



IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

JOINED CASES C-411/10 and C-493/10

Between:-

N. S.

Appellants

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT IN UNITED KINGDOM**

Respondents

And Between:-

M. E. AND OTHERS

Appellants

- and -

**REFUGEE APPLICATIONS COMMISSIONER AND THE MINISTER
FOR JUSTICE, EQUALITY AND LAW REFORM IN IRELAND**

Respondents

**WRITTEN OBSERVATIONS OF THE
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

In relation to Case C-411/10 (*N.S. v Secretary of State for the Home Department in United Kingdom*), the United Nations High Commissioner for Refugees ('UNHCR') is represented by Raza Husain QC, Samantha Knights and Marie Demetriou,

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In relation to Case C-493/10 (*M.E. and Others v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform in Ireland*), the UNHCR is represented by Patrick Dillon-Malone, Barrister, instructed by Millett and Matthews, solicitors, with an address for service at Main St., Baltinglass, Co. Wicklow, Ireland.

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1 February 2011

PRELIMINARY

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees ('UNHCR') in relation to the orders for reference made by the Court of Appeal of England and Wales in the case of *N.S. v Secretary of State for the Home Department* [2010] EWCA Civ 990 and by the High Court of Ireland in the case of *M.E. and Others v the Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform* (Record No. 2010/131 JR).¹ By order of 9 November 2010, the President of the Court of Justice of the European Union decided to join the examination of the two cases C-411/10 and C-493/10 for the purposes of the written procedure.

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

2. UNHCR has been entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problems of refugees.² Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, and Article 35 of the 1951 Convention relating to the Status of Refugees ('the 1951 Convention')³ obliges States Parties to cooperate with UNHCR in the exercise of its functions.
3. UNHCR's supervisory responsibility has been reflected in European Union law, including by way of reference to the 1951 Convention in Article 78 of the Treaty on the Functioning of the European Union ('TFEU'), as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "*consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy*". Furthermore, the supervisory responsibility of UNHCR is specifically articulated in Article 21.1(c) of Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status ('the Procedures Directive').⁴
4. In supervising the application of the 1951 Convention throughout the world for 60 years, a Convention widely recognised, inter alia by this Court, as "*the cornerstone of the international legal regime for the protection of refugees*,"⁵ UNHCR has developed unique expertise on asylum issues. Such expertise has been acknowledged in the context of the Union's asylum *acquis*⁶ and beyond,

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) including introductory note (provided as Annex 1).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (provided as Annex 2).

⁴ Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13. Article 21(c) in particular obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure"

⁵ Cases C-175/08; C-176/08; C-178/08 and C 179/08, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* [2010] (not yet reported) para 52; Joined Cases C-57/09 and C-101/09, *Germany v. B and D* [2010] (not yet reported) para 77.

⁶ The 'Union's asylum *acquis*' refers to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union asylum law. In this regard, see Recital 10 of Regulation 439/2010 of 19 May 2010 establishing the European Asylum Support Office [2010] OJ L 132/11;

including in the pronouncements of the European Court of Human Rights ('ECtHR'), which has highlighted the reliability and objectivity of UNHCR in this field, not least because of its long-standing presence and mandate-related activities in countries and regions of origin and transit of refugees, as well as in asylum countries.⁷ This includes EU Member States, and notably of relevance for the present case, Greece.

THE CONTEXT OF THE REFERENCES

5. These questions have been referred to the Court in the context of UK and Irish national proceedings. The UK proceedings concern the transfer of an Afghan asylum-seeker to Greece under Council Regulation (EC) No 343/2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* ('the Dublin II Regulation'). The Irish proceedings concern the transfer to Greece under the Dublin II Regulation of five asylum-seekers, from Afghanistan, Iran and Algeria.
6. In the exercise of its mandate, UNHCR has actively monitored the asylum situation in Greece for many years and has issued several papers containing its findings and views on the conditions in and the transfer of asylum-seekers to that State.
7. In its *Observations on Greece as a country of asylum*, published in December 2009,⁸ UNHCR reported widespread and severe shortcomings in the Greek asylum system. UNHCR continues to monitor the situation in Greece closely through its office there and is of the view that major systemic failures have not yet been remedied. UNHCR made submissions in the case of *M.S.S. v*

