in fact, been subjected to criticisms by the UNHCR and the Strasbourg Court (see at paragraphs [107] – [106] below). The Commission thus sought to investigate the relationship between Hungary and Serbia. In January 2016 the Commission sought details concerning the procedures relating to the return of asylum seekers to Serbia as a safe third country. In response, Hungary explained that if an application for asylum was rejected on "*safe third country*" grounds Hungary would contact Serbia for the purpose of receiving the applicant. If Serbia refused to receive the applicant the Hungarian authority would revoke its *ex officio* its decision based upon admissibility and would, thereafter, proceed to assess the application in accordance with general rules.

(2) The position of the UNHCR

94. I turn now to the approach of the UNHCR towards Hungary. In May 2016 the UNHCR published a report entitled "*Hungary as a Country of Asylum",* based upon information available to it as of 31st March 2016. This records the views of the UNHCR on the legal measures and practices Hungary adopted between 1 July 2015 and 31 March 2016. The UNHCR concluded that the new legislative measures and practice effectively limited the right of asylum-seekers to seek international protection in Hungary. The UNHCR Report identified both systemic and operational failings of a fundamental nature in the Hungarian asylum system. Some of these would impact upon the Claimants were they to be removed to Hungary. Others would, in all likelihood, not affect the Claimants directly save only that they related to changes to the asylum process including judicial supervision which were so far-reaching that they reflected a deliberate anti-asylum-seeker approach on the part of the Hungarian authorities which could, indirectly, adversely affect the Claimants. The UN identified the following suite of measures as creating this adverse effect.

95. First, the erection of a fence along Hungary's borders with Serbia and Croatia, accompanied by the introduction of a procedure in which individuals arriving at the border who wished to submit an asylum application in Hungary were required to do so in special "transit zones" in which the asylum procedure and reception conditions were not in accordance with EU and international standards, in particular concerning procedural safeguards, judicial review and freedom of movement.

96. Second, the application of the "safe third country" concept to countries on the principal routes followed by asylum-seekers to Hungary (namely Greece, the former Yugoslav Republic of Macedonia and Serbia) <u>without</u> adequate procedural safeguards, and also despite the fact that no other EU Member State applied a presumption of safety to those countries and that the UNHCR had already recommended that asylum-seekers should not be returned to them.

97. Third, the criminalization of irregular entry into Hungary through the border fence, punishable by actual or suspended terms of imprisonment of up to ten years and/or the imposition of an expulsion order. Prison sentences, at variance with the EU Return Directive, were imposed following fast-tracked criminal trials of questionable fairness, and were not suspended in the event that the concerned individual submitted an asylum application. The proper consideration of a defence under Article 33 of the 1951 Convention that the individual had come directly from a territory where his or life or freedom was threatened was thus prevented.

98. Fourth, there had also been a reduction of permanent open reception capacity for asylum-seekers at the very time when substantially increased reception capacity for asylum-seekers was needed.

99. The UNHCR considered that collectively these measures: "*raise serious concerns as regards compatibility with international and European law, and may be at variance with the country's international and European obligations*."

100. With particular regard to the adoption of the "*safe third country*" concept as it applied to Serbia the UNHCR recorded that in August 2012, UNHCR called on states to refrain from sending asylum-seekers back to Serbia, given shortcomings in its asylum system. Hungary ignored this recommendation. In October 2012 the UNHCR called on states participating in the "Dublin system" (i.e. determining the State responsible for examining an application for international protection under the applicable EU regime) to refrain from transferring asylum-seekers back to Hungary, *inter alia*, because of Hungary's continued application of the safe third country concept to Serbia. In October 2012 the UNHCR reversed that position after Hungary ceased applying the safe third country concept. However, Hungary resumed application of the deemed safe country concept in September 2015. The list of third countries treated as safe by Hungary includes countries along the Western Balkans route such as Serbia notwithstanding that the UNHCR had urged all states not to return asylum-seekers to those countries.

101. With specific regard to EU law the UNHCR adopted a position similar to that of the EU Commission and echoed by the Claimants in these proceedings. The UNHCR considered that it was relevant that Article 38(2) (b) of the recast Procedures Directive 2013/32/EU required that rules be laid down in national law "*on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant' including, if applicable, as regards 'national designation of countries considered to be generally safe*". Recital 46 of the Directive further stated that "*[w]here Member States ... designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, as well as relevant UNHCR guidelines*".

102. Similarly, Recital 48 of the Directive stated:

> "In order to ensure the correct application of the safe country concepts based on up-to-date information, Member States

> should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe".

A country could only therefore be designated as safe after a review of an up-to-date, balanced and broad range of information sources (including UNHCR) according to rules laid down in national law. The European Asylum Support Office (EASO) Country of Origin Information report methodology sets out a number of basic standards in that regard, including the need to provide accurate and current information from a range of sources, presented in a traceable and transparent manner.

103. As applied to Hungary the UNHCR stated:

> "However, aside from the fact that the Act on Asylum authorizes the Government to establish a national list of safe third countries, Hungary does not otherwise appear to have laid down rules in its national law on the methodology by which the competent authorities may satisfy themselves that a third country may be designated as a safe third country within the meaning of Section 2(i) of the Action Asylum. Nor is any explanation or justification provided in Government Decree 191/2015 as to how the Government arrived at the conclusion that each country listed qualifies as safe. Thus, as regards the inclusion of Greece, former Republic of Macedonia and Serbia on the list, it remains unclear, for example, why the Government did not heed the Opinion of the Administrative and Labour Law Panel of the *Kúria* in December 2012 that: '[i]f the asylum system of a third country is overburdened, this may should be treated as safe third countries in the same sense as other safe third countries. Different procedures apply as regards to states participating in the "Dublin system" and states that do not. For states participating in the "Dublin system" clear criteria for determining the state responsible for examining an application for international protection are provided for in the Dublin Regulation, whereas for other states the determination of the admissibility of applications for international protection with respect to applying the safe third country concept to these states in individual cases is regulated in the recast APD.82 Further, there is no EU common list of safe third countries, and the recast APD does not provide for such a list."

104. The conclusion of the UNHCR set out at paragraphs [76] and [78] – [79] was in the following terms:

> "76. Another substantial barrier to accessing the Hungarian asylum procedure has been introduced by a decree establishing a national list of safe third countries, which includes inter alia Greece, former Yugoslav Republic of Macedonia and Serbia. UNHCR has repeatedly urged States not to return asylum seekers to these countries, as UNHCR considers that they do not meet their protection obligations vis-à-vis refugees, and can thus not be considered "safe".
>
> ….
>
> 78. UNHCR is further concerned by the number of persons kept in detention while awaiting expulsion to Serbia. Since there are limitations on the number of individuals that are actually accepted back by Serbia, the situation of those in detention pending expulsion is unclear. The detention of such people, without clear time limits or effective access to the means to challenge its ongoing legality, may be inconsistent with European and international legal standards governing detention.
>
> 79. In conclusion, UNHCR considers that significant aspects of Hungarian law and practice, as described above, raise serious concerns as regards compatibility with international and European law."

105. **Hungary – Greece**: Very recently Hungary has set in train steps to effect direct transfers of migrants to Greece. The UNHCR has not, as of the date of this judgment, expressed any view upon this though in the May 2016 Report described above the UNHCR was critical of any state authorising returns to Greece. However the European Council on Refugees and Exiles (ECR) Hungarian Committee has stated: "The *HHC find this recent development extremely worrisome: first it is unfair to Greece, which is already struggling to be able to handle the backlog of cases and provide shelter and protection to refugees. Second it is clear that the situation in Greece for refugees and asylum seekers is still far from the standards required by the European Union. According to information provided by the ELONEA network, there is no other Member State which orders transfers to Greece, which shows that the situation is still not assessed as satisfactory*".

(3) Application of the safe third country concept in practice: The approach adopted by the Hungarian courts

106. In the May 2016 Report the UNHCR set out data on actual removals from Hungry to Serbia and this suggests that in some degree the courts in Hungary are exercising a measure of control over adverse administrative asylum decisions. However the evidence is sketchy and not such as to indicate that there is wholesale rigorous judicial scrutiny and supervision exercised over administrative decision taking. Between 1st August 2015 and 31st March 2016 the Hungarian immigration authority (OIN) found 1,184 applications to be inadmissible. The UNHCR was unable to determine whether this was always on safe third country grounds. In the same period, 387 applicants submitted a request for judicial review of the OIN's inadmissibility decision of which

114 were submitted in the transit zones. In 246 cases, the Courts annulled the authority's decision and referred it back to the authority. The UNHCR was unable to obtain statistics on cases where, upon reconsideration, the authority found an asylum application to be admissible. In paragraphs [42] and [43] of the report the UNHCR stated:

> "42. Since January, courts in Debrecen, Szeged and Györ have been annulling OIN's inadmissibility decisions and instructing OIN to assess the application on its merits in the repeat procedure. When annulling the administrative decisions, courts either declare that Serbia is not a safe third country or argue that the administrative authority did not comply with its obligation to satisfy itself that the Serbian authorities will take over or back the applicant pursuant to Section 51/A of the Act on Asylum and in accordance with Article 38 (4) of the Recast APD. In the latter case, the courts take into account that, since 15 September, Serbia is not taking back third country nationals under the readmission agreement except for those who hold valid travel/identity documents and are exempted from Serbian visa requirement, and they conclude that OIN must examine the applications on their merits. Yet, OIN again denies the cases on admissibility grounds and the applicants must submit a second request for judicial review of the OIN's inadmissibility decision. OIN therefore only examines the applications on their merits after the administrative courts render a second decision instructing OIN to do so.
>
> 43. In failing to promptly take into account the court's instructions, OIN renders asylum-seekers' right to effective remedy as set out in Article 47 of the Charter on Fundamental Rights as well as Article 13 of the European Convention on Human Rights ineffective".

G. The position in Serbia

107. I turn now from Hungary to Serbia. In the present case the Claimants argue that if removed to Hungary they are likely to be transferred to Serbia for the reasons set out above. In August 2012 the UNHCR issued a report on Serbia as a country of asylum entitled "Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia". The UNHCR concluded that Serbia's asylum system (i.e. systemically) did <u>not</u> offer effective protection against refoulement. The recommendation of the UNHCR was that given widespread and endemic operational failings and inadequacies in the Serbian asylum system third States should <u>not</u> transfer migrants to Serbia:

> "UNHCR concludes that there are areas for improvement in Serbia's asylum system, noting that it presently lacks the resources and performance necessary to provide sufficient protection against *refoulement*, as it does not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure. Furthermore, given the state of Serbia's asylum system,

> Serbia should not be considered a safe third country, and in this respect, UNHCR urges States not to return asylum-seekers to Serbia on this basis".

108. Serbia is a party to the UN 1951 Convention. The Constitution of Serbia provides for a right to asylum. In furtherance of this right the Law on Asylum was adopted in November 2007 and Serbia assumed full responsibility for refugee status determination upon its entry into force on 1st April 2008. Serbia is predominantly a country of transit for mixed migratory flows from Asia and the Middle East towards more northerly EU Member States.

109. The UNHCR analysed, upon a statistical basis, recognition rates in Serbia. The UNHCR recognised that a relevant legislative and reception framework and system was in place. However, it concluded that the State could not process the significant increase in asylum seekers which it was experiencing. In addition, the reception rate (i.e. the percentage of positive decisions for refugee status against the total number of substantive first instance decisions for a given period) was zero. This was attributed in particular to an overreliance upon deemed safe third country concepts.

110. A principal concern was that the asylum office operated under the auspices of the Border Police Directorate and was not independent of the police structure. Asylum procedures were conducted by police officers who were inadequately trained and lacked relevant experience. The role of police as interviewer during an asylum procedure undermined perceptions of confidentiality and impartiality which, the UNHCR concluded, was crucial in creating conducive conditions for applicants during the personal interview stage.

111. In relation to the possibility of onward removal to third countries such as Greece, Turkey or Macedonia the UNHCR stated as follows:

> "37. The list of safe countries adopted by the Government of Serbia is, in UNHCR's view, excessively inclusive and broadly applied, and includes all neighbouring countries. The list includes Greece, which according to the European Court of Human Rights, has been found to be unable to provide effective international protection to refugees. In December 2009 UNHCR issued a position paper entitled "Observations on Greece as a Country of Asylum", advising Governments to refrain from returning asylum-seekers to Greece under the Dublin Regulation or otherwise. Serbia's list of safe third countries also includes Turkey, even though Turkey maintains the geographical limitation on the 1951 Refugee Convention with regard to refugees originating from outside Europe. If asylum-seekers are to be returned to these countries, they run the genuine risk of finding themselves in limbo, without access to protection, and at possible risk of refoulement".

112. The asylum office applied the safe third country concept to all asylum-seekers who transited through countries on its list without ensuring adequate safeguards in individual cases, such as a right of access to the asylum process and the so-called safe third country. In the present case the most likely States of transfer for the Claimants are Turkey and Macedonia.

113. The possibility of refoulement from Serbia to Turkey is of particular significance in the present case. At present, asylum law in Turkey is characterised by the "*geographical limitation*" with which it implemented the 1951 Convention. Article 1 of the Convention accords to acceding States the possibility to accept the application of the Convention to refugees coming from anywhere in the world, or, solely to those who were (at the time) fleeing events in Europe. This was accompanied by the so-called "*time limitation*". Turkey was one of the first States that accepted the Convention with both the "geographical" and "time" limitations. Subsequently, Turkey removed the "time" limitation but refrained from lifting the "geographical" limitation. Accordingly, Turkey does not have in place a status determination process for asylum-seekers emanating from outside of Europe. In practice, applications from such asylum-seekers are assessed in cooperation with the UNHCR and are granted temporary protection until a decision is reached. Those who are then recognised as refugees are expected to be resettled in third countries with the support of the UNHCR.

114. The UNHCR report on Serbia records that migrants transferred from Hungary to Serbia could also find themselves transferred to Macedonia. Paragraph [76] of the Report stated:

> "76. ... UNHCR received reports in November 2011 and again in February 2012 that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the Former Yugoslav Republic of Macedonia. This coincides with reports in the local media in Serbia at that time, that the police had destroyed makeshift camps near the Hungarian border on the outskirts of the Serbian city of Subotica. There have been other reports that Serbian police have rounded up irregular migrants in Serbia and were similarly sent back to the Former Yugoslav Republic of Macedonia. However, there are no reports that persons who have managed to apply for asylum in Serbia have been subject to such deportations".

115. The overall conclusion to the UNHCR report was that the Serbian system was "*...manifestly not capable of processing the increasing numbers of asylum-seekers in a manner consistent with international and EU norms*". The report continued that viewed in the context of the fact that there had not been a single recognition of refugee status since April 2008 led to the strong suggestion that the asylum system as a whole was inadequate in protecting those in need of international protection. There remained a need to set up a fair and efficient asylum procedure that was consistent with existing legislative frameworks and capable of adequately processing the claims of the increasing number of asylum-seekers in a manner consistent with international standards. This required greater investment of resources by the Government and continued and dedicated engagement with UNHCR. Until such a system was fully established in Serbia the UNHCR recommended that Serbia should not be considered a safe third country of asylum and that countries should therefore refrain from sending asylum-seekers back to Serbia upon this basis.

116. No evidence was placed before this Court suggesting that the conclusions of the UNHCR in August 2015 were no longer valid as of the date of this judgment. In other words, there is no evidence to suggest that the position has improved. Indeed the May 2016 UNHCR Report on Hungary clearly reflects the view of the UNHCR that Serbia

remains unsafe. For present purposes, the conclusion is that a person removed from Hungary to Serbia will, because of operational and systemic failures in the asylum and judicial supervision systems, be at risk of being transferred from Serbia to Greece, Turkey or Macedonia.

H. The position in Macedonia

117. It is not suggested that Hungary would remove either Claimant directly to Macedonia. The Claimants argue that if Hungary was to remove them to Serbia they would be at risk of onward transfer to Macedonia. In August 2015 the UNHCR issued a report on the Former Yugoslav Republic of Macedonia as a country of asylum entitled "Observations on the Situation of Asylum-Seekers and Refugees in the former Yugoslav Republic of Macedonia". The UNHCR recorded significant progress in Macedonia to bring its national legislative framework into line with international standards yet the UNHCR still concluded that there were substantial shortcomings in relation to implementation.

118. The Government lacked capacity to ensure protection to the increasing number of asylum-seekers and significant concerns were raised about access to and the operation of asylum procedures. There was a causal connection between these failings and the risk of refoulement. The deficiencies were such that asylum-seekers were exposed to the "*...risk of not being able to obtain international protection, or to exercise rights associated with international protection*" (ibid paragraph [3]). The quality of decision making was inadequate and resort to national security was used excessively as a ground for rejection of claims. There was a lack of access to effective legal remedies as cases were not considered upon their merits in the course of judicial review. Other basic procedural safeguards such as access to information and interpretation were not guaranteed. As of August 2015 the country did not meet international standards for protection and did not qualify as a safe third country. Accordingly, the UNHCR advised that other States should refrain from returning or sending asylum-seekers to Macedonia pending further improvements. The May 2016 Hungary UNHCR Report still treats Macedonia as unsafe.

119. As with Serbia, in excess of 90% of those applying for asylum were, in substance, in transit and would leave the country on their way to more northerly EU Member States before interviews were held or first instance decisions taken. For example, in 2013 1,353 asylum applications were lodged but only one interview was held and only one decision was taken. In 2014 1,289 applications were lodged but only 16 decisions on asylum were taken. In 2015, despite an increase in the number of asylum applications, as of August only one applicant had been recognised as a refugee. The UNHCR recorded that the majority of cases between 2013 – 2015 were dismissed due to them having been withdrawn (i.e. because the migrant had passed through).