Recital 15 of *Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted* [2004] OJ L 304/12. See also the opinion of Advocate-General Sharpston in Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, (not yet reported) recognizing the persuasive force of UNHCR's statements (para. 16); and the references to/quotations of UNHCR's positions in the opinion of Advocate-General Mazák in Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and others v Bundesrepublik Deutschland*, (not yet reported) para. 20; and Advocate-General Poiares Maduro in Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, (para. 27), which also recognise UNHCR's expertise.

⁷ ECtHR, *K.R.S. v. United Kingdom*, Appl. No. 32733/08, 2 December 2008, p. 12. (Annex 3)

⁸ Annex 4

Belgium and Greece before the ECtHR, including on the factual situation in Greece, many of which are recorded in the Court's judgment, which acknowledges notably the "deficiencies of the asylum procedure".⁹ UNHCR's most recent observations on the situation are annexed hereto.¹⁰ The ongoing problems can be summarised as follows:

- a) The asylum procedures which have operated up to the beginning of 2011 were seriously deficient, with poor quality decisions observed in a large proportion of first instance cases. Significant barriers precluded access to the means to register or re-register a claim and procedural safeguards, such as legal assistance, were missing.¹¹
- b) Since early January 2011, a gradual process of implementation has begun for new transitional procedures which aim to improve the functioning of the asylum system until a new asylum service and procedure is established and becomes operational.¹² While it is difficult to assess the effectiveness of the transitional arrangements after only a few weeks, UNHCR considers that significant problems are likely to remain for asylum-seekers in securing fair and efficient assessment of and decisions on their claims. This is because of the persistent lack of resources and adequately trained decision making personnel, professional and accurate interpretation and access to legal assistance.
- c) Overall protection rates remain extremely low. In 2009, less than one percent of cases decided at first instance, i.e. by the Police Directorates, were granted refugee status or subsidiary protection. This figure diverges fundamentally from practice at first instance in other EU Member States receiving large numbers of claims (France, UK, Germany, Sweden and Italy) where the average protection rate at first instance was 25.5 per cent

⁹ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011 (Annex 5); See *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.S.S. v. Belgium and Greece*, June 2010 (Annex 6); *UNHCR's oral intervention in MSS v Belgium and Greece*, 1 September 2010 (Annex 7).

¹⁰ UNHCR information note on the asylum situation in Greece including for Dublin transferees, 31 January 2011 (Annex 8)

¹¹ See Annex 8, pp. 1-2, part 1a

¹² See Annex 8, pp. 3-4, part 1b

in 2009. In Greece, 2860 decisions in total were made in the first 9 months of 2010 but even among these, the recognition rates were well below EU averages. Afghans and Iraqis received protection in approximately 8% of cases, while the recognition rates for Somalis was 0%. By contrast, the five EU Member States who received the highest numbers of claims in the EU in the same period recognised 45% of Afghans, 51% of Iraqis and 70% of Somalis.¹³

- d) Asylum-seekers are frequently detained and detention facilities are generally inadequate and severely overcrowded. Conditions in some of the facilities have been found by the ECtHR to be degrading in violation of Article 3 ECHR.¹⁴
- e) Many asylum-seekers have no shelter or other State support and live in conditions of acute destitution.¹⁵
- f) Deportations to Turkey take place, under the terms of the bilateral readmission protocol between Turkey and Greece.¹⁶
- g) Children who seek asylum face the same obstacles as adults regarding the processing of their claims and are generally treated in the same way, i.e. there are no special procedures in place in practice. Destitution and homelessness also affect them significantly.¹⁷
- h) The concerns summarised above are equally valid for persons returned to Greece under the Dublin II Regulation. They will face the same risks as others of deportation, inadequate access to asylum procedures, inadequate reception assistance, and in the case of children, inadequate safeguards for their rights as such.