120. Deficiencies in the Macedonian asylum system reflect the fact that it is a country of transit and the large numbers of individuals passing through Macedonia have no serious intention to seek asylum there and wish, instead, to move north to other EU Member States. In paragraph [36] the report states:

> "The fact that up to 90% of asylum-seekers leave the country before the asylum procedure is completed reinforces the perception of the Government that asylum claims submitted in the country are not

genuine and that the country is used as transit stage on the way to Western Europe".

I. The position in Greece

121. Mr Ibrahimi may have arrived in the EU via Greece. The starting point in relation to Greece is the judgment of the Court in Strasbourg in *MSS (ibid)*. This establishes that Greece is to be treated as an unsafe country for the purpose of Article 3ECHR. This is upon the basis (a) that there was inadequate reception capacity in Greece and migrants faced destitution on the streets; and (b) that the procedural and judicial environment for the assessment and protection of asylum claims was inadequate, and that there was, consequentially, a risk of refoulement. It is submitted by the Claimants, and not challenged by the Secretary of State, that no Member State in the EU, or elsewhere, treats Greece as a safe country for the purpose of removals. The May 2016 UNHCR Report on Hungary shows that the position still holds true. The system criticised by the Court in *MSS* was that operative prior to 7th June 2013 when reforms to the asylum system were introduced by the Hellenic Parliament. Evidence before the Court in the form of a Report dated 27th May 2016 from Amnesty International refers to an Explanatory Report of the new law (4375/2016) issued by the Hellenic Parliament which indicated that the intention of the new law was to perform a "clearing the decks" exercise pursuant to which old cases could be put into a backlog to be worked through whilst new cases would be dealt with under a new and more efficient system. Recent statistics indicate that in excess of 18,500 cases were pending under the old system.

122. The new system was established pursuant to Presidential Decree 113/2013 and is the governing legal framework for the asylum system operating in Greece as of the date of this judgment. The new system relates to asylum applications lodged on or after 7th June 2013. The purpose of the new legislation is to put in place a procedure consistent with the Procedures Directive 2005/85/EC. In relation to returns to Greece from Hungary, Serbia or Macedonia a forced returnee would fall to have his/her asylum claim considered under this system. However, systemic deficiencies have been identified even within the new system particularly with regard to access to the asylum procedure. For instance, there are widely reported problems with an absence of capacity. The number of claims lodged increased by 39.9% between 2014 and 2015 from 9432 to 13197 (according to statistical data on the Greek asylum system published by the Ministry of Interior, Hellenic Republic, 1st January 2015 – 31st December 2015). These figures do not, however, reflect the total number of persons passing through or resident in Greece during the period who had a potential asylum claim and who, for personal reasons, did not wish to make a claim in Greece but wished to treat it as a transit country as they moved elsewhere towards northern Europe. This increase in supply has imposed intolerable pressure upon the registration and processing of applicants. The authorities have resorted to Skype as the principal means whereby asylum-seekers can book an appointment to register their asylum applications or relocation requests but, in consequence of overload, there are booking and connection problems experienced (Report of Directorate General for Internal Policies, European Parliament, "On the Frontline – The Hotspot Approach to Managing Migration").

123. Amnesty International, in their Report to this Court, has given evidence which is reflective of the position described in the official documents:

> "Between February and March 2016, Amnesty International interviewed several asylum-seekers who described the repeated attempts they made for several weeks to contact the Regional Asylum Service in Attika by Skype in order to book an appointment for the registration of their asylum application or relocation request. The Skype lines of the Attika Regional Asylum Office are open three days a week, for an hour in each of the designated days for Farsi/Dari speakers; two days a week, for an hour in each of the designated days for Syrian asylum-seekers; three days a week, for three hours in each of the designated days for persons wishing to apply for relocation. Persons stranded on mainland Greece who are unable to access the asylum procedures are also at risk of being arrested and detained by the Greek police after the papers requiring them to leave the country within a specific period expire".

124. Concerns continued to exist as to the length of detention and the conditions of detention. Amnesty International records that national NGOs have stated that asylum-seekers and migrants held in pre-removal centres and police stations around Greece have not been provided with individualised assessments of the necessity to detain them in line with the legitimate purpose or object and that alternatives to detention are not applied.

125. A Report prepared by the European Parliament (May 2016) has pulled together some of the observations of bodies such as the UNHCR and Human Rights Watch. The Parliament records that as of 6th May 2016 a total of 53,901 migrants and refugees were present in reception centres on Greek soil of whom 46,660 were detained on the mainland and 8,241 were detained on the Greek islands. On the Greek mainland overall capacity across all sites was for 34,150 individuals but, as of May 2016, 46,660 were currently detained in the sites, meaning that there was "*...significant overcrowding*" though it is notable that the problem is significantly better relative to that analysed by the Court in *MSS*. The Parliament observes:

> "Given that one of the grounds for suspending Dublin transfers in the first place was the dire reception conditions, this does not auger well for the resumption of Dublin transfers in the near future".

126. In relation to asylum applications in Greece the Parliament, relying upon official Greek statistics, states as follows:

> "Despite the extremely high numbers of people arriving in Greece, it is clear from the statistics that the vast majority of those seeking asylum in the EU continue (or at least continued until the effective closure of the Western Balkan route – see below) their journey to other EU countries where they lodge asylum applications. As such while over one million people arrived in Greece in 2015, only 13,197 people applied for asylum in Greece. This compares to 476,510 in Germany, 177,135 in Hungary and 162,450 in Sweden. According to Human Rights Watch, those wishing to apply for asylum in

> Greece face serious problems. It also reports that the Greek asylum service has set up a system for appointments almost exclusively through Skype, though with significant booking and connection problems".

127. Amnesty International records and reiterates the concerns expressed by the UNHCR that reception arrangements for asylum-seekers were insufficient and below the standard set out in EU and national law. Amnesty International also records information provided to it by the UNHCR that the same conclusion applies in 2016 in respect of second-line reception conditions for asylum-seekers. The Amnesty International Report states:

> "In December 2014, the UNHCR described the reception arrangements for asylum-seekers in Greece as "insufficient and, if provided, considerably below the standard set out by EU and national law".

During a meeting with Amnesty International on 16th February 2016, a UNHCR staff member responsible for following up reception conditions in Greece reported that their December 2014 report was still valid in terms of second-line reception conditions for asylum-seekers in Greece.

128. In an attempt to remedy these identified and acknowledged systemic deficiencies on 14th May 2016 the UNHCR and the European Asylum Support Office, and the Greek Asylum Service stated:

> "The Asylum Service will conduct a pre-registration exercise for international protection in the mainland from end of May to end of July with the financial support of the European Commission (DG Home). The United Nations High Commissioner for Refugees (UNHCR) and the European Asylum Support Office (EASO) will support the Asylum Service in this exercise.
>
> The pre-registration exercise will take several weeks to conclude, but all those who arrived in Greece before 20 March, wishing to apply for international protection in Greece and are currently residing on the mainland will be able to pre-register.
>
> The pre-registration exercise is the first step to apply for international protection in Greece, which could eventually lead to (i) examination of the application for international protection by the Greek authorities, and potential recognition of beneficiary of international protection, or (ii) transfer to another EU Member State in the context of Dublin III provisions, or, (iii) transfer to another EU Member State in the context of the relocation scheme. Before and during the pre-registration exercise, information will be provided on the available options to those concerned, through leaflets and information teams deployed to the open accommodation sites.

> The International Organisation for Migration will also participate in order to provide information on voluntary repatriation to the countries of origin to those interested.
>
> Those wishing to be pre-registered must be physically present during this exercise, including any members of their family. A photo will be taken of each individual during this exercise. At the end of the pre-registration an asylum seeker card will be issued for each individual".

129. The EU-Turkey Agreement entered into between the EU and Turkey on 18th March 2016 has a direct effect upon the position in Greece. An EU explanatory document about the agreement explains how it works:

> "On 18 March, following on from the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March EU-Turkey statement, the European Union and Turkey decided to end the irregular migration from Turkey to the EU. Yesterday's agreement targets the people smugglers' business model and removes the incentive to seek irregular routes to the EU, in full accordance with EU and international law.
>
> The EU and Turkey agreed that:
>
> 1) All new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;
>
> 2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU;
>
> 3) Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU;
>
> 4) Once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated;
>
> 5) The fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements;
>
> 6) The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey. Once these resources are about to be used in full, the EU will mobilise additional funding for the Facility up to an additional €3 billion to the end of 2018;

> 7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.
>
> 8) The accession process will be re-energised, with Chapter 33 to be opened during the Dutch Presidency of the Council of the European Union and preparatory work on the opening of other chapters to continue at an accelerated pace;
>
> 9) The EU and Turkey will work to improve humanitarian conditions inside Syria.
>
> **On what legal basis will irregular migrants be returned from the Greek islands to Turkey?**
>
> People who do not have a right to international protection will be immediately returned to Turkey. The legal framework for these returns is the bilateral readmission agreement between Greece and Turkey. From 1 June 2016, this will be succeeded by the EU-Turkey Readmission Agreement, following the entry into force of the provisions on readmission of third country nationals of this agreement.
>
> **On what legal basis will asylum seekers be returned from the Greek islands to Turkey?**
>
> People who apply for asylum in Greece will have their applications treated on a case by case basis, in line with EU and international law requirements and the principle of *non-refoulement*. There will be individual interviews, individual assessments and rights of appeal. There will be no blanket and no automatic returns of asylum seekers.
>
> The EU asylum rules Member States in certain clearly defined circumstances to declare an application "inadmissible", that is to say, to reject the application without examining the substance."

130. So far as the present case is concerned the reach of the agreement is limited and relates only to those migrants who arrived on or after 20th March 2016 on a Greek island <u>from</u> Turkey. It follows that those arriving in Greece prior to 20th March 2016 or who arrived in Greece *via* a country other than Turkey or who arrived at a land or air border on the Greek mainland at any time fall *outside* the scope of the agreement. Pursuant to the EU-Turkey Agreement the new system in Greece has been modified pursuant to Hellenic Law 4375/2016. Under this the Greek authorities continue to retain control over the asylum system across its territory but establish specific procedures in relation to those who fall within the scope of the EU-Turkey Agreement.

131. The report of the European Parliament in May 2016 describes how the EU-Turkey Agreement has been implemented in Greece. The new Greek legislation introduces provisions to apply the concept of safe third-country and first-country of asylum, as

well as ensuring fast-track procedures for the examination of asylum applications, including appeal procedures. Transitional arrangements are in place for six months pending the creation of a new Appeals Authority and the Appeal Committees. The Parliament records that a number of NGOs have criticised the new arrangements arguing that it weakens protection standards. The Parliament states:

> "Under Article 55, for example, an application is considered inadmissible where the asylum-seeker has entered Greece from a "first country of asylum". Whereas previously under Article 19(2) of Presidential Decree 113/2013, a country could only be deemed a "first country of asylum" if it met the "safe third country" criterion, the revised law requires a "first country of asylum" to provide "sufficient protection" to asylum-seekers (mainly protection against refoulement – being sent back to a country which is unsafe). While the revised law appears to be aligned with Article 35 of the Asylum Procedures Directive, NGOs thus criticise the weakening of protection under Greek law. PACE, for its part, recommends that Greece "refer the question of interpretation of the concept of "sufficient protection" in Article 35 of the European Union Asylum Procedures Directive to the Court of Justice of the European Union and, until such interpretation has been given, refrain from involuntary returns of Syrian refugees to Turkey under this provision".
>
> The picture is further clouded by reports that Turkey has in fact been returning refugees to Syria, which would clearly be in breach of the principle of non-refoulement".

132. The Parliament also criticises the fast-track procedures and whether "*such speed is really reasonable*". The Parliament points out that under the new arrangements an applicant has one day to prepare for the first instance interview and only three days for a decision on an appeal. The Parliament also expresses concern about the absence of automatic suspensive effect for appeals against return orders in border procedures. Because applicants must apply to a judge in order to remain in Greece pending their appeal they are being deprived of the right to an effective remedy enshrined in EU law.

133. In relation to the return of irregular migrants <u>from</u> Greece <u>to</u> Turkey the Parliament states as follows:

> "The mechanics of returning irregular migrants from Greece to Turkey under the EU-Turkey Statement are in fact governed by a bilateral readmission agreement between Greece and Turkey (as explained in Chapter 2, the EU-Turkey Readmission Agreement applies only to Turkish and EU citizens citizens for the time being). The bilateral readmission protocol was signed between Athens and Ankara in April 2002. This readmission agreement allows for migrants who are not eligible for international protection to be returned to Turkey if this is the country of departure for Greece. On 8 March 2016, ahead of

> the revised EU-Turkey mechanism, the bilateral readmission protocol was amended, allowing Greek authorities to send back those migrants immediately. The plan is that, as of 1 June 2016, the bilateral readmission agreement will be succeeded by the EU-Turkey readmission agreement, following the entry into force of the provisions on readmission of third country nationals".

134. According to statistics provided by the EU Commission to the European Parliament, and to the European Council arising out its First report on the progress made in the implementation of the EU-Turkey Statement (20th April 2016) as of 20th April 2016 a total of 325 persons who entered the EU irregularly after 20th March 2016 and who did not apply for asylum after that date had been returned from Greece to Turkey. The bulk of these were Pakistanis (240) and Afghans (42). Over the same period, there was a marked drop in the number of individuals arriving in Greece. Parliament stated:

> "Though criticism of the new mechanism is considerable...there is no doubt that it seems to have reduced the number of arrivals and the number of deaths at sea – at least in the short term".

135. In its conclusion and policy recommendations the European Parliament refers to the possibility of a resumption of transfers to Greece under the existing Dublin system (i.e. from other Member States). The starting point for Parliament is that there are *no* transfers which may properly be made to Greece. The conclusion and policy recommendation is in the following terms:

> "**Any resumption of transfers to Greece under the existing Dublin Regulation should take into account that Greece still receives a large number of asylum-seekers on a daily basis.** Regardless of the outcome of the Commission's deliberations on a reform of the Dublin Regulation, plans to reinstitute Dublin transfers to Greece under the existing Dublin Regulation in June 2016, in the midst of considerable pressure on the Greek asylum system raise questions. It also seems to contradict the idea of an emergency relocation mechanism to transfer those in need of international protection out of Greece. Until such times the pressure has been alleviated and adequate reception conditions can be guaranteed, resumption appears to be premature".
>
> (Emphasis in original)

J. The position in Turkey

136. I turn now to the position in Turkey. The position in Turkey is that it is considered to be an unsafe country. No EU Member State permits transfers to Turkey. This is because, as set out in paragraph [113] above, Turkey retains its geographical limitation under the 1951 Convention pursuant to which it accords international protection only to those individuals who have a well founded fear of persecution in Europe. Turkey retains a discretion however to permit an asylum-seeker fearful of

persecution elsewhere to enjoy limited residence but with a status short of refugee status.

137. There is no doubt that the position in Turkey is one of immense concern. There are approaching 3 million refugees in detention and reception centres close to the Syrian border. Turkey, with the assistance of the international community, has made immense efforts to provide humanitarian care and attention to these individuals. However, the problems are truly stupendous in scale and nature. It is a condition of the EU-Turkey Agreement that it amend its law and remove the geographical limitation under the 1951 Convention. However, this has not, to date, occurred. The present position, therefore, is that Turkey is not treated as a safe country for the purpose of removal.

138. The position in relation to Turkey has, however, been exacerbated by virtue of the failed coup on the night of 15th July 2016 which led, in its wake, to the arrest and suspension of (according to reports) nearly 40,000 individuals (government officials, military, academics etc). Apparently in excess of 2000 members of the judiciary have also been suspended. The President has announced a state of emergency and Turkey has informed the Council of Europe of a partial withdrawal from the ECHR. As of the date of this judgment the impact of these developments upon the approach adopted by the State towards asylum returnees is unclear. What can be said with some confidence is that the suspension of very large numbers of the judiciary and the partial suspension of adherence to the ECHR only serve to entrench the conclusion already arrived at by the international community which is that Turkey is not a "safe" country to whom asylum seekers could be sent in the expectation that their claims for international protection would be effectively safeguarded. The Council of Europe issued a press release on 21st July 2015 (DC132(2016) in the following terms:

> "Strasbourg, 21.07.2016 – The Secretary General of the Council of Europe, Thorbjørn Jagland, has been informed by the Turkish authorities that Turkey will notify its derogation from the European Convention on Human Rights under the Convention's Article 15.
>
> The possibility of a derogation is foreseen by Article 15 of the Convention in times of public emergency threatening the life of a nation and has been used in the past by other member states, most recently by France and by Ukraine.
>
> There can be no derogation from the following articles: Article 2 (Right to life), Article 3 (Prohibition of torture and inhumane or degrading treatment or punishment), Article 4 para. 1 (prohibition of slavery), Article 7 (No punishment without law).
>
> It is important to note that the European Convention on Human Rights will continue to apply in Turkey. Where the Government seeks to invoke Article 15 in order to derogate from the Convention in individual cases, the European Court of Human Rights will decide whether the application meets the

> criteria set out in the Convention, notably the criteria of proportionality of the measure taken.
>
> The Turkish Government will inform the Secretary General about measures taken."