¹³ See Annex 8, pp. 3-4, part 1b

¹⁴ ECtHR, *S.D. v. Greece*, Appl. No. 53541/07, 11 June 2009, (Annex 9); ECtHR, *Tabesh v. Greece*, Appl. No. 8256/07, 26 November 2009, (Annex 10); ECtHR, *A.A. v. Greece*, Appl. No. 12186/08, 22 July 2010, (Annex 11); ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, (Annex 5) para. 233;

¹⁵ See Annex 8, pp. 5-6, part 2a

¹⁶ See Annex 8, p. 2 part 1a

¹⁷ See Annex 8, p. 6, part 2a

8. In light of the grave concerns set out above, UNHCR considers the Greek asylum system to fall well short of international and European standards including the 1951 Convention. It advises governments to refrain from returning asylum-seekers to Greece and recommends that they instead examine those cases under Article 3(2) of the Dublin II Regulation (see UNHCR's recent update on the situation in Greece as of 31 January 2011¹⁸, UNHCR, *Observations on Greece as a country of asylum*, December 2009,¹⁹ and UNHCR, *position on the return of asylum-seekers to Greece under the "Dublin Regulation"*, 15 April 2008²⁰).
9. Furthermore, there have been an increasing number of applications to the European Court of Human Rights for interim measures to stay Dublin transfers to Greece under the Dublin II Regulation. In 2009, there were approximately 500 such requests from Member States and approximately 65 per cent of them were granted. In 2010, some 850 requests were made of which about 82 per cent were granted. More significantly, since 1 October 2010, the Court has received some 190 requests, of which only four were rejected, meaning that almost 98 per cent were granted. Consequently, as at the end of January 2011, there were some 666 cases relating to Dublin transfers to Greece pending before the European Court of Human Rights.²¹
10. There is a significant disparity in the practice of Member States regarding transfers to Greece under the Dublin II Regulation. Certain Member States have in recent months decided to suspend all transfers to Greece, while others have not. Some States have decided to suspend them for specific categories of asylum-seekers, such as unaccompanied children or other vulnerable applicants. In January 2011, notably after the ECtHR's decision in *M.S.S. v. Belgium and Greece*, several additional States have announced their intention to suspend transfers, and in some cases, specifically to take responsibility for determining the claims. Higher Courts in Austria, France, Hungary, Italy,

¹⁸ Annex 8, Introduction, para. 2.

¹⁹ Annex 4

²⁰ Annex 12

²¹ UNHCR has intervened in the following four recent Dublin II Regulation cases: *Xb. v. France and Greece*, October 2009; *Sharifi and Others v. Italy and Greece*, October 2009; *Ahmed Ali and Others v. The Netherlands and Greece*, February 2010, *M.S.S. v. Belgium and Greece*, June 2010.

Poland, Romania, Spain, and Sweden have increasingly ruled against proposed Dublin transfers to Greece, in particular but not only where specific vulnerabilities are involved. Higher courts, including in Belgium, Finland, France, Ireland, the Netherlands, Norway and the UK, by contrast, have allowed them in a number of cases, especially where no such vulnerability is present. Thus, a significant number of Dublin States have suspended transfers to Greece as a result of government policy or as a result of rulings by the ECtHR. As of the time of writing, while national Member State jurisprudence remained divergent, it appears likely that the recent ECtHR decision in *M.S.S.* will lead national courts to decide in favour of suspension in many relevant pending and future cases. (see *UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, January 2011).²²

THE GENERAL LEGAL FRAMEWORK: EU FUNDAMENTAL RIGHTS AND THE DUBLIN II REGULATION

11. The EU Charter of Fundamental Rights ('the Charter') recognises a series of rights of particular relevance for asylum-seekers as outlined below.
12. Respect for fundamental rights, including the right to asylum²³, was long recognised as a general principle of EU law²⁴. Such general principles occupied the same position as Treaty provisions in the hierarchy of EU law, and governed the validity and interpretation of secondary Community legislation, as well as national implementing measures.