139. States adhering to the ECHR may, under Article 15 thereof, derogate therefrom in times of emergency or in exceptional circumstances. The Council of Europe describes the right in the following way:

> "**Article 15 (derogation in time of emergency) of the European Convention on Human Rights**[1] affords to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention. The use of that provision is governed by the following procedural and substantive conditions:
>
> - the right to derogate can be invoked *only in time of war or other public emergency threatening the life of the nation*;
>
> - a State may take measures derogating from its obligations under the Convention *only to the extent strictly required by the exigencies of the situation;*
>
> - any derogations *may not be inconsistent with the State's other obligations under international law;*
>
> - *certain Convention rights do not allow of any derogation*: Article 15 § 2 thus prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the rule of "no punishment without law"; similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention;
>
> - lastly, on a procedural level, the State availing itself of this right of derogation must *keep the Secretary General of the Council of Europe fully informed*."

140. It will be seen that derogations under Article 15 are not allowed to Article 3, but are permitted to Article 5.

K. The position in Iran

141. At the end of the refoulement chain lies the risk of removal to Iran. Iran is a signatory to the 1951 Convention. It is also a state that has experienced a large influx of immigrants, many fleeing Afghanistan. And it is also (according to UNHCR reports) a state where the UNHCR has a presence and works closely with a variety of governmental agencies there. On the other hand there are reports from NGOs to the effect that there is persecution against Christians and political activists such that an identifiable risk exists to a returnee who, for whatever reason, evinces religious or political views adverse to those of the state.

142. The position as explained to this Court was that there is no evidence that Hungary was able to effect undocumented returns to Iran and as such enforced returns were difficult to implement. The Secretary of State cited in support the response of Hungary to a query from the EU Commission about enforced returns to Iran in May 2014. The evidence shows that in the recent past Hungary has endeavoured to effect removals to Iran. Hungary stated that that there were increasing numbers of illegal immigrants from Iran present in Hungary and that the OIN would make contact with the Embassy of the Islamic Republic in Budapest but that the Iranian foreign representation: "*… does not demonstrate a high degree of willingness to cooperate with the Office in order to enhance the identification of self-declared Iranian citizens*". The issue therefore lies in the willingness of the Iranians to cooperate, not in the reluctance by Hungary to seek removals to Iran.

143. It was argued by the Claimants that the position would be no different in other affected third states. In response to questions from the Court Ms Anderson for the Secretary of State explained that many immigrants claimed (not always honestly) to be Iranian in order to optimise the prospects of an asylum claim and that identifying self-declared Iranian citizens was not considered to be a priority activity by the Iranian consular staff but that since Iran had emerged from diplomatic exile there were some suggestions of a change in the position.

144. The domestic courts have addressed the question of removals to Iran on a number of occasions. In *SH (Iran) v Secretary of State for the Home Department* [2014] EWCA Civ 1469 ("*SH (Iran)")* Davis LJ, with whom the other members of the court agreed, recognised the difficulties of removals to Iran but expressed the view that this was not a fixed or immutable state of affairs:

> "38. Fourth, there is no room for argument that these applicants and this appellant are to be treated as entitled to a grant of leave to remain simply because they otherwise (so it is said) will be left in a state of indefinite limbo. True it may be that there have been times when (for example) it has not proved possible for undocumented Iranians to be removed to Iran. But it does not follow that will always remain the case; and, as found as a fact by Simler J, there at no stage has been in existence a policy that those whose removal from the United Kingdom cannot be enforced should for that reason alone be granted leave …."

145. In *BM (Iran) v SSHD* [2015] EWC A Civ 491 ("*BM (Iran)")* the Court of Appeal, per Richards LJ, after citing *SH (Iran),* addressed the position in relation to enforced removals to Iran from the United Kingdom concluding that removals to Iran were not

impossible and that consular policies which made undocumented enforced removals difficult could be worked around:

> 24. At the date of the FTT's determination, the UK Border Agency's relevant Interim Operational Instruction, dated 10 August 2012, was headed "Iran: Suspension of enforced escorted returns" (original emphasis). The "Background" section explained that recent Foreign and Commonwealth Office travel advice for British citizens was against travel to Iran and that this advice "affects our escorts who are British citizens". The document continued:
>
> > "**Voluntary and enforced unescorted returns**
> >
> > This suspension does not apply to Iranian nationals who are returning voluntarily or those cases where removal is enforced without escorts.
> >
> > **Documentation required for returns to Iran**
> >
> > We continue to be able to remove to Iran where the subject holds a valid document, either a valid Iranian passport or previously issued emergency travel document (ETD).
> >
> > …
> >
> > **Documents to support voluntary returns**
> >
> > The Omani Embassy in London should now be the first point of contact for enquiries regarding documentation for Iranian cases who wish to return. It is likely that only well documented cases who want to return could benefit from assistance from the Omani Embassy. This development is untested but may provide a possible avenue for assistance within the UK."
>
> 25. We were told by Mr Blundell that the version of the Instruction in force from 28 April 2014 records that although the Iranian Embassy was closed in November 2011, officials operating from the Iranian Consulate in London have been providing consular services since February 2014 and will consider applications for emergency travel documents from individuals who wish to return to Iran voluntarily, but not for enforced, non-voluntary returns. It further confirms that Iranian nationals can be removed if they hold a valid passport or emergency travel document and that unescorted removals can take place with valid travel documents. Prior to February 2014, Iranians could, as well as using the services of the Omani Embassy, contact other local Iranian diplomatic missions,

officials in Tehran or friends and family in Iran to assist in obtaining travel documentation. We were also told that the position set out in the Instruction remains the policy, though the Instruction itself has now expired.

26. It follows that at no stage were returns to Iran impossible; the one thing that was impossible was an enforced escorted return. Mr Blundell made the point that the appellant had been found to have no claim to international protection and that the Secretary of State was entitled to expect him to return voluntarily rather than having to expend public resources on an enforced removal. Mr Halim submitted that the appellant could not return voluntarily because he has no passport or other travel documentation. That, however, is not a satisfactory answer, since there were channels through which it was open to the appellant to seek to obtain an emergency travel document for return to Iran. They included the possibility of assistance from his family in Iran, since the FTT found as a fact (at paragraph 50 of its determination) that the appellant had family remaining in the family home in Iran and that he was able to contact them if he chose to do so. In the absence of evidence of genuine and unsuccessful attempts to obtain such documentation, the premise to the limbo argument lacks any solid foundation. It must also be borne in mind that the policy itself was subject to the possibility of change at any time in the light of changes in international relations with Iran. "

146. The conclusion was in relation to persons lacking international protection. But in the present case the risk the Claimants rely upon is that in Hungary and/or in the other states along the refoulement route they will not obtain a fair hearing of their claims to international protection in which case they would therefore be at risk of removal to Iran.

147. There is some evidence that the position is changing more generally. For instance in April 2016 the UNHCR reported that Turkey was in the process of seeking to agree re-admission agreements with (*inter alia*) the Islamic Republic of Iran to facilitate the repatriation to Iran of immigrants who were in Turkey and who, in the view of Turkey, did not meet their requirements for protection. The position can thus be summarised to the effect that undocumented removals to Iran appear difficult but not impossible. Some third countries (e.g. Turkey) are seeking more formal re-admission agreements with Iran. As Iran re-engages with the international community the provision of identity documents by the Iranian authorities is likely to become easier and there may be ways around any consular resistance.

L. Analysis and conclusion

(1) The issues

148. I turn now to my conclusions. The starting point is to identify the issue to be resolved which is whether removal from the UK to Hungary gives rise to a risk of indirect refoulement to Iran? It is also important to be clear as to what the issue is not. It is not whether there are systemic defects in the legislative or regulatory systems

governing asylum in any one or more of the states through which the Claimants might pass down the chain from Hungary. The mere fact that there are or may be such systemic or operational defects in the asylum systems of the various actor states is only relevant in so far as it is a part of the wider analysis of the central issue, which is refoulement to Iran. A second issue is whether, even if refoulement to Iran is to be excluded as a real risk, the Claimants will along the way be detained in conditions or circumstances which themselves amount to a violation of international law (i.e. Article 5(1)(f) ECHR).

(2) Observations upon the nature of the evidence

149. Before setting out conclusions on individual States I should set out certain observations about the evidence in the case.

150. ***Chain refoulement and remoteness***: Ms Anderson, for the Secretary of State, made the point that in a case of chain refoulement, and in particular one where the chain is potentially lengthy, as a matter of elementary logic the magnitude of the risk was inversely proportionate to the increase in the number of links in the chain. In the present case there may be up to 6 links (e.g. UK – Hungary – Serbia – Macedonia – Greece – Turkey – Iran). Unless it could be said (it was argued) that the risk in relation to any one link was 100% then the risk inevitably shrunk as the chain extended. There is an appealing logic to this proposition but it is, in my view, too neat. In a general sense if the chain is long then I would agree that in a multi-chain assessment this can have some impact in the overall assessment. However, I would shy away from any resort to quasi-mathematical logic since the evidence is simply too unclear to be able with any degree of accuracy to quantify risk and in any event it is an unknown how many links in the chain would actually arise in the present case. For instance, it is possible that removal to Iran might become a possibility towards the start of the chain as opposed only at the end.

151. ***The probative value of the evidence***: The parties in the present case have undertaken extensive research into source material. Nonetheless it remains the case that the evidence sources are of mixed probative value and it is also the case that in some instances the evidence has been relatively slight. There are a number of preliminary observations I would make about the evidence generally. The evidence is variable in nature. In some instances (e.g. Hungary) it is possible with accuracy to describe the legal system and to draw balanced conclusions about alleged "systemic" flaws or weaknesses simply by reading the account of the legislation in question. But in other cases it is not possible to gather detailed and accurate evidence of the way in which foreign asylum systems operate and whether in fact they work well or are beset with legal and logistical problems. It is evident (*inter alia*) from even the reports, of the UNCHR and other NGOs, from Reports of the EU Commission and from the European Parliament, that comprehensive evidence is hard to come by. And that task is exacerbated where the events are fast moving and may change almost daily. For this reason the Court must of necessity rely upon the evidence collection exercises of the NGOs, notwithstanding that their conclusions and findings may (analytically) amount to multiple hearsay. The probative value of their evidence comes however from the fact that they are highly expert bodies and may be presumed not to publish facts or form opinions or conclusions unless they are confident of their positions, not least because they know that others, such as national and supra-national courts, will rely upon their conclusions.

152. ***Matters of record:*** Official data and statistics can provide reliable evidence (for instance the number of successful applications for asylum in Serbia – see paragraph [115] above) but even then the inferences that can sensibly be drawn from such evidence may not be certain (e.g. whether the low figure is due to the fact that most immigrants do not wish to obtain asylum in Serbia and wish instead to move on to other states in the EU). Numerous statements in UNHCR reports can also be described as multiple hearsay.

153. ***UNHCR Reports:*** In the present case UNHCR reports express negative conclusions about each of: Hungary, Serbia, Macedonia, Greece and Turkey. The reasons in each case are different. But in four out of the five cases there is a express recommendation not to send immigrants back to those states and in the one remaining case (Hungary) the nature and tenor of the conclusions is perilously close to a firm negative conclusion and if one compares the evidence which is now available about the position in Hungary with that which led the UNHCR to form negative conclusions about the other states the conclusions can fairly be drawn that the position in Hungary is as bad or worse than in some of these other states. If I were, in this case, to simply tot up the UNHCR conclusions as to safeness and treat these as dispositive then it seems to me that the answer to the case would be obvious – I would grant the relief sought. If, however, I treat the UNHCR reports as admissible, important and probative but *not* dispositive then the result might be different. Guidance from other Courts makes it clear that the views of the UNHCR carry considerable weight but they remain but one part only of the evidence that a Court must consider. One limitation in UNHCR Reports is that they do not, as a rule, analyse the causal links between systemic flaws and removals to individual countries, and certainly none consider the position of Iran as an ultimate destination. It was for this reason that in *KSR* (ibid, generally see paragraphs [62] – [69] above) the Strasbourg Court went beyond the UNHCR report and accepted the more nuanced and detailed analysis of the Court of Appeal. In my judgment I must therefore treat UNHCR reports with great respect. They represent evidence of the highest probative value but they are not dispositive and do not release me from the duty to consider all of the evidence in the round with the very particular question of refoulement to Iran in mind.

154. ***Expert evidence under CPR 35 – the position of Amnesty International:*** I turn now to a particular but related issue. Amnesty International has adduced evidence in this case. The final statement adduced in evidence was tendered as expert evidence within the meaning of CPR 35.1. The Claimants point out that reports from Amnesty have been relied upon repeatedly in judgments of the Court in Strasbourg and also by the domestic courts. The Secretary of State disagrees that such evidence can amount to "expert evidence" because, it is argued, Amnesty International lacks the required stamp of independence which an expert must have for the purposes of CPR 35. Nonetheless, it is accepted by the Defendant that in a lay (non-expert) sense Amnesty International has expertise and, in the event, there was no objection to its evidence being admitted in proceedings. But, it was argued, to label Amnesty International as "expert" would be to ascribe to it a false status which would risk a court being less rigorous in its review of its opinions than might otherwise be the case. The Secretary of State was especially concerned at the precedent value that such an acknowledgement by the High Court would have on other lower courts and specialist tribunals. As observed it is clear from case law that the Strasbourg Court routinely treats as admissible, reports from Amnesty International. Having considered the

matter I consider that the attribution to Amnesty International as "experts" or otherwise is rather beside the point. If their reports are directed at a relevant issue in a case and if the authors are identified and their experience and competence to express views upon the matter upon which they opine are set out then the Court can form its own view as to the weight to be attached to the substantive content. The position may vary from report to report. If the report does little more than pull together various sources of information, for instance about detention conditions in third countries or about strengths and weaknesses in foreign asylum systems (as is the case for much of the Amnesty International material in the present case) and if the material reported upon is properly sourced then the Court will no doubt give it weight. If, on the other hand the authors express opinions, e.g. that a certain third country is unsafe or that its judges are not impartial, etc but there is nothing to support the opinion, then a Court is likely to accord little, if any, weight to the conclusion. On the facts of this case I therefore do not consider that it has been necessary to form a conclusion as to whether evidence submitted by Amnesty International formally meets the test of expert evidence. In my view in the unusual circumstances of the fact finding and evaluation exercise that I must undertake the utility of seeking to categorise authors of reports as expert or not is questionable. The better approach, in my view, is simply to view each report on its own merits and to accord to it such weight as it deserves.

155. ***The presumption of compliance:*** The Secretary of State places great weight on the presumption of compliance. When the decisions in issue were adopted the Secretary of State argued that there was little relevant evidence to displace the presumption (see paragraphs [22] – [26] above). However, in the past 6-9 months dramatic changes have occurred and the UNHCR and other respected NGOs have generated a substantial volume of analysis and information. Yet the Secretary of State has not in this litigation reneged from her earlier position though *in principle* it has been accepted by the Secretary of State in the challenged decisions that ***if*** such new material ***did*** reverse the presumption of compliance in relation to Hungary that could alter the analysis. This was not a concession made explicitly but it is clearly implicit in the decisions taken (see paragraph [25] above). In law there is as between EU states a presumption of compliance with EU and *a fortiori* international law obligations. This must flow in part at least from the fact that each such Member State is a strong adherent to the rule of law and will in good faith seek to protect rights conferred upon vulnerable individuals conferred upon them by EU and international law. In the EU moreover there is, as the present infraction process ongoing between the EU and Hungary demonstrates, a body with a supra-national law enforcement role (viz., the EU Commission) empowered to ensure adherence to the law. It is thus easy to understand why the presumption should exist and should import considerable weight in the evidential weighing process. But it is not irrefutable.

156. ***Assurances:*** The Secretary of State relies upon the fact that she has obtained from the Hungarian authorities a written acceptance that they will receive back the Claimants (see paragraph [21] above). These are not however assurances extracted by the Secretary of State from the Hungarian authorities that on transfer they will be accorded treatment which is consistent with international and EU law. In *MSS* an argument arose to the effect that Belgium had sought and obtained assurances from Greece which, it was argued, should be treated as adequate to exculpate Belgium from criticisms that it had abrogated its responsibilities. The Court rejected this submission *on the facts* (see paragraphs [59] – [61] above); it did not however conclude that in an

appropriate case assurances might not be effective. In the present case the Secretary of State has not sought any form of assurance from the Hungarian authorities or from any *other* State to whom the Claimants might be transferred in due course down the refoulement chain.

(3) Conclusion on Iran

157. It is convenient to start the analysis of the position in individual states by considering the position in Iran. ***If*** I were to conclude that there was *no* risk of refoulement to Iran from any of the states in question then the issue of refoulement would become somewhat academic since even if the Claimants were removed down the chain and ended up in Greece or Turkey (being the final links in the chain before removal to Iran) they would on this basis remain there. In such a scenario the next (and residual) question would then be whether they would then be detained without any lawful purpose and therefore in violation of Article 5(1)(f) ECHR. However, the risk of refoulement contrary to international law would not arise.

158. The first question therefore is as to the risk of refoulement to Iran from *any* of the relevant states. As to this evidence (see paragraph [142] above) suggests that in the past (2014) Hungary has sought to remove individuals to Iran but has encountered problems in relation to those whose claims to be Iranian are undocumented. There is therefore no rooted objection on the part of the Hungarian authorities to removal to Iran. Moreover as of 2016 Turkey is seeking to agree readmission arrangements with Iran (see paragraph [147] above). The Court of Appeal in this jurisdiction has concluded (see paragraphs [144] – [146] above) that there is no absolute bar on removals to Iran and there are ways around the lack of relevant documentation. It is difficult to be precise about the extent of the risk of the Claimants being refouled to Iran as they pass on down the chain of refoulement but in my view it is possible to conclude that the risk *canno*t be discounted as negligible. It is a real risk. On the basis of this conclusion it is necessary to arrive at a conclusion about the position in each possible state in the chain. I commence with Hungary.

(4) Conclusion on Hungary

159. ***Presumption of compliance is rebutted***: Hungary is an EU state to whom the presumption of complianc*e prima facie* exists and the Secretary of State places heavy reliance upon this fact. However, in my judgment the presumption cannot stand, even if it could have stood as of the date of the impugned decisions. Since that date much has changed. The EU Commission has opened the pre-formal infraction procedure against Hungary and the UNHCR has expressed concerns which on their face are very serious. Hungary has also taken steps to effect removals to Greece knowing full well that the Strasbourg Court (in *MSS*) has concluded that Greece is not to be treated as a safe country. The conclusion of the EU Commission and the UNHCR is that a person removed to Hungary will be subject to an asylum and judicial supervision procedure under which that person's true asylum case and any properly grounded fears of refoulement to Iran might <u>*not*</u> be fairly and effectively assessed. The overall context of the asylum law reforms in Hungary also needs to be taken into account. The Claimants have placed significant reliance upon the general anti-immigrant climate which they say pervaded the approach of the Hungarian Government: See Evidence Summary at Annex 1 paragraphs [43] - [49]. Care is of course required: political rhetoric does not necessarily translate into action particularly in a state governed by

the rule of law. Whilst not all of the reforms to the Hungarian asylum rules are relevant to the facts of this case (such as the border reforms) the broader context is of a state that is prepared to adopt an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries. In these circumstances the submission that the presumption that Hungary *qua* EU Member State adheres to the *acquis Communitaire* and can be relied upon to respect relevant international law and ECHR rights of the Claimants cannot carry much weight. The objective facts suggest otherwise. In such circumstances it is necessary to look carefully at the facts and assess the risk of refoulement or treatment contrary to the ECHR without applying any presumption.

160. ***Assurances***: There are no assurances obtained by the Secretary of State from Hungary which would meet the test set out in *MSS*.

161. ***The general risk of refoulement in Hungary due to deficient procedural guarantees:*** The analysis advanced by the Claimants as to the position in Hungary following the changes in the law is *prima facie* convincing. These arguments are consistent with the views of the EU Commission. They are also consistent with the conclusions of the UNHCR. The changes made to the asylum system and the judicial supervision of it are profound and strike at the very ability of the courts to exercise effective supervision. The upshot is that there is a real and substantial risk that any asylum application made in Hungary would not receive fair treatment and, in consequence, there is a consequential risk that they would be removed from Hungary to a third country (most likely Serbia or Greece). The EU Commission recognised in its exchanges with Hungary that the perceived deficiencies in the asylum and judicial supervisions procedures could lead to a risk of refoulement. The position is not however entirely one-sided. There is also evidence (see paragraph [106] above) which suggests that the judiciary is beginning to exercise at least some degree of control over removals to Serbia and this being so there is the possibility that would exercise control over removals to other states. This is an obviously welcome indication which mitigates somewhat the risk of unlawful refoulement but it is not clear that this judicial control applies across the board or whether there remain asylum seekers whose legitimate rights are being overlooked because the judicial system prevents the courts from effectively protecting those rights. The reality remains that there are systemic flaws in the system of a substantial nature which create a real risk of refoulement. This is a view shared by other Courts in the EU: See Evidential Summary paragraphs [155] – 163]). It is possible that in due course the fact of the pressure brought to bear by the EU Commission, and the threat of formal infraction proceedings being commenced before the Court of Justice, could serve to persuade the Hungarian Government to modify its legislation in a way which brings it backs into line with international and/or EU law. But this has not yet happened; it remains a future possibility but not a present reality. And, given the fact that Hungary has responded to the Commission criticism with (so far as is known) no agreement to modify its laws there is a possibility that the case will be referred to the Court of Justice and any resolution to the issue could still be some years away.

162. ***Detention in Hungary***: The Claimants contend that if they become subsumed into protracted litigation in Hungary then there is a risk that *pro tem* they will be detained in conditions that violate Article 5(1)(f) ECHR, i.e. detention lacking a legitimate

purpose because there is no view to removal. It is very hard to assess this risk (See the Evidential Summary paragraphs [102] – [132] on detention generally but in particular paragraphs [127ff] on Article 5). The Claimants are not detained in the United Kingdom so (presumably) are not considered to be at risk of absconding. Whether they would be detained in Hungary is simply unknown. On the basis of the 2016 May UNHCR report there does seem to be a broad policy of detaining those who *prima facie* may be removed to Serbia (which is the Claimant's case). It seems to me that this is a risk which cannot be excluded. But the Claimant's case does not rest upon the fact of detention; it assumes instead that they will remain in detention beyond a point in time when detention is justifiable. As to this if the Claimants were detained yet the Courts held that they could not be removed to Serbia (or Greece/ Iran) then the basis for detention might disappear and then the question then is whether the Claimants would be released. On this there is no real evidence, and certainly none that shows that migrants are being detained once there is no possibility of their being removed. In practice the evidence from UNHCR reports about the Balkan and East European states generally is that the immigrants are frequently released because the authorities assume that they will simply leave the country voluntarily and attempt to head north. Overall the picture is unclear. On balance there is not in my judgment sufficient evidence to suggest that there is a real risk of unlawful detention contrary to Article 5 ECHR if the Claimants were removed to Hungary.

163. In conclusion if the Claimants are removed to Hungary there is a real risk that they will not be given a fair chance to establish their refoulement claims and accordingly there is a risk of onward transfer.

(5) Conclusion on Serbia

164. With regard to removal to Serbia Hungarian law deems Serbia to be "safe" notwithstanding and in the face of the contrary conclusion of the UNHCR which cites extensive deficiencies in the asylum procedure and judicial supervision and in the detention conditions. The evidence suggests that if the Claimants are removed to Serbia from Hungary there is a real risk that they will not be accorded a fair chance to establish their refoulement case. As such there is a real risk of onward transfer. The position is not entirely free from doubt. Serbia is a transit state and if illegal immigrants are detained there is some evidence to suggest that in practice many such detainees are released to continue their journey back to northern Europe. On balance however I cannot say that there is no significant, real, risk to the Claimants of refoulement if they are removed to Serbia from Hungary.

(6) Conclusion on Macedonia

165. The present position of the UNHCR is that Macedonia is not safe in that, *inter alia*, the deficiencies of the asylum and judicial supervision systems are such that asylum-seekers are exposed to the risk of not being able to obtain international protection or to exercise rights associated with such protection. The quality of decision making both administratively and in the courts is inadequate. There is a lack of access to effective legal remedies and cases are not considered upon their merits in the course of judicial reviews. Basic procedural safeguards such as access to information and interpretation are not guaranteed. The UNHCR advised other States that they should refrain from returning or sending asylum-seekers to Macedonia pending further improvements. *Prima facie*, this strongly indicates that were Hungary to move the

Claimants to Serbia and were they then at risk of onward transfer to Macedonia that this should not be treated as "safe". However (as with Serbia) it is also right to record that as a matter of practicality the deficiencies in the asylum and judicial systems, in practice, seem to play a secondary significance because the overwhelming proportion of migrants are in transit and either do not make asylum applications in Macedonia or withdraw them because they leave Macedonia before their asylum applications are processed. On balance the position is that if the Claimants found themselves in Macedonia and they were required to make asylum applications there then they would be at risk of refoulement. However, it is unpredictable as to how they would be received in Macedonia. It is possible that they would not be held in detention but would then be freed, as with the vast majority of other migrants, to leave Macedonia and attempt, once again, to reach northern Europe. Given the relative paucity of "on the ground" information it is not, in my judgment, possible to go beyond the clear and unequivocal recommendation of the UNHCR that there are both systemic and operational failings in the Macedonian administrative and judicial procedures which would place the Claimants at risk of onward removal from Macedonia to Greece or Turkey.

(7) Conclusion on Greece

166. ***Risk of refoulement to Iran***: With regard to Greece the UNHCR and the Strasbourg Court have found Greece to be unsafe. This must be the starting point for analysis. The conclusion of the Strasbourg Court in *MSS* was in 2011 but developments since then do not justify any significant alteration in that conclusion. No other state at present removes immigrants to Greece. Greece is a signatory of the 1951 Convention. However the UNHCR has expressed real concerns and doubts as to the ability of the Greek authorities to cope with the demand for asylum processing and as to the adequacy of judicial supervision. The present conclusion is that a person making an asylum claim in Greece risks being subjected to an inadequate administrative and judicial procedure such that there is a risk that the asylum claim will not be assessed effectively and, I consequence, there is an increased risk of refoulement to Iran. There is no particular evidence on the extent to which Greece is removing persons to Iran. There is however no reason to believe that the general position set out above at paragraphs [140ff] is not reflected also in Greece. On balance I cannot exclude the real possibility that if the Claimants were to be removed to Greece they would be denied a full and effective hearing of their refoulement case.

167. ***EU – Turkey agreement – implications for Greece:*** On its face the EU-Turkey agreement does not apply to Dublin III returnees so that the new procedures set up thereunder would, at best, exert only indirect effects upon the Claimants were they be removed to Greece.

168. ***Positive contra-indications***: It is right to record that the analysis is not entirely adverse. There are some positive signs as well (though in so far as these relate to Turkey they pre-date the failed coup there in July 2016 so all of the comments below must be seen in that light). First, the Courts are reported (according to the press – no hard evidence has been adduced before the Court) to have refused the removal of immigrants to Turkey under the EU-Turkey arrangements upon the basis that they will not be properly treated in Turkey, not least (again if the press are to be believed) because Turkey does not provide full protection under the 1951 Convention. Second, Greece has been the recipient of very substantial financial and logistical support from

the EU and it is realistic to assume that the benign effect of EU support would spread across the entire system. Third, the UNHCR is working more intensely with Greece following the EU-Turkey agreement so this also is capable of exerting a salutary effect upon the system as a whole which might make it less likely that Greece (administratively or judicially) acts in violation of international or EU law. Fourth, there is evidence that the EU-Turkey agreement is having the practical effect of reducing the numbers of migrants arriving in Greece which in due course might alleviate some of the capacity problems which presently beset the Greek asylum system. All of these indicate the possibility of future improvements in the asylum system but none suggest that at present the risks to the Claimants can be ignored.

169. ***Detention risk***: The question is whether, if the Greek courts were to refuse to remove the Claimants from Greece because of the risk of refoulement, whether they wold be, thereafter, unlawfully detained. As to this the position as set out in the ECHR case law is that Greece is unsafe due to the inadequate capacity in reception and detention facilities. Since the date of the judgment in *MSS* pressure on the Greek asylum and judicial system has increased very substantially. This has led to significant international financial and logistical support but there is no evidence suggesting that the position in Greece has changed to such a degree to undermine and reverse the position of the Court in *MSS*. However, the Claimants case is not that they will suffer inhuman or degrading treatment because they will be rendered destitute on the streets of Athens, but, rather, that they will be detained unlawfully. The basis of their case is for this reasons Article 5, and not Article 3 ECHR. As to this I would accept that since the Turkish coup the Greek Courts might well prove more disinclined to remove Dublin III returnees to Turkey. However there is no material evidence as to whether the Claimants would be detained or would, if detained) be released or have their detention (unlawfully) prolonged even after removal was no longer an option. In the absence of any evidence on this particular point from UNHCR or other NGO sources it does not seem to me to be proper to assume that the Greek authorities would unlawfully detain the Claimants.

170. My overall conclusion on Greece is that the risk of refoulement is not one that can be ignored. It is real and more than *de minimis*.

(8) Conclusion on Turkey

171. ***Risk of refoulement to Iran***: Member States of the EU do not transfer individuals to Turkey because of the geographical limitation placed by Turkey on adherence to the 1951 Convention. There are also doubts about the ability of its asylum and judicial supervisions systems to ensure effective protection of those seeking international protection. Recently (April 2016) Turkey has sought to negotiate re-admission agreements with a variety of states, including Iran. It is also relevant that the Turkish asylum system is under vast pressure and is struggling to cope. The *prima facie* position therefore is that Turkey has systemic defects in its asylum and judicial systems which means that if the Claimants ended up in Turkey there is a real and significant risk that their claims for asylum would not be effectively assessed.

172. ***The coup*:** The recent failed coup has led to consequences which serve to reinforce the present conclusion of the UNHCR and the international community generally that Turkey cannot be considered to be safe for the purpose of guaranteeing rights conferred under international law. This is in particular because of the present threat to the judiciary and its independence and to the fact that Turkey has notified the Council of Ministers of its partial non-application of the ECHR. The practical ramifications of this are very far from clear. Although a partial suspension of the ECHR is contemplated under Article 15 ECHR this does not contemplate non-observance of other obligations under international law or from Article 3 ECHR. However, Turkey maintains its limitation to the 1951 Convention and the partial suspension does permit derogations from Articles 5 (detention) and 13 ECHR (effective remedy), both of which are relevant to the facts of the present case. In short the coup serves to reinforce my conclusion that Turkey is not "safe"

173. ***Positive contra-indications***: The most up to date assessment of the position in Turkey (May 2016) makes the following points: First, the UNHCR is working closely with Turkey and has access to all detention and reception centres. Second, that there remained concerns (articulated as work still to be undertaken by Turkey) in relation to the need for those seeking international legal protection to "*… have access to a fair and proper determination of their claims, within a reasonable timeframe*" and "*assurances against refoulement or forced return*". Third, that following the EU-Turkey agreement individuals who were re-admitted to Turkey would be transferred to removal centres and could be considered to be a "*… distinct and separate target group for the activities of the UN agencies within Turkey*". The widespread suspension of large numbers of the judiciary does nothing to allay concerns.

(9) Overall conclusions

174. I have come to the conclusion that removal of the Claimants to Hungary gives rise to a real risk of chain refoulement to Iran. The UNHCR has (albeit for different reasons) concluded in relation to each of Serbia, Macedonia, Greece and Turkey that there should be no returns to these states and has expressed serious concerns in relation to Hungary. It would be a surprising result if in the light of this accumulated weight of criticism the High Court were to accept that notwithstanding there was no risk of breach of international law. I emphasise however that my conclusion is based upon the available evidence and does not rest upon a simple adoption of the headline conclusion found in UNHCR Reports. There are however a number of important caveats and points to be made about my conclusion.

175. First, the conclusion I have arrived at is based upon the evidence before the Court. It is apparent to me that in numerous respects the picture is partial and there may well be additional evidence that could be material to the assessment. The picture is not wholly one-way i.e. unequivocal. Often the picture is more balanced. For instance it is possible that with greater analysis the conclusions about Greece or Iran could change. Greece might turn out to be safer than at present appears; equally the picture about Iran might clarify and indicate that returns are more or less impossible or (conversely) that they are becoming more common as Iran reintegrates into the international community.

176. Second, the position is extremely fluid. At the heart of my decision is the fact that the basic facts have changed dramatically between the dates of the relevant decisions and

the date of this judgment. And they are intrinsically likely to change yet further. This judgment is necessarily based upon a snapshot of the positon as of the date of judgment but in a very fast evolving situation my conclusions could be overtaken by events. For instance the position in Hungary might alter because of pressure from the EU; the increased engagement of the UN with Greece and Turkey might result, for instance, in Turkey removing its geographical limitation to the 1951 Convention; but the widespread suspension and removal of serving judges in Turkey and the partial suspension of the ECHR suggest a real risk to judicial independence there.

177. Third, I do not preclude the possibility that in the future in the light of changing circumstance the Secretary of State obtains satisfactory assurances from one or more States as to the treatment that would be given to the Claimants which could affect the analysis.

178. Fourth, my conclusion is based upon the up to date position before the Court. However, had I focused exclusively upon the reasoning in the initial decisions I would still have set them aside. I do not think in a case such as this it is sufficient to rely simply on sweeping generalisations about presumptions. What was required when the decisions were taken given that even the UNHCR was beginning to express serious concerns about Hungary was a detailed analysis of the actual facts.

179. It follows that this judgment does not create a bar to the Secretary of State conducting a fresh and much more comprehensive inquiry and producing new decisions on the risks arising.

180. The Claimants case on detention only arises if I come to the conclusion that they may be returned to Hungary. As such the point does not arise. However, were it to have been relevant I would not have accepted, on the basis of the evidence as it *presently* stands, that there is sufficient for me to conclude that the Claimants would be kept in detention at any point during which removal was not in contemplation ie the argument advanced under Article 5(1)(f) ECHR

181. However, on the basis of evidence before the Court these applications for judicial review succeed. I will hear submissions as to next steps, including as to the nature of any relief that I should now grant.

ANNEX 1

SUMMARY OF EVIDENCE

A. INTRODUCTION

1. This summary is based upon a document served by the Claimants and annotated by the Defendant. It sets out the Claimants' evidence as to the position in Hungary In respect of the changes to asylum laws with particular regard to transfers to Serbia. It also

provides the Claimants' evidence in relation to detention. The Secretary of State's annotations are in square brackets and/or underlined.

B. COUNTRY INFORMATION: HUNGARY

2. Hungary is a landlocked country in central Europe, which borders seven countries: Slovakia, Ukraine, Romania, Serbia, Croatia, Slovenia and Austria. It has a population of 9,879,000 as of 2014.