²² Annex 13

²³ Advocate General Maduro states that the "fundamental right to asylum (...) follows from the general principles of Community law"; Advocate General Maduro's Opinion in case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 21; The fact that the right to asylum preceded the Charter is also clarified by the Explanations to the Charter of Fundamental Rights of the European Union, [2007] OJ C 303/17, which provides that this right has been based on Article 63 TEC.

²⁴ C-402/05 P and C-415/05 *Kadi v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351, para 283. See also T. Tridimas, "The General Principles of EU Law", Oxford European Community Law Series, 7 June 2007.

13. This was reinforced since the coming into force of the Lisbon Treaty on 1st December 2009, which establishes that the legal nature of the Charter's provisions is that of primary legislation within the Union's legal order.²⁵
14. The content of the rights at stake in this submission, in particular the right to asylum under Article 18 of the Charter, is further elaborated upon in EU secondary legislation on asylum and involves a series of corresponding obligations for all the Member States, including the obligation to examine the asylum application (Article 3(1) of the Dublin II Regulation) and to grant international protection to those in need (Articles 13 and 18 of Council Directive 2004/83/EC *on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted* ('the Qualification Directive')).
15. Under the Dublin II Regulation, these obligations are discharged by one Member State; the Member State which Article 3(1) designates as the responsible State in accordance with the criteria set out in Chapter III of the Regulation ('the Responsible State').
16. It follows in the submission of UNHCR that if the Member State responsible under Article 3(1) cannot guarantee fundamental rights of the asylum-seeker, the transferring Member State cannot be discharged of its obligations under the Union's asylum *acquis* vis-à-vis an asylum applicant. In such circumstances, that Member State is obliged to examine the asylum application lodged in its territory. Article 3(2) of the Dublin II Regulation - commonly known as the "sovereignty clause" - is in that context a particular procedural mechanism which permits and facilitates the effective fulfilment of the transferring Member State's own obligations towards asylum-seekers.
17. The key fundamental rights at issue in this context are those enshrined in Articles 1, 4, 18, 19(2) and 47 of the Charter.²⁶

²⁵ Article 6(1) Treaty on European Union, as amended.

Article 1

18. Article 1 of the Charter provides:

“Human dignity is inviolable. It must be respected and protected.”

19. Article 1 is a fundamental provision and the protections contained in other Articles of the Charter must be read in its light.

20. In the present context, Article 1 requires that an asylum-seeker has access to adequate reception conditions in the receiving state, including basic subsistence adequate to ensure respect for human dignity (See the preamble of the Council Directive 2003/9/EC *laying down minimum standards for the reception of asylum-seekers* (‘the Reception Directive’, which provides that this Directive “seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter”²⁷; See also the Grand Chamber judgment of the ECtHR *M.S.S. v. Belgium and Greece*²⁸).

Article 4

21. Article 4 of the Charter provides that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

22. Article 4 mirrors Article 3 of the European Convention on Human Rights and Fundamental Freedoms (‘ECHR’) which, inter alia, requires that an asylum-

²⁶ This does not mean that other rights in the Charter (especially, Articles 2, 5, 6 and 10) would not be relevant to the assessment of any given case.

²⁷ Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers, [2003] OJ L31/18, Recital 5.

²⁸ See Annex 5 at para. 263. The ECtHR held as follows:

“In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.”

seeker is not expelled or returned (*refouler*) to a place where his or her rights under this provision would be threatened²⁹, inter alia, due to his or her detention and living conditions in the receiving state.³⁰

Article 18

23. Article 18 provides:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’)”

24. Article 18 is of fundamental importance as it confers a right to asylum. UNHCR notes moreover this Court’s concern that the issues at stake in asylum cases relate to “*the fundamental values of the Union.*”³¹

25. Article 18 expressly incorporates (i) the rules of the 1951 Convention and 1967 Protocol and (ii) the requirements of the Treaties.