Politics

3. Hungary is a parliamentary representative democratic republic. The head of government is the Prime Minister while the President holds a largely ceremonial role as the head of state.
4. The government exercises elective power. Legislative power is vested in both the government and National Assembly (parliament).
5. The Prime Minister since 29 May 2010 is Mr. Viktor Orban. He is a member of the Fidesz political party.
6. The President since 10 May 2012 is Mr. Janos Ader. He is a member of the Fidesz political party.
7. The unicameral National Assembly (*Országgyűlés*) is the Hungarian parliament and has 199 members. Elections are every four years.
8. Following the general election of 6 April 2014, the Government presently holds 131 seats, the opposition 68.
9. The present government is the result of a joint list coalition between the conservative Fidesz – Hungarian Civil Alliance (114 seats) and the KDNP (Christian Democratic Peoples' Party) (17 seats).
10. The largest opposition parties are the MSZP (Hungarian Socialist Party) (29 seats) and the radical nationalist Jobbik (24 seats). The purported aim of the latter is the protection of Hungarian values and interests and it has been identified as a radically patriotic Christian party. In the 2014 elections it secured 1,020,476 votes (20.54% of the total).

European Union

11. Hungary has been a member State of the European Union since 1 May 2004.
12. Upon acceding to the European Union, Hungary transposed the Union's asylum *acquis* and so harmonised its asylum legislation with other Member States.
13. It has been a member of the Schengen area since 21 December 2007.
14. Hungary sought, unilaterally, to suspend its obligations under the Dublin III Regulation on 23 June 2015, citing that it was overburdened by illegal immigration and had exhausted the resources at its disposal [*Hungarian Government*]
15. The provisions of the Dublin III Regulation do not foresee the ability of a country to suspend its obligations.
16. It reversed its decision the following day

17. The Hungarian Foreign Minister, Peter Szijjarto, stated on 11 November 2015 *"the Dublin system is dead … If anyone leaves from Syria toward Europe it is physically impossible for them to enter the European Union in Hungary ... Therefore it is not justified to send any Syrians back to Hungary."*

C. ASYLUM REGIME

Asylum system

18. The primary legislative act concerned with asylum is:
    - Act LXXX of 2007 on Asylum (the Asylum Act) **[C/2]**
19. It is subject to amendment:
    - Act XCIII of 2013 on the amendment of certain acts relating to law enforcement matters;
    - Act CXXVII of 2015 on the temporary closure of borders and amendment of migration-related acts;
    - Act CXL of 2015 on the amendment of certain Acts related to the management of mass migration.
20. Other relevant legislation includes:
    - Act II of 2007 on the Entry and Stay of Third-Country Nationals (the Third-Country Nationals Act);
    - Act LXXX of 2003 on Legal Aid
21. Relevant implementing decrees are:
    - Government Decree No. 301/2007 (XI.9) on the implementation of Act LXX of 2007 on Asylum **[C/3]**;
    - Government Decree No. 114/2007 (V.24) on the Implementation of Act II of 2007 on the Entry and Stay of Third-Country Nationals;
    - Government Decree No, 9/2013 (VI.28) on the rules of execution of asylum detention and bail;
    - Government Decree No. 191/2015 (VV. 21) on safe countries of origin and safe third countries **[Bundle C, Tab 4]**.

    [B/29/252 *AIDA***]**
22. The authority in charge of asylum procedure is the Office of Immigration and Nationality (OIN). It is a financially independent department of the Ministry of the Interior that has been concerned with immigration, asylum and citizenship issues since January 2000.
23. The asylum procedure is a single procedure where all claims for international protection are considered. The procedure consists of two instances.
    - The first instance is an administrative procedure carried out by the OIN. This may either be by way of the usual, or normal, procedure and by an accelerated procedure. There is also a special border procedure, which is a type of

accelerated procedure for asylum seekers entering Hungary through the transit zones.

- The second instance is a judicial review procedure carried out by regional courts of appeal, which is not specialised in asylum.

[B/29/254, 259-260 *AIDA***]**

24. As of 1 August 2015 there are three types of first instance procedure:

- The ***inadmissibility procedure*** should be used if somebody (a) is an EU citizen; (b) has protection status from another EU Member state; (c) has protection from a third country and this country is willing to readmit the applicant; (d) submits a subsequent application and there are no new circumstances or facts; and (e) ***has travelled through a safe third country***.

- The accelerated procedure can be used if somebody; (a) has shared irrelevant information with the authorities regarding his or her asylum case; (b) comes from a safe country of origin; (c) gives false information about his or her name and country of origin; (d) destroys his or her travel documents with the aim to deceive the authorities; (e) provides contradictory, false and improbable information to the authorities; (f) submits a subsequent applicant with new facts and circumstances; (g) submits an application only to delay or stop his or her removal; (h) enters Hungary irregularly or extends his or her stay illegally and did not ask for asylum within reasonable time although he or she would have had the chance to do so; (i) does not give fingerprints; and (j) presents a risk to Hungary's security and order or has already had an expulsion order for this reason.

- The asylum application in the normal procedure starts out with an interview by an asylum officer and an interpreter, usually within a few days after arrival. At that point, biometric data is taken, questions are asked about personal data, the route to Hungary and the main reasons for asking for international protection. The OIN will decide about the placement of the asylum seeker in an open centre or will order asylum detention. The normal procedure is no longer divided into an admissibility and an in-merit phase, it consists of one interview only.

[Emphasis added]

[*AIDA***]**

The Secretary of State notes that the report continues: The asylum authority should consider whether the applicant should be recognised as a refugee, granted subsidiary protection or a tolerated stay under non-refoulement considerations. A personal interview is compulsory, unless the applicant is not fit for being heard, or submitted a subsequent application and, in the application, failed to state facts or provided proofs that would allow the recognition as a refugee or beneficiary of subsidiary protection. **[B/29/255** *AIDA***]**

25. An applicant may challenge a negative ONI decision by requesting judicial review from the regional Administrative and Labour Court within 8 calendar days. A challenge against an inadmissibility decision is to be filed within 7 calendar days. The Court should take 60 days in the normal procedure and make a decision within 8 days in the inadmissibility and accelerated procedures [*AIDA*]

26. Both points of facts and law may be assessed during a judicial review procedure. However, the scope of review in inadmissibility appeals is limited to the grounds of admissibility and the merits of the case are not considered [*AIDA*]

Legal Aid

27. Section 37(3) Asylum Act confirms that asylum seekers in need have access to free legal aid. The needs criterion is automatically met, given that asylum seekers are considered in need irrespective of their income or financial situation, merely on the basis of their statement regarding their income and financial situation.

The Legal Aid Act sets out the rules for free of charge, state-funded legal assistance provided to asylum seekers. Sections 4(b) and 5(2)(d) provide that asylum applicants are entitled to free legal aid if they are entitled to receive benefits and support under the Asylum Act. Section 3(1)(e) provides that legal aid shall be available to those who are eligible for it, as long as the person is involved in a public administrative procedure and needs legal advice in order to understand and exercise his or her rights and obligations, or requires assistance with the drafting of legal documents or any submissions. Legal aid is not available for legal representation during public administrative procedures. Therefore, in the asylum context, the presence of a legal representative during the asylum interview conducted by OIN is not covered by the legal aid scheme. However, legal aid in the administrative phase of the asylum procedure is available through the national allocation of European Refugee Fund (ERF) projects.

Section 13(b) of the Legal Aid Act also provides that asylum seekers may have free legal aid in the judicial review procedure contesting a negative asylum decision. Chapter V of the Legal Aid Act sets out rules on the availability of legal aid in the context of the provision of legal advice and assistance with drafting of legal documents for persons who are eligible for legal aid.

Section 37(4) of the Asylum Act provides that legal aid providers may attend the personal interview of the asylum seeker, have access to the documents produced in the course of the procedure and have access to reception and detention facilities to contact their client.

Legal aid providers may be attorneys, NGOs or law schools who have registered with the Legal Aid Service of the Judicial Affairs Office of the Ministry of Justice and Public Administration.24 Legal aid providers may specify which main legal field they specialise in, i.e. whether in criminal law, or civil and public administrative law. As a general rule, beneficiaries of legal aid are free to select a legal aid provider of their own choice. This is facilitated by the legal aid offices around the country, which maintain lists and advise clients according to their specific needs.

Although asylum seekers have been eligible for free legal aid since 2004, very few avail themselves of this opportunity due to several practical and legal obstacles. Usually, asylum seekers are not aware of the legal aid system. The system does not cover translation and interpretation costs, hence the opportunity to seek legal advice in the asylum procedure is rendered almost impossible. The majority of Hungarian lawyers based in towns where reception and detention facilities are located do not speak foreign languages [*AIDA*]

Growth in numbers of asylum seekers

28. Hungary acceded to the 1951 UN Convention on the Status of Refugees in 1989. Hungary has acceded to almost all relevant human rights conventions, as well as the 1954 UN Convention relating to the Status of Stateless Persons (henceforth the 1954 Convention) in 2001 and to the 1961 UN Convention on the Reduction of Statelessness in 2009. **[B/13/64, §1** *UNHCR***]**

29. In 2011 there were unscheduled visits by the UN Special Rapporteurs on the Promotion and Protection of the Rights to Freedom of Opinion and Expression (April) and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (May). Both Rapporteurs expressed concerns about xenophobia, racism and intolerance encountered by refugees and asylum-seekers in Hungary as well as the harsh conditions of detention imposed on asylum-seekers **[B/13/64, §3** *UNHCR***]**

30. Historically, Hungary has experienced low levels of asylum applications. In 2011, Hungary registered 1,693 asylum seekers (mostly from Afghanistan, Serbia and Kosovo, Pakistan, Syria and Somalia). 47 were recognised as refugees, 98 received subsidiary protection and 11 benefited from protection against *refoulement* on the basis of tolerated stay **[B/13/65, §7** *UNHCR***]**

31. In 2014, Hungary received 42,777 applications for asylum **[B/23/208** *Amnesty International***]**, but received 175,963 applications between January and September 2015 **[B/29/252** *AIDA***]**. The Eurostat figures refer to 42,775 and 177,135 applications for 2014 and 2015 respectively **[C/5/156]**.

As to the numbers of Dublin returnees to Hungary in 2015, the Secretary of State notes that the Commissioner refers to 1,338 successful transfers to Hungary under the Dublin III Regulation (up to November 26). **[B/3/43, §41** *Council of Europe***]** AIDA also reports 1,081 Dublin transfers in 2015 (up until September 24), with AT, SK and DE as the top sending countries. **[B/29/252** *AIDA***]**

32. By the latter end of 2015, Hungary was receiving the second highest number of asylum claims in Europe after Germany, with more than 315,000 by the end of October 2015 **[C/6/157** *BBC***]**

33. From 1 January 2015 to 23 November 2015, 391,115 persons crossed the border irregularly into Hungary. The two main countries of origin were Syria (132,169 from 1 January up to 30 September 2015) and Afghanistan (71,557 for the same period) **[B/3/37, §9** *Council of Europe***]**

The Secretary of State observes that the Commissioner also states in this paragraph that:

"At the junction of various migration routes in Central Europe, Hungary has experienced a considerable increase in asylum applications in recent years, which has put a strain on its asylum system. The pressure was particularly high in 2015 in the context of growing numbers of refugees attempting to each Europe to flee wars and persecution."

The Secretary of State observes that the Hungarian Government budgeted for an additional HUF 15.8 billion in 2015 to manage the refugee situation **[D/10]**.

34. In the same year, up to 24 November 2015, 176,637 persons applied for asylum, of whom approximately 65,063 were Syrians (37%) and 46,571 Afghans (26%). In other

words, as also noted by the United Nations High Commissioner for Refugees (UNHCR), a large percentage of asylum seekers in Hungary come from conflict zones and many are likely to be in need of international protection [*Council of Europe*]

35. While the number of asylum applications amounted in some cases to over 10,000 per week during the summer of 2015, from the beginning of October applications dramatically dropped to 60 for the week starting 16 November 2015 [*Council of Europe*]. This coincides with the building of a border fence and the positioning of security forces at border crossings.

36. On 15 September 2015 the Hungarian government declared a "crisis situation" caused by mass immigration. On the same day, the construction of a fence on the border with Serbia was finished and amendments to the Criminal Code and Asylum Law, making it an offence to enter the country through the border fence and establishing "transit zones" at the border, entered into effect [*Amnesty International*]

37. On 22 September 2015, the Hungarian Parliament adopted a resolution that stated, among other things, that Hungary should defend its borders by "every necessary means" against "waves of illegal immigration". The resolution stated: *"[W]e cannot allow illegal migrants to endanger the jobs and social security of the Hungarian people. We have the right to defend our culture, language and values."* [*Amnesty International*]

38. Amnesty International has observed: "*While Hungary is bearing much of the brunt of the EU's structurally unbalanced asylum regime, it has also shown a singular unwillingness to engage in collective EU efforts to address these shortcomings and participate in initiatives designed to redistribute the responsibility for receiving and processing asylum seekers, notably the relocation and "hotspot" processing schemes that the European Commission and Council have been proposing. Instead, Hungary has moved in recent months to construct fences along its southern borders, criminalise irregular entry to its territory and expedite the return of asylum seekers and refugees to Serbia, through its inclusion on a list of safe countries of transit. The cumulative effect, and desired consequence, of these measures will be to render Hungary a refugee protection free zone. Ultimately, Hungary's attempts to insulate itself against a regional, and wider global, refugee crisis can only be achieved at the expense of the respect its international human rights and refugee law obligations. In fact, this is already happening; only the completion of a fence along the Croatian border is preventing Hungary's isolationist migration policies from reaching fruition*." [*Amnesty International*]

Recognition rate of beneficiaries of international protection

39. Hungary has a low recognition rate of international protection compared to other European Union countries [*Council of Europe*]

40. In 2015, the average recognition rate was of 17% while in 2014 it was 9% (compared to 45% for the whole EU in 2014. [*Council of Europe*]

41. The AIDA report (November 2015), using Eurostat as its source, identifies the following statistics concerning substantive considerations and appeals:

Applicants in 2015	Pending applications in 2015	Refugee[1] status	Subsidiary[2] protection	Humanitarian[3] protection	Rejection
175,960	107,422	105	235	5	1,715

Refugee rate	Subsidiary protection rate	Humanitarian protection rate	Rejection rate
5.1%	11.4%	0.2%	83.3%

Number of Appeals	Successful Appeals (Total)	Successful Refugee appeal	Successful Subsidiary protection appeal	Successful Humanitarian protection appeal	Negative decision
366	28	14	13	1	338
100%	7.6%	3.8%	3.5%	0.3%	92.3%

[Bundle B, Tab 29 page 247-248 *AIDA***]**

42. The recognition rate has drastically decreased since mid-September 2015, when a series of restrictive measures entered into force. From 15 September to 27 November 2015, 5,081 asylum claims were registered (2,000 originating from Afghans and 1,362 from Syrians). Out of these applications 1,189 were discontinued because the asylum seeker was assumed to have left Hungary; 372 were declared inadmissible (of which 311 on grounds that the asylum seeker had transited through a safe third country), 23 applications were rejected; 4 persons received subsidiary protection; and nobody was recognised as a refugee **[B/3/38, §11** *Council of Europe***]**

Hardening of domestic attitude to migration

43. On 3 September 2015 at a press conference held in Brussels, Prime Minister Viktor Orban said: "*We have one message for refugees: Don't Come*!" **[B/15/104** *Hungarian Helsinki Committee***]**

44. Later in September 2015, Hungarian Prime Minister Orbán defended the measures by saying that they concerned "defending European lifestyles," contrasting this with Islam. UN High Commissioner for Human Rights Zeid deplored the xenophobic and anti-

[1] Recognition as a refugee under the 1951 UN Convention on the Status of Refugees

[2] A form of protection provided to those who would be at risk of serious harm if returned to their home country, but who do not fit the strict definition of a refugee. It is provided by European Directive 2004/83, the "Qualification directive"

[3] A form of protection to those persons unable to demonstrate a claim for asylum but who would face a serious risk to life or person if returned to their home State.

Muslim views that appear to lie at the heart of current Hungarian Government policy, and which were reflected in a blatantly xenophobic Government poster campaign earlier in the year **[B/9/55** *UNHCR***]**

45. Government communications consistently labels Syrian, Iraqi, Afghan, Somali and other refugees fleeing from war and terror as economic migrants, "livelihood immigrants", or simply illegal migrants, towards whom the Hungarian state has no protection obligations **[***Hungarian Helsinki Committee***]**

46. The Government's hard-line approach to immigration has proved popular domestically. Reuters reports:

> *[Viktor] Orban's anti-migrant policies have been popular at home.*
>
> *A poll by Median showed that Orban's Fidesz, which has been in power since 2010, had 51 percent support among decided voters, over 21 percent for the second strongest party, the far-right Jobbik. This is the first time that any Hungarian ruling party is supported by more than half of decided voters in the middle of its parliamentary term, Median said."*
>
> **[***UNHCR***]**

47. The CoE Commissioner for Human Rights has expressed concern as to the negative climate against refugees and asylum seekers and integration issues:

> *"The Commissioner is particularly shocked at repeated references by the Hungarian Prime Minister to the danger for Hungary's culture posed by the arrival of Muslim migrants. The Commissioner was all the more dismayed to learn during his November visit that the government was planning a new media campaign under the headline: "The quota increases the terror threat!" (referring to the EU plans to relocate asylum seekers in different countries according to quotas) and other statements reading: "An illegal immigrant arrives in Europe on average every 12 seconds"; other messages read: "We don't know who they are, or what their intentions are"; and "We don't know how many hidden terrorists are among them"*
>
> **[***Council of Europe***]**

48. Amnesty International observed that the amendments were a *"thinly veiled attempt by Hungary to dodge its obligations under national and international law to assist asylum-seekers who have a globally recognised right to claim international protection"* **[***Amnesty International***]**

49. The Hungarian authorities have continued to conduct public campaigns targeting migrants. In December 2015, it launched a new campaign portraying those fleeing war and conflict as "criminals. Invaders and terrorists" based on their religious beliefs and places of origin **[***UNHCR***]**

D. AMENDMENTS TO ASYLUM LAW - 2015

50. Domestic asylum procedure in Hungary is regulated in Act LXXX of 2007 on asylum and Government Decree 301/2007 implementing the Act. The asylum system was amended in July and September 2015.

Amendments to asylum law

51. In July 2015, Hungary amended its asylum legislation by way of Act CXXVII of 2015, with the changes coming into force on 1 August 2015. Further amendments came into force on 15 September 2015. In September 2015, Hungary also passed Act CXL of 2015, which also amended Act LXXX of 2007.

52. The amendments coming into force on 1 August 2015 merged what were previously i) the preliminary assessment (i.e. admissibility) procedure and ii) the in-merit procedure for considering asylum applications into one single procedure **[B/29/252** *AIDA***]**

53. A second procedure, an accelerated procedure, was established which is applied if one of 10 identified grounds are established. Vulnerable applicants are not exempted from accelerated procedures [*AIDA*]

54. The new rules have authorized the government to adopt a list of safe countries of origin and safe Third Countries. The latter list includes Serbia consequent to it being a candidate for membership of the European Union [*AIDA*]

55. The amendments that came into force on 15 September 2015 introduced additional restrictions to access to protection. The amended Asylum Act now provides for a border procedure in transit zones, subject to lower procedural guarantees and in practice lasting as short as one hour in certain cases, whereby asylum claims are summarily rejected as inadmissible. Vulnerable applicants are exempted from the border procedure in the transit zone [*AIDA*]

Criticism of amendments by the UNHCR

56. The UNHCR raised its deep concerns as to the proposals to amend the Asylum Act in July 2015, observing:

> *"Even before the new proposals, the Hungarian asylum system was becoming more and more restrictive. We fear that the new amendments will make it impossible for people fleeing war and persecution to seek safety in this country," Ms. Feixas Vihé*[4] *added. "We understand Hungary's national security concerns, but this should not victimize the victims."*
>
> [*UNHCR*]

57. In September 2015, the UNHCR further expressed its concerns as to these amendments:

> *UNHCR is particularly concerned about a series of restrictive measures recently introduced by Hungary and the way they are being implemented, resulting in extremely limited access for refugees at the border. New legislation includes deterrence measures, some contrary to international law and European jurisprudence when applied to asylum-seekers and refugees.*
>
> *"UNHCR reiterates its call on the Hungarian authorities to ensure unimpeded access for people in need of protection in line with its legal and moral obligations", the UN High Commissioner for Refugees, António Guterres, said today. "States should manage their borders in a way that is consistent with International and EU Law, including guaranteeing the right to seek asylum," Guterres added.*

[4] Montserrat Feixas Vihé, UNHCR's regional representative for Central Europe

> *Reports indicate that only a few asylum-seekers have been allowed to enter Hungary through the official border crossing point. UNHCR was especially shocked and saddened to witness Syrian refugees, including families with children who have already suffered so much, being prevented from entering the EU with water cannons and tear gas.*
>
> *Hungary has also begun to return asylum-seekers to Serbia, against standing UNHCR advice to governments. The argument that refugees can be denied entry because it is possible to be returned to Serbia does not take into account the asylum system Serbia is currently building is not able to cope with the magnitude of the current inflow of people who require effective protection.*
>
> *In relation to refugees being detained for irregularly crossing the border barrier and will be charged, UNHCR reminds States of their obligations under the UN Refugee Convention and, in particular, article 31 (non-penalization for unauthorized entry or presence for asylum seekers and refugees).*
>
> *"It is not a crime to cross a border to seek asylum," Mr. Guterres said.*
>
> [*UNHCR*]

58. In joint observations with the Council of Europe and the ODHIR (Office for Democratic Institutions and Human Rights) in December 2015, the UNHCR called upon the Hungarian leadership to *"adopt the true spirit of humanity in helping those who have been forced out of their countries against their own will and choice and are currently seeking safety in Europe"*:

> *"The Hungarian Government launched a new public campaign portraying those fleeing war and conflict as criminals, invaders and terrorists based on their religious beliefs and places of origin. Not the first of its kind in the country, this campaign also targets migrants and plans to run for two months through Christmas and into the new year in 2016.*
>
> *The Organisations are collectively stressing the need for the Hungarian Government to acknowledge that refugees are coming to Europe, after having endured trauma, tragedy and loss while searching for hope and dignity to start a new life far from the upheavals of war and conflict. As part of the common European system, Hungary is looked upon to contribute to the joint efforts in dealing with the continent's largest refugee crisis since the World War II and to meet its international legal commitments in this area under both International law and the European Convention on Human Rights."*
>
> [*Council of Europe*]

Criticism of amendments by the UN Human Rights Commissioner

59. On 17 September 2015, the UN Human Rights Commissioner Zeid Ra'ad Al Hussein said that amendments of the Criminal Code and the Asylum Law that entered into force on 15 September are incompatible with the human rights commitments binding on Hungary. "*This is an entirely unacceptable infringement of the human rights of refugees and migrants. Seeking asylum is not a crime, and neither is entering a country*

irregularly." The UN Human Rights Commissioner further observed that some of the actions carried out by the Hungarian authorities, such as denying entry, arresting, summarily rejecting and returning refugees, using disproportionate force on migrants and refugees, as well as reportedly assaulting journalists and seizing video documentation, amounted to clear violations of international law. He also noted "*the xenophobic and anti-Muslim views that appear to lie at the heart of current Hungarian Government policy*" [*Amnesty International*] [*UNHCR*]

Safe Third Countries including Serbia

60. From January 2013 to 31 July 2015, Hungary stopped applying the safe third country rule to asylum seekers arriving via Serbia and their cases were examined in Hungary. However this has now changed further to the legal amendments introduced in July 2015 (coming into force on 1 August 2015). Now all asylum claims lodged by applicants who came through what is considered a safe Third Country are to be considered inadmissible when the applicant would have had the opportunity to apply for effective protection in that country. Governmental Decree 191/2015 (VII.21) created a list of "safe third countries" including Serbia [*Council of Europe*]

61. The UNHCR does not consider Serbia to be a safe third country of asylum. In August 2012 it identified a number of shortcomings in Serbia's asylum regime, including:

- Lack of personnel, expertise, infrastructure, implementation of legislation and government support;
- The Asylum Office is operating on an *ad hoc* basis and lacks sufficient numbers of qualified persons to adjudicate asylum claims;
- The Asylum Office has no budget allocated to it and its essential services are covered by the UNHCR;
- As the Asylum Office is based within the Border Police Directorate it is not independent from the police structure. Asylum procedures are conducted by police officers often inadequately trained in the principles and application of international refugee protection;
- Placing police in the role of interviewer during the asylum procedure may undermine the perception of confidentiality and impartiality;
- The national asylum system cannot process the significant increase in asylum seekers;
- The structural relationship between the Asylum Office managed by the Ministry of the Interior and the asylum centres which are independently managed by the Serbian Commissariat for Refugees (SCR) and its impact upon the provision of accommodation.

  [*UNHCR*]

62. No other European Union member State recognises Serbia as a safe Third Country [*Hungarian Helsinki Committee*]

63. In Hungary the authorities can now rely upon an asylum seeker admitting that they travelled through Serbia or their being apprehended by the police in the region of the Serbian border so as to be able to declare an asylum claim to be inadmissible [*Hungarian Helsinki Committee*]

64. The amendment is retrospective and applies to asylum seekers who claimed asylum prior to 1 August 2015 [*Hungarian Helsinki Committee*]

65. The presumption that an asylum seeker had an opportunity to claim asylum in Serbia is, in principle, rebuttable. However, in reality, respite is theoretical:

    a) The law requires the applicant to prove that he could not present an asylum claim in Serbia. This represents an unrealistically high standard of proof as compared to the lower standard of "to substantiate", which is generally applied in Hungarian asylum law.

    b) The law does not provide the necessary due process safeguards by stipulating that an asylum-seeker after being informed about the application of the safe third country concept in his case can, without delay and in any case not later than within 3 days, make a declaration concerning why in his individual case the given country cannot be considered as safe. No mandatory, free of charge legal assistance is foreseen in this process. Due to the lack of a functioning legal aid system accessible to asylum seekers, the vast majority of them have no access to professional legal aid during the asylum procedure.

    c) The lack of a possibility to have access to protection in Serbia does not stem from individual circumstances but from the general lack of a functioning asylum system. Therefore, it is absurd and conceptually impossible to expect an asylum-seeker to prove that for individual reasons he had no access to a functioning system in Serbia that in reality does not exist. It is to be observed that Hungary's legislation deems the Serbian asylum system to be safe.

    d) If the claim is considered inadmissible, the OIN has to deliver a decision in a maximum of 15 days. This extremely short deadline adds to the presumption that no individualized assessment is carried out.

    [*Hungarian Helsinki Committee*]

66. The new provisions put in place for the first time in Hungary an accelerated asylum procedure whereby a decision by the OIN has to be taken within 15 days. This procedure is lacking essential legal safeguards. In particular, there is a high risk of judicial review being ineffective. A personal hearing at the court is no longer mandatory, and in some cases there is no automatic suspensive effect against the negative decision on protection and the removal decision. The time-limit to file a request for judicial review of a negative decision is three days. A new provision allows the authorities to oblige asylum seekers to contact their country of origin while their asylum application is still pending, a requirement that could put applicants in danger. The lack of access to proper information on the new asylum procedures and of interpretation is also an issue of concern [*CoE*]

67. Those subject to the inadmissibility decision also receive a ban on entering Hungary for 2 years [*Hungarian Helsinki Committee*]

The Secretary of State observes that this statement was made in the context of a discussion of one particular case only: [*Hungarian Helsinki Committee*]

68. This ban is entered into the Schengen Information system and so prevents a person from entering the entire Schengen area in any lawful way [*Hungarian Helsinki Committee*]

69. Return to a Serbia, as a safe Third-Country, has to take place within 1 year of an asylum-seeker's entry into Hungary consequent to the EU-Serbia Readmission Agreement (*Article 10, 2007/819/EC: Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization*) [*Hungarian Helsinki Committee*] [**Article 10** *European Community-Serbia Readmission Agreement*]

E. EUROPEAN UNION - INFRINGEMENT PROCEEDINGS

70. On 10 December 2015, the Commission gave formal notice to Hungary that it was opening an infringement procedure concerning recently adopted asylum legislation.

71. The press release details:

> *"The Commission has found the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)).* [*EU Commission*]

72. The Commission identified the following concerns in the Press release:

- No possibility to refer to new facts and circumstances in the context of appeals;
- Hungary is not automatically suspending decisions in case of appeals, effectively forcing applicants to leave Hungary before the time limit for lodging an appeal expires or before an appeal has been heard;
- The law on fast-tracked criminal proceedings for irregular border crossings does not respect the right to interpretation and translation in criminal proceedings;
- The law concerned with judicial review of decisions rejecting an asylum application does not provide for a mandatory oral hearing and judicial decisions are being taken by court secretaries (a sub-judicial level) who lack judicial independence.

73. The Hungarian authorities have responded by asserting that this move is an act of revenge for its rejection of mandatory migrant quotas.

74. Reuters reports the Hungarian response:

> *[Viktor] Orban's chief of staff Janos Lazar said Hungary would fight the new infringement procedure.*
>
> > *"This is an unjust and to us unfair procedure, clearly the revenge of political groups who condemn Hungary's determined stance about defending European borders," he told a news conference."*
>
> [*UNHCR*]

F. COUNCIL OF EUROPE

75. An effective response to the current refugee movements across Europe can only be found through concerted European action, but States must continue to abide by their human rights obligations. Following a visit to Hungary in November 2015, the CoE Commissioner for Human Rights, Nils Muiznieks, observed:

    "I am concerned that Hungary has not lived up this challenge"

    [*Hungarian Helsinki Committee*]

The Secretary of State notes that this statement also observes on the same page that "*Hungary has been confronted with an unprecedented task in this field*".

76. The President of the First Section of the European Court of Human Rights invited the Council of Europe Commissioner for Human Rights to intervene as a Third Party in the Court's proceedings and to submit written observations concerning the cases of *S.O. v Austria* and *A.A. v Austria* (Applications Nos. 44825/15 and 44944/15)

77. The Third Party Intervention is dated 17 December 2015 and raised the following concerns:

    The Commissioner considers that the very restrictive measures taken in recent months by the Hungarian authorities translate into a deliberate intention of the latter to deter asylum seekers from entering the country and applying for asylum therein. In conclusion, the Commissioner considers that:

    - *The current asylum law and practice in Hungary are not in compliance with international and European human rights standards. At the moment, virtually nobody can access international protection in Hungary. The asylum procedure is too expedited and lacks essential safeguards; the use of asylum detention and the detention conditions are problematic; and the general negative climate against migrants fostered by the authorities is not conducive to the integration of asylum seekers and refugees in Hungarian society. All of the above has a serious negative impact on the conditions of reception of Dublin returnees.*

    - *A considerable proportion of those returned to Hungary under the Dublin III Regulation are currently detained. The detention regime is very restrictive, a circumstance which the Commissioner considers cannot be reconciled with the fact that asylum seekers are not criminals and should not be treated as such. The material conditions of detention are also reported to be substandard. Furthermore, the remedies available to challenge detention cannot, in the Commissioner's view, be considered effective.*

    - *Due to the introduction of the rule according to which Serbia is to be considered as a safe third country, persons currently returned to Hungary under the Dublin III Regulation do not, as a rule, have their asylum application examined on the merits by the Hungarian authorities, contrary to the latter's international obligations in matters of asylum. As a result, Dublin returnees to Hungary are exposed to a very high risk of being subject to deportation to Serbia and to onward chain refoulement, with the*

> *corresponding risk of treatment contrary to Article 3 of the European Convention on Human Rights.*

[*CoE*]

78. The Commissioner observes that current asylum law and practice in Hungary are not in compliance with international and European human rights standards. Dublin returnees are at high risk of being detained in poor conditions with ineffective remedies available to challenge this. Furthermore, Dublin returnees are exposed to a very high risk of being subject to deportation to Serbia and onward chain *refoulement* leading to a risk of violation of Article 3 ECHR, due to the Hungarian law considering Serbia as a safe third country, which applies retroactively.

G. REFOULEMENT

79. On 21 July, Governmental Decree 191/2015 created a list of "safe Third Countries" including Serbia (as a candidate state of the European Union). Asylum-seekers entering Hungary from Serbia face the quasi-automatic rejection of their application.

80. Under the law, Serbia is considered a "safe Third Country" and if the applicant travelled through it or stayed there, it is assumed that he or she "could have applied for effective protection there". As the "safe Third Country" assessment takes place at the admissibility stage of the application, a claim can be rejected before a review of its merits and of the particular circumstances of the applicant [*Amnesty International*]

81. The UNHCR recommended in 2012 that Serbia not be considered a safe Third Country of asylum, and that countries therefore refrain from sending asylum seekers back to Serbia [*Council of Europe*] [*HHC*]

82. The inclusion of Serbia on the list of safe countries of transit is particularly problematic. The situation in Serbia exposes refugees and asylum-seekers to a risk of human rights violations. Amnesty International's recent research demonstrates that the asylum system in Serbia remains ineffective and fails to guarantee access to international protection to even *prima facie* refugees, including Syrian nationals, who make up the majority of applicants [*Amnesty International*]

83. The CoE Commissioner for Human Rights understands that no other EU Member State currently regards Serbia as a safe third country for asylum seekers [**B/3/42, §35** *Council of Europe*]

84. The newly established list of safe third countries does not take into account the guidelines issued by the Kúria, the Supreme Court of Hungary, about countries to be considered as safe third countries. A translation of *Opinion No.2/2012 (XII.10) KMK on certain questions relating to the application of the safe third country concept* (10 December 2012) is at []

85. The Supreme Court concluded; "*the country information issued by UNHCR shall always be taken into consideration*." [*Council of Europe*] [*Hungarian Helsinki Committee*]

86. Failures and delays in the implementation of the provisions of Serbia's Asylum Law deny asylum-seekers a prompt and effective individual assessment of their protection needs. The failure of the Serbian Asylum Office to provide asylum-seekers with information on submitting a claim, identify vulnerable persons, conduct asylum interviews promptly and provide first-instance decisions in a timely fashion, places a

significant number of individuals at risk of *refoulement* to Macedonia and onwards to Greece [*Amnesty International*]

87. The UN Committee against Torture was concerned in June 2015 at information that persons expelled from Hungary to Serbia were subjected to forced return to the former Yugoslav Republic of Macedonia, "in application of the readmission agreements, without effective procedural guarantees to gain access to legal remedies against the decision, free legal aid or information provided through interpretation services". The Committee was concerned that those individuals are at "*a heightened risk of refoulement, including chain refoulement*" [*Council of Europe*]

88. According to the UNHCR's latest assessment in August 2015, the former Yugoslav Republic of Macedonia is not to be considered as a safe third country due to outstanding gaps in the asylum system in the country and the sharp increase in the number of new arrivals in the country more recently, which presents major challenges to the asylum environment. Accordingly, UNHCR advised that other states should refrain from returning or sending asylum-seekers to the country, until further improvements to address these gaps have been made by the national authorities [*CoE*] [*UNHCR*]

89. The risk of chain refoulement consists of an asylum seeker being removed from Hungary to Serbia to Macedonia to Greece, the latter's asylum system being considered to subject to systemic deficiencies that give rise to Article 3 ECHR breaches.

Application of Safe Third Country presumption by Hungary

90. The rule concerning Serbia as a safe Third Country is effectively applied to asylum seekers both in the accelerated and border procedures and that people have already been returned to Serbia on this ground. From 15 September to 27 November 2015, the vast majority (372 out of 399) of the asylum applications that were not discontinued on grounds that the asylum seeker had left Hungary, were declared inadmissible and in 311 cases this was done on safe third country grounds [*Council of Europe*]

91. The judicial review of the inadmissibility decisions is characterised by insufficient legal safeguards, including very short time-limits to appeal and a lack of mandatory, free-of-charge legal assistance of good quality [*Council of Europe*]

92. In practice, since almost all asylum seekers came to Hungary via Serbia (or another country on the safe third country list), their asylum claim will be considered as inadmissible and therefore rejected before having been examined on the merits. Once the claim is rejected, the next step consists in ordering and implementing the expulsion of the asylum seeker to Serbia [*Council of Europe*]

93. The CoE Commissioner for Human Rights is clear in his opinion:

> *"The Commissioner considers that this situation renders access to international protection in Hungary virtually impossible and entails a real risk of refoulement of persons with international protection needs (including Dublin returnees) to Serbia, and of onward chain refoulement. It is therefore at variance with Hungary's international obligations under the European Convention on Human Rights and 1951 Refugee Convention."*
>
> [*Council of Europe*]

94. Dublin returnees also run a very high risk of being expelled to Serbia without having their asylum claims examined on the merits, as a result of the application to their cases of the safe Third Country rule described above. It should be noted in this respect that the rule applies retroactively, in that it operates with respect to persons who initially entered Hungary before the coming into force of the list of safe Third Countries. As a result, their application will likely be declared inadmissible, without the possibility for these persons to be heard beforehand [*Council of Europe*]

H. ASYLUM – DUBLIN RETURNEES

First-time applicants

95. Persons who had not previously applied in Hungary and persons whose applications are still pending are both treated as first-time asylum applicants [*Hungarian Helsinki Committee*] [*AIDA*]

96. For persons whose applications are considered to have been tacitly withdrawn (i.e. they left Hungary and moved on to another EU member state) and the asylum procedure had been terminated, the asylum procedure may be continued if the person requests such a continuation within 9 months of the withdrawal of the original application [*Hungarian Helsinki Committee*]

97. When that time limit has expired, the person is considered to be a subsequent applicant. This is contrary to Dublin III Regulation, Article 18(2) and recast Asylum Procedures Directive, Article 28(3) [*AIDA*]

98. Persons who withdraw their application in writing cannot request the continuation of their asylum procedure upon return to Hungary and will have to submit a subsequent application and present new facts or circumstances. This is contrary to Dublin III Regulation, Article 18(2) [*AIDA*]

Subsequent applications

99. A subsequent application is considered as an application made after a final termination or rejection decision on the former application. New circumstances or facts have to be submitted in order for a subsequent application to be admissible [*Hungarian Helsinki Committee*]

100. Where an asylum seeker has left the country over 9 months before return they cannot request a continuation. They will be considered to be a subsequent applicant. The Hungarian Helsinki Committee observes:

> *"... imposing a deadline in order for the procedure to be continued is contrary to the Dublin III Regulation as the second paragraph of Article 18(2) states that when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in the Recast Asylum Procedures Directive. This is also recalled in Article 28(3) of the Recast Asylum Procedures Directive,which explicitly provides that the aforementioned 9-*

> *months rule on withdrawn applications "shall be without prejudice to [the Dublin III Regulation""*
>
> [*Hungarian Helsinki Committee*]

101. The asylum procedure would also not continue when the returned foreigner had previously received a negative decision from the OIN and did not seek judicial review. This is problematic when the OIN had previously issued a decision in someone's absence, which can only be issued when the OIN considers that all necessary facts have been obtained in the case (e.g. the personal interview has taken place). The asylum seeker who is later returned under the Dublin procedure to Hungary will have to submit a subsequent application and present new facts and evidence in support of the application and, in addition, show that previously he/she had been unable to present these new facts and evidence [*Hungarian Helsinki Committee*]

I. DETENTION

Historic issues

102. Until the end of 2012, many asylum-seekers were held in "immigration detention". The practice and procedures were criticized. In 2013, it was stopped and following a six-month interim period and law reform, a new regime was introduced. From 2013, the new regime concerning the detention of asylum seekers is "asylum detention" [*Cordelia Foundation*]

Detention Centres

103. The OIN operates three permanent asylum detention centres in Békéscsaba, Nyírbátor and Kiskunhalas. The latter one was opened in November 2015, following the closure of the country's largest open reception facility and an asylum detention centre in Debrecen in the same month [*Cordelia Foundation*]

104. The police operate four immigration detention centres, which are located in Győr, Kiskunhalas, Nyírbátor and the Liszt Ferenc International Airport in Budapest, with a capacity of approximately 350–400 persons altogether [*Cordelia Foundation*]

105. Asylum-seekers are not placed in the police detention centres. Undocumented migrants not asking for asylum are housed there [*Cordelia Foundation*]

The Secretary of State observes that there is no reference to detention centres being used for housing. It simply says "refugee-assisting organisations witnessed an increasing pattern of undocumented migrants not asking for asylum in Hungary in 2015".

Reception Centres

106. There are now 4 open reception centres and 2 homes for unaccompanied children. The largest reception centre situated in Debrecen was closed at the end of 2015.

	Situated	**Nature**	**Majority**
Balassagyarmat	Near Slovakian border	Community shelter	111
Vamosszabadi	Near Slovakian		255

	border		
Nagyfa	Near Serbian border	Heated containers located inside prison grounds	300
Bickse	Near Budapest		439

[*AIDA*]

Asylum seekers can also request to stay in private accommodation at their own cost; however, they are then not entitled to most of the material reception conditions.

Unaccompanied children are not placed together with adults but are accommodated in specialised structures:

	Situated	**Nature**	**Maximum capacity**
Fót	North of Budapest	Home	20
Hódmezővásárhely	Near Serbian and Romanian border	Small house	18

107. The centres are operated by OIN [*AIDA*]

Summer 2015 onwards

108. The recent changes in asylum law and practice have resulted in a further deterioration of the situation, with increasing use of asylum detention made by the Hungarian authorities, often in inadequate conditions. In November 2015, 412 asylum seekers were detained in the three operating asylum detention centres while 525 were in open reception centres, meaning that around 44% of asylum seekers were detained. Official figures show that at other points in time the proportion of asylum seekers in detention was even higher: on 2 November 2015, for instance, 52% of asylum seekers were detained. In contrast, in 2014 a total of 4,806 asylum seekers were detained (11% of the total number of asylum seekers) [*Council of Europe*]

109. The authorities' current focus is on detaining migrants, including asylum seekers, rather than offering them accommodation in open reception centres. The Commissioner was informed that the open reception capacities are being diminished and the asylum detention capacities have been increased, further to the closing down of the open reception centre in Debrecen and the opening of a new asylum detention centre in Kiskunhalas. The Commissioner notes in particular that the Debrecen reception centre was the largest one and was generally considered as the best open reception centre in all of Hungary [*Council of Europe*]

110. The running down of reception centres and non-detention forms of accommodation has been observed by Amnesty International:

> *"In June 2015, Hungary was already struggling to provide adequate reception for the large numbers of refugees and asylum-seekers entering the country. "We cannot give them blankets and beds. We have even run out of*

tents," Lajos Kosa, vice president of the ruling party Fidesz declared. Despite this acknowledgment, the government declined to improve or enhance the reception facilities. It refused without any explanation an offer by UNHCR to provide mobile homes with the capacity to accommodate 2,400 persons."

[*Amnesty International*]

111. Radically tightening asylum rules and widely criticised new policies led to an unprecedented situation by the autumn of 2015, when more first-time asylum-seekers were detained than those accommodated at open facilities [*Cordelia Foundation*]

112. Between January and September 2015, 1,860 asylum seekers were detained and as of 2 November 2015 52% of asylum seekers applying in Hungary were detained [*AIDA*]

Dublin returnees

113. Dublin returnees may be placed in asylum detention if one of the grounds for asylum detention under Section 31/A of Asylum Act prevails. Usually the ground invoked for detaining Dublin returnees is "the risk of absconding". Asylum applicants may be detained during the entire asylum procedure, from its start till the final and enforceable decision or court judgment. The maximum duration of asylum detention is six months for adults. For families with children under 18 years of age, asylum detention can last no longer than 30 days. Unaccompanied minors may not be held in asylum detention. After the maximum duration of detention, applicants have to be released from detention and are instructed to stay at an open reception centre [*Hungarian Helsinki Committee*]

114. As regards conditions of reception, Dublin returnees run first of all the risk of being placed in asylum detention, where the conditions give rise to a number of concerns as mentioned above. The OIN has confirmed that in 2015 (up to 26 November) there were 1,338 successful transfers to Hungary under the Dublin III Regulation. Of these, 332 were placed in asylum detention and the others in open reception centres. Civil society organisations reported to the CoE Commissioner for Human Rights that on 15 October 2015, out of the 145 persons held in asylum detention at Debrecen, approximately half were single male adult Dublin returnees. During his visit to the Debrecen asylum detention centre in November, the Commissioner spoke to a number of Dublin returnees who said they had been detained for a few weeks already. All of them claimed that they did not belong in detention as they had not committed a crime and many of them also did not understand the content of the documents they had been handed ordering their detention and the grounds on which this had been done [*Council of Europe*]

Article 3 – general conditions – inhuman and degrading

115. The Asylum Government Decree turned a mandatory requirement of at least 5 sq. metres moving space and 15 cubic metres space per person in the cells of asylum jails into a non-binding recommendation. In addition, under a new provision introduced on 15 September 2015, if an extraordinarily great number of persons seeking protection puts an unforeseen burden on the capacity of the asylum detention centres and/or on the

refugee authority, the refugee authority may carry out detention in locations other than specific asylum detention centres [*Council of Europe*] [*Hungarian Helsinki Committee*]

116. Detainees of the Nyírbátor asylum centre had said that the facilities were infested with bedbugs and that, although the temperature was cold (around five degrees centigrade), many people were without sweaters and were wrapped in bed sheets [*Council of Europe*] [*Human Rights Watch*]

117. The Commissioner finds the detention regime applied to asylum seekers particularly worrisome. In Békéscsaba and Nyírbátor, when escorted from the facility to the court for hearings, or on other outings (such as to visit a hospital, bank or post office), detained asylum seekers are handcuffed and escorted on leashes, which are normally used for the accused in criminal proceedings. Detainees also reported that they would be escorted by police officers handcuffed and on a leash to go to the town for instance to collect the money sent to them by their families [*Council of Europe*] [*Human Rights Watch*] [*AIDA*]

118. During his visit to Debrecen in November 2015, the CoE Commissioner for Human RIghts saw a group of detainees handcuffed and on leashes being escorted outside one of the buildings within the centre. Inside the facilities, the Commissioner noticed that every asylum seeker who left the closed part of the building – for instance to see the administration personnel - was accompanied by one security official. At the end of his visit, the Commissioner urged the authorities to improve asylum detention conditions and treat detained asylum seekers in a more humane way [*Council of Europe*]

Article 3 – Vulnerable persons

119. There are concerns as to access to mental health, in particular the failure to triage upon arrival at detention centres. Mental health illness is not screened and it often requires deterioration in health before care may be provided.

120. Mental health care in detention is provided by an NGO, the Cordelia Foundation [*Cordelia Foundation*]

121. Access to healthcare in asylum detention centres leaves much to be desired, particularly as concerns mental health, as there is no psycho-social support available in any of the detention centres. The Commissioner for Human Rights observed during his visit to the (now closed) Debrecen Asylum detention centre, that while a paramedical nurse is present at all times, the doctor is there only for a few hours a day. There are also problems of communication between the medical staff and the detainees due to language barriers and the lack of interpreters [*Council of Europe*]

122. In detention centres, there is a lack of triage upon induction, which is a grave concern as persons with special needs are not excluded by law from being held in asylum detention. In practice, since there is a lack of an early identification mechanism, asylum-seekers with PTSD or other special needs are often found in asylum detention [*Hungarian Helsinki Committee*]

123. In severe cases of auto- or hetero-aggression, detainees are taken to the local psychiatric ward. Due to a lack of interpretation services available the patient is usually released after a short stay and some medical treatment provided. Such emergency interventions, however, do not contribute to detainees' overall mental wellbeing and sometimes even fuel further tensions between them. In the Debrecen asylum detention centre, when a young Algerian man committed self-harm and was brought to the

hospital, other inmates' reaction was: "*Do we also have to hurt ourselves or others in order to be let out of here?*" [*Cordelia Foundation*]

124. In reception centres only basic health care is available for asylum-seekers and there were complaints about the lack of interpretation services when accessing medical services. Psychological services and psychotherapy for traumatized asylum-seekers are exclusively provided by the NGO Cordelia Foundation, to a limited extent within the framework of a European Refugee Fund-supported project. Medical assistance for seriously mentally challenged persons is unresolved. Similarly, residents with drug or other type of addiction have no access to mainstream health care services [*Hungarian Helsinki Committee*]

125. The Cordelia Foundation has identified:

> *"A cumulative observation of the monitoring teams in Hungary … is that persons suffering from post-traumatic stress disorder (PTSD), including primary torture victims, can be found in detention in the same proportions as in open facilities. This is primarily due to the fact that [Hungary lacks] a standardised, generally-applied protocol for the identification of vulnerable asylum-seekers (and torture victims and traumatised persons among them) with special reception or procedural needs. In addition, monitors did not encounter any effective ad hoc mechanisms applied in individual facilities either."*
>
> *"The lack of standard identification procedures is further confirmed by the fact that no properly trained mental health personnel is available in any of the detention centres visited in the project"*
>
> [*Cordelia Foundation*]

126. Difficulties are compounded by a lack of interpreters:

> *"As the majority of the guards and medical staff do not speak English or other foreign languages, the absence of an interpreter in most communication situations between them and detainees represents a major obstacle to successful communication and thus, fuels tension. An example for such tensions is that the medical staff and their patients in detention mutually blamed each other for the poor quality of medical care on the occasion of several monitoring visits in Hungary. When confronted with the complaints of detainees, nurses and doctors in the majority of the centres responded that their patients often do not come for the medicine prescribed to them or take it only as long as symptoms persist, disregarding the prescribed length of treatment (crucial in the case of antibiotics, for instance). At the same time, it is difficult to imagine how detainees could understand these prescriptions, if – in lack of an interpreter – they are not explained to them in a language they understand."*
>
> [*Cordelia Foundation*]

The Hungarian Government reports that the OIN spends approximately HUF 5.5 billion for the feeding, health care and appanage of refugees **[7/161]**.

Article 5

127. The problem of arbitrariness of detention orders remains acute. There seems to be no clear explanation as to why some people are detained while others are sent to open

reception centres or are allowed to continue their travel to other European countries. Decisions ordering and upholding asylum detention are reportedly schematic, lacking individualised reasoning with regard to the lawfulness and proportionality of detention and failing to consider the individual circumstances (including vulnerabilities) of the person concerned. The necessity and proportionality tests are reportedly not used [*Council of Europe*] [*Hungarian Helsinki Committee*]

128. The problem of vulnerable persons being placed in asylum detention has further intensified in 2015. Vulnerable persons are in principle exempted from asylum detention under the law. However, in the continuing absence of a reliable system for identifying vulnerable asylum seekers, such as victims of torture and human trafficking or those suffering from post-traumatic stress disorder, it is not rare for specialised NGOs to find such vulnerable persons in asylum detention [*Council of Europe*]

129. Another issue of serious concern to the CoE Commissioner for Human Rights is the detention of unaccompanied asylum seeking minors, despite the fact that it is prohibited by law. In his December 2014 report, the Commissioner called on the Hungarian authorities to establish an adequate system of age assessment in order to avoid placing unaccompanied minors in detention. During his November 2015 visit, the Commissioner received numerous concurring reports that some persons who were likely to be minors have indeed been placed in detention following questionable age-assessment tests [*Council of Europe*]

130. Detention of families with children has again become a serious issue. Further to his July 2014 visit, the CoE Commissioner for Human rights noted that while the law provided for the detention of families with minors for a maximum period of 30 days, in practice families with children (as well as single women) were no longer detained in asylum detention centres. He called on the authorities to remove the possibility of detaining families with children from the law. Unfortunately, however, the authorities appear to have taken steps in the opposite direction, with numerous reports indicating that in practice families with children have been detained again since September 2014 [*Council of Europe*]

131. The insufficient use of alternatives to detention seems to be continuing. In January 2015, UNHCR observed that only the applicability of asylum bail was considered in practice, while other alternative measures, such as a regular reporting requirement and a designated place of accommodation, were rarely applied as stand-alone measures. The use of bail is adversely impacted by a lack of clear rules and information provided to the persons concerned [*Council of Europe*]

132. As to the length of detention, further to the legislative changes introduced in September 2015, the detention of asylum seekers is implicitly allowed during the judicial review procedure which would mean that it could be extended beyond the 6 month time limit [*Council of Europe*]

J. EFFECTIVE REMEDY – Article 13 ECHR

Asylum decision

133. The amended Asylum Act introduced new rules for the judicial review of asylum decisions:

a) The deadline to seek judicial review against inadmissibility decisions and decisions on the merits taken in an accelerated procedure is 7 days.

Without a functioning and professional legal aid system available for asylum-seekers, the vast majority of them have no access to legal assistance when they receive a negative decision from the OIN. Many asylum-seekers may fail to understand the reasons for the rejection, especially in case of complicated legal arguments, such as the safe third country concept, and also lack awareness about their right to turn to court. The excessively short deadline makes it difficult for the asylum-seeker to exercise her/his right to an effective remedy;

b) The judge has to take a decision in 8 days on a judicial review request against an inadmissibility decision and in an accelerated procedure. The 8-day deadline for the judge to deliver a decision is insufficient for "a full and *ex nunc* examination of both facts and points of law" as prescribed by EU law. Five or six working days are not enough for a judge to obtain crucial evidence (such as digested and translated country information, or a medical/psychological expert opinion) or to arrange a personal hearing with a suitable interpreter;

c) The personal hearing of the applicant by the judge is not mandatory, although this would be a crucial safeguard in the judicial review procedure, as the first-instance judge delivers a final, non-appealable decision. It is very unlikely that judges will hold personal hearings, given the extremely short time limit in which it may easily prove to be impossible to make the necessary arrangements, including arranging a suitable interpreter, for example. The unreasonably short time limit and the lack of a personal hearing may reduce the judicial review to a mere formality, in which the judge has no other information than the documents provided by the OIN;

d) The judicial review request will only have an automatic suspensive effect on removal if it is against an inadmissibility decision that is based on the application of the safe third country concept, or if it is against a negative decision that was taken in an accelerated procedure that has been initiated on grounds of an illegal entry or stay. The lack of an automatic suspensive effect on removal measures is in violation of the principle established in the consistent case-law of the European Court of Human Rights, according to which this is an indispensable condition for a remedy to be considered effective in removal cases. While rules under EU asylum law are more permissive in this respect and allow for the lack of an automatic suspensive effect in case of inadmissibility decisions and accelerated procedures, the lack of an automatic suspensive effect may still raise compatibility issues with the EU Charter of Fundamental Rights. The lack of an automatic suspensive effect is in clear violation of EU law with regard to standard procedures, as the Asylum Procedures Directive allows for this option only in certain specific (for example accelerated) procedures. In all cases where the suspensive effect is not automatic, it is difficult to imagine how an asylum-seeker will be able to submit a request for the suspension of her/his removal as she/he is typically without professional legal assistance and subject to an unreasonably short deadline to lodge the request. To make it even worse for asylum-seekers, the rules allowing for a request to grant a suspensive effect to be submitted are not found in the Asylum Act itself, but they emanate from general rules concerning civil court procedures. The amended Asylum Act lacks any additional safeguards for applicants in need

of special procedural guarantees with regard to the automatic suspensive effect, although this is clearly required by EU law;

e) In the judicial review request, no reference may be made to new facts or new circumstances and the court may not change the decision of the refugee authority, that is, the court no longer has reformatory powers in asylum cases since 1 August 2015.

[*Hungarian Helsinki Committee*]

Detention

134. The lack of efficient judicial review of asylum detention orders also remains a serious problem. In 2014, the CoE Commissioner for Human RIghts noted the ineffectiveness of judicial review of decisions ordering detention. The Kúria (Supreme Court) concluded in 2014 that the judicial review of asylum detention was ineffective and called for improvements including at the legislative level [*Council of Europe*]

135. Detention may initially be ordered by OIN for a maximum duration of 72 hours. It may be extended by the court of jurisdiction upon the request of OIN, which should be filed within 24 hours from the time it has been ordered **[B/29/308** *AIDA***]**

136. The Court may grant an extension of asylum detention for a maximum duration of 60 days. Every 60 days, the OIN needs to request the court for another prolongation, 8 working days prior to the due date for extension. The court can prolong detention for 60 days repeatedly up to 6 months [*AIDA*]

The hearing in the judicial review procedure is mandatory in the first prolongation procedure (after 72 hours of detention) or if the detained person asks for it when he or she files an objection against the detention order. The court shall appoint a lawyer for the asylum seeker if he or she does not speak Hungarian and is unable to arrange his or her representation by an authorised representative. **[B/29/309** *AIDA***]**

137. Judicial reviews of immigration and asylum detention are conducted mainly by criminal law judges [*AIDA*]

138. The automatic, periodical judicial review of asylum detention performed at lengthy 60-day intervals is clearly ineffective, with no individualised decision-making as Hungarian courts fail to address the lawfulness of detention in individual cases, or to provide individualised reasoning based upon the applicant's specific facts and circumstances [*Hungarian Helsinki Committee*] [*Council of Europe*] [*Hungarian Helsinki Committee*] [*AIDA*]

139. This process reduces the judicial review to a mere formality, in which the judge has no other information than the one provided by the first-instance authority and has to deliver a decision under circumstances that do not allow for a proper judicial assessment [*Hungarian Helsinki Committee*]

140. The Hungarian Helsinki Committee has considered 64 court decision undertaken in February ~~2015~~ 2014 and observes:

a) The proceeding courts systematically failed to carry out an individualized assessment as to the necessity and the proportionality of detention and relied merely on the statements and facts presented in the OIN's detention order, despite clear requirements under EU and domestic

law to apply detention as a measure of last resort, for the shortest possible time and only as long as the grounds for ordering detention are applicable

b) Both detainees interviewed and the decisions observed by the HHC confirmed that the state-funded, ex officio appointed case guardians (local attorneys) play a passive role in the judicial review process. This violates the equality of arms principle

c) Four court decisions contain a date of birth which indicates an age lower than 18 years. Nevertheless, none of the decisions questioned the lawfulness of detention of the persons concerned, nor did they refer to any age assessment process or evidence proving the adult age of the asylum-seeker concerned

[*Hungarian Helsinki Committee*]

141. Judicial clerks can also proceed and decide in these cases. Clerks are not yet appointed as judges and have significantly less judicial experience [*Hungarian Helsinki Committee*]

K. BORDER FENCE

142. During the summer of 2015, Hungary constructed a fence on the 175-kilometre long border with Serbia, with the explicit aim to divert refugee and migration flows from this border section elsewhere. The fence, which was completed on 15 September, consists of two lines of fences: a smaller barbed wire fence and a 3-metre tall fence right next to each other [*Hungarian Helsinki Committee*]

143. The Hungarian government invested more than 100 million euros on building the fence [*Amnesty International*]

144. The amended rules allow for the construction of so-called transit zones in a maximum distance of 60 metres from the frontier. The transit zone is where immigration and asylum procedures are conducted and where buildings required for conducting such procedures and housing migrants and asylum-seekers are located [*Hungarian Helsinki Committee*]

145. The Hungarian authorities built a razor-wire fence first at the border with Serbia and then at the border with Croatia, and created makeshift transit zones. An “extremely” accelerated asylum procedure (referred to as the border procedure) is applied. Under this procedure, asylum applications are hardly ever examined on the merits and some asylum seekers have seen their claims processed in less than a day and have been sent back to Serbia directly from the transit zone. According to reports, only a few asylum seekers were allowed to enter through the official crossing border points. In one serious incident that occurred on 16 September 2015 at the Röszke crossing point, water cannons and tear gas were used by the Hungarian authorities against migrants trying to enter Hungary. [*CoE*]

146. Although Hungary has the prerogative to control the access of persons to its territory and a legitimate interest in doing so, it must do so in conformity with its obligations under international human rights law and EU law to respect the rights of those requesting international protection [*Amnesty International*]

147. There is evidence of “push-backs” occurring at the transit zones. Many asylum seekers have had their asylum applications declared inadmissible on “safe Third-Country

grounds" within a few hours of the applications being made. They are then expelled and physically accompanied by a police officer to the Serbian border [*AIDA*]

148. This is an illegal practice. The Asylum Procedures Directive and the corresponding Hungarian rule require people returned to a "safe third country" to be equipped with a document in the language of the destination country explaining that no in-merit examination of the asylum application took place[5] [*AIDA*]

149. The Hungarian Helsinki Committee has serious concerns regarding the legal status of the transit zones. The official government position, as communicated in the press, is that asylum-seekers admitted to the transit zone are on "no man's land", and persons who were admitted and later "pushed back" in the direction of Serbia have never really entered the territory of Hungary. Consequently, such "push-backs" do not qualify as acts of forced return. This position has no legal basis: there is no "no man's land" in international law; the concept of extraterritoriality of transit zones was clearly rejected by the European Court of Human Rights in the *Amuur v France*[6] case as well. The transit zone and the fence are on Hungarian territory and even those queuing in front of the transit zone's door are standing on Hungarian soil, as also evidenced by border stones clearly indicating the exact border between the two states [*Hungarian Helsinki Committee*]

150. The border procedure does not offer an effective remedy against negative first-instance decisions. Asylum-seekers usually arrive at the border following a painful journey of several weeks of months. They are exhausted, many of them traumatised. As rejections are passed in less than an hour, they have no time to have a rest and get prepared for the interview, and even less for preparing a proper appeal. The asylum-seekers the Hungarian Helsinki Committee interviewed after rejection did not understand the reasons for the rejection (an easily understandable consequence given the complexity of the legal question at stake – the safe third country concept – for anyone without specific training in refugee law), and their right to turn to court. In such a context, the 7-day time limit to submit a judicial review request is excessively short. The excessively short deadline makes it difficult for the asylum-seeker to exercise her/his right to an effective remedy and thus it questions the rule's compliance with EU law [**B/15/~~106~~ 108** *Hungarian Helsinki Committee*]

The Secretary of State observes that the Hungarian Government's stated aim in reinforcing its borders was to protect them.

Mr Orbán explained that "The Hungarian Government looks upon the issue of the fence as an issue of the protection of Hungary's borders".

He also confirmed that the legal channels remained open: "Hungary maintains its legal border crossing stations, and intends to extend and develop them. In other words, we are not closing down border crossing stations, but we shall prevent illegal border-crossing with any means possible".

L. PROSECUTION FOR ILLEGAL CROSSING OF BORDER

[5] *Directive 2013/32/EU, Article 38(3)(b)*

[6] *Amuur v France* (1996) 22 EHRR 533

151. In September 2015, the Hungarian Parliament introduced new criminal offences related to the illegal crossing of the razor-wire border fence, punishable with up to several years of imprisonment, accompanied by a special fast-track criminal procedure that presents shortcomings in terms of fair trial standards. At the end of his November 2015 visit, the COE Commissioner for Human Rights urged the Hungarian authorities to remove these newly created criminal offences, stressing that immigrants and asylum seekers are not criminals and should not be treated as such [*Council of Europe*]

152. Amendments to Act C of 2012 on the Criminal Code. Prohibited crossing of the border closure: unauthorized entry into the territory "protected by the border closure". Under the basic definition this criminal act is punishable by up to 3 years imprisonment. If committed armed, or with the use of weapons, or while part of a riot (previously the requirement only existed under insurrection): the sentence will range between 1 – 5 years; the sentence ranges from 2 – 8 years if committed armed, with the use of weapons and as part of a riot. If the act results in a death the sentence ranges between 2 – 10 years [*Hungarian Helsinki Committee*]

153. The law further criminalizes "damaging of the border fence", an offence punishable with between one to five years imprisonment [*Amnesty International*]

154. Although the cases related to the new crimes of "prohibited crossing of the border" and "damaging the border barrier" are likely to involve foreigners, the law does not oblige the authorities to provide a written translation of essential documents such as the indictment and the court decision on the prison sentence as required by the EU Directive on the right to interpretation and translation in criminal proceedings and by international fair trial standards. [*Amnesty International*]

M. DECISIONS IN OTHER MEMBER STATES

155. Several national courts have suspended Dublin returns to Hungary in recent months [*Council of Europe*]

Denmark

156. On 9 October 2015, the Danish Refugee Appeals Board decided to suspend all Dublin transfers to Hungary and made a request to the Danish Immigration Service to launch a general consultation on whether Hungary presently accepts Dublin returnees from other Member states, as well as whether Hungary observes its obligations under international law [*Judgment*]

The Secretary of State notes that the Danish Committee for Refugees requested the Danish Immigration Service to "seek more general information as to whether Hungary would continue to accept Dublin returnees from other Member States and whether Hungary would continue to fulfill its international obligations". It only decided to suspend "all accepted Dublin cases with Hungary as their country of reception until the answer to the consultation has been received".

Germany

Decision of 02.10.2015 case no. 10 L 923/15. A Administrative Court of Minden

157. The amendments to Hungarian safe-Third Country legislation introduced in August 2015 creates a risk that the Applicant would be deported to Serbia, Macedonia or Greece without substantive examination of his grounds for seeking asylum because the Hungarian authorities deem these countries to be safe Third Countries. Further, there was no effective remedy against a decision to declare an asylum claim inadmissible on safe Third Country grounds. Concerns were also raised as to detention practice.

158. The Administrative Court determined that Hungarian asylum system currently demonstrates serious indications of systems flaws [*Judgment*]

Decision of 04.09.2015 case no. 4 L 810/15.A Administrative Court of Potsdam

159. The Court held that the asylum procedures in Hungary constituted systemic deficiencies. If returned to Hungary, the Applicant would face the risk of removal to Greece without receiving an appropriate examination of his grounds for seeking asylum in Hungary.

160. The Court cited the deep concern of the UNHCR that the amendments to the Hungarian asylum legislation permitted the removal of asylum seekers to potentially unsafe Third Countries [*Judgment*]

Luxembourg

Decision No. 36966 (19 September 2015)

161. The decision to transfer an Afghan asylum seeker to Hungary was annulled on the basis of systemic deficiencies in the asylum procedure and reception conditions. The Hungarian legislative and political framework for asylum seekers was labelled as a draconian regime [*Judgment*]

The Netherlands

201507248/1/V3 (26 November 2015)

162. The Dutch Council of State allowed the appeals of two asylum seekers to prevent their transfer to Hungary, under the Dublin III Regulation (with reliance on M.S.S. v Belgium and Greece) the Council of State asked for further investigation into whether the situation of Dublin returnees in Hungary would lead to a violation of the European Convention on Human Rights [*Judgment*] [*CoE*]

163. Several other courts have suspended or quashed decisions to transfer asylum-seekers to Hungary (translations not presently available)

The Secretary of State observes that this ECRE paper specifically does not discuss the cases in which a transfer was allowed to Hungary. It states as follows:

"Given the aim of the paper, cases where a transfer was ultimately allowed to Hungary will not be discussed. However, it is worth signaling that in 2015 administrative authorities did undertake transfers to the country, as evidenced by recent statistics that out of 39,299 take charge and take back requests from Member States since January 2015 – November 2015, 1,338 successful transfers actually took place."

[*ECRE*]

Austria

Federal Administrative Court, Decision of 30 September 2015, W168 2109023-1

Federal Administrative Court, Decision of 30 December 2015, W185 2110998-1

Federal Administrative Court, Decision of 28 September 2015, W185 2114671-1 W105 2112758-1; W168 2110928-1 29.09.2015

Federal Administrative Court, Decision of 24 September 2015, W185 2114721-1

Federal Administrative Court, Decision of 24 September 2015, W 1442114716-1/ 3 E

Belgium

Council of Alien Law Litigation, Decision of 15 December 2015, 158.631, 158.621 and 181 584

Council of Alien Law Litigation, Decision of 13 December 2015, 158 281

Germany

Cologne Administrative Court, Decision of 22 December 2015, 2 K 3464/15.A

Arnsberg Administrative Court, 4 November 2015, 6 L 1171.15.A

Dusseldorf Administrative Court, Decision of 21 October 2015, 13 L 3465.15.A

Minden Administrative Court, 5 October 2015, 1 L 756.15.A

Minden Administrative Court, Decision of 2 October 2015, 19 L 923/15.A

München Administrative Court, 11 September 2015, M_23_K_15_50045

Düsseldorf Administrative Court, Decision of 11 September 2015, 8 L 2442.15.A

Minden Administrative Court, Decision of 10 September 2015, 3 L 806.15.A

Cologne Administrative Court, 8 September 2015, 18 K 4584/15.A

Potsdam Administrative Court, 4 September 2015, 4 L 810/15.A

Düsseldorf Administrative Court, Decision of 3 September 2015, 22 L 2944.15.A

Düsseldorf Administrative Court, Decision of 20 August 2015, 15 L 2556/15.A

Augsburg Administrative Court, Decision of 18 August 2015, Au 6 K 15.50155

Augsburg Administrative Court, Decision of 18 August 2015, Au 6 K 15.50155

Würzburg Administrative Court, Decision of 13 August 2015, W 7 S 15.50248

Saarland Administrative Court, Decision of 12 August 2015, 3 L 816.15

Düsseldorf Administrative Court, Decision of 11 August 2015, 22 L 2559.15.A

Frankfurt/Oder Administrative Court, Decision of 7 August 2015, VG 3 L 169/15.A

Kassel Administrative Court, 7. August 2015, 3 L 1303/15.KS.A

Administrative Court Augsburg, Decision of 3 August 2015, Au 5 K 15.50347

Kassel Administrative Court, 24 July 2015, 6 L 1147-15.KS.A

Potsdam Administrative Court, 20 July 2015, VG 6 L 356/15.A

Düsseldorf Administrative Court, 17 July 2015, 8 L 1895/15.A

München Administrative Court, 17 July 2015, M 24 S 15.50508

Munster Administrative Court, Decision of 7 July 2015, 2 L 858/15.A

Switzerland

Federal Administrative Court, Decision D-6089/2014 of 10 November 2014

Federal Administrative Court, Decision D-6576/2015 of 29 October 2015

Federal Administrative Court, Decision E-6571/2015 of 27 October 2015

Federal Administrative Court, Decision E-6626/2015 of 22. October 2015

Federal Administrative Court, Decision E-6106/2015 of 1 October 2015

Federal Administrative Court, Decision E-5961/2015 of 29 September 2015

Federal Administrative Court, Decision E-5961/2015 of 29 September 2015

[In all of these decisions, the case was remitted to the first instance authority to provide further clarifications on the current situation in Hungary, they are therefore not final]

[*ECRE***]**