26. The 1951 Convention defines those to whom refugee status shall be conferred and establishes a number of rights and duties for the refugees in the receiving country. While the 1951 Convention does not set out procedures for the determination of refugee status as such³², fair and efficient asylum procedures are (outside the context of large scale influx) an essential element in the full and inclusive application of the Convention.³³ Contracting States need to set out such procedures.

²⁹ E.g. ECtHR, *Saadi v. Italy*, Appl No. 13229/03, 29 January 2008

³⁰ ECtHR, *M.S.S. v. Belgium and Greece*, (Annex 5), para. 367.

³¹ Cases C-175/08; C-176/08; C-178/08 and C-179/08, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, [2010] (not yet reported) para 90. See also Case C-19/08, *Migrationsverket v Edgar Petrosian & Others* [2009] ECR I-495, paras 41 and 48.

³² Articles 1C(5) 1C(6), and 9 are premised on a duty to determine refugee status; see also UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992 (Annex 14), para 189

³³ See: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992 (Annex 14) Part Two A; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*,

27. To turn to the requirements of the Treaties, Article 78 of the Treaty on the Functioning of the European Union ('the TFEU') (ex Article 63 EC Treaty) is a starting point, and contains the following fundamental principles:
- (a) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement* (Art. 78(1)).
 - (b) The policy must be in accordance with the 1951 Convention and its 1967 Protocol (Art. 78(1)).
 - (c) The European Parliament and the Council shall adopt measures for a common European asylum system which will include a uniform status of asylum, valid throughout the Union, and a uniform status of subsidiary protection for nationals of third countries (Art. 78(2)).

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

28. The requirements of the Treaties have, pursuant to Articles 63 EC Treaty (now Article 78 TFEU), been laid down in a series of secondary legislative measures which include:
- a) The Dublin II Regulation itself;
 - b) Council Directive 2003/9/EC *laying down minimum standards for the reception of asylum-seekers* ('the Reception Directive');
 - c) The Qualification Directive; and

January 2007, para. 8 (Annex 15); UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. 4–5 (Annex 16). See also Executive Committee, Conclusion No. 81 (XLVIII) "*General*" (1997), para. (h) Annex 17); Conclusion No. 82 (XLVIII), "*Safeguarding Asylum*" (1997), para. (d)(iii) (Annex 18); Conclusion No. 85 (XLIX), "*International Protection*" (1998), para. (q) (Annex 19); Conclusion No. 99 (LV), "*General Conclusion on International Protection*" (2004), para. (l) (Annex 20).

d) The Procedures Directive.

29. It is clear from the Preambles to these measures that their purpose is, *inter alia*, to give effect to the right to asylum enshrined in Article 18 of the Charter. This is acknowledged in similar terms by all these instruments. Notably, the 15th Recital to the Dublin II Regulation states that:

“The Regulation observes the fundamental rights and principles which are acknowledged in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum granted by Article 18.”³⁴

30. Article 18 of the Charter thus provides, in combination with Article 3(1) of the Dublin II Regulation and Articles 13 and 18 of the Qualification Directive, for an obligation on Member States to ensure that an asylum-seeker (i) has access to and can enjoy a fair and efficient examination of his or her asylum claim and/or an effective remedy in the receiving state, (ii) is treated in accordance with adequate reception conditions and (iii) is granted asylum in the form of refugee status or subsidiary protection status when the criteria are met. It requires compliance not only with the substantive provisions of the 1951 Convention, but also with the substantive and procedural standards contained in the EU instruments referred to in paragraph 28 above.

31. The scope of the right protected by Article 18 goes beyond protection from *refoulement*.³⁵ To construe Article 18 otherwise and in a narrow fashion is to fail to secure the effectiveness (*effet utile*) of this Article. The scope of Article 18 is further evident from the *travaux préparatoires* of the Charter. Thus, for example, the *travaux* show that the drafters of the Charter considered and rejected wording which restricted the scope of the provision to the “*right to seek asylum*” and chose the wider formulation of the “*right to asylum*”, notwithstanding that the right to asylum was not guaranteed in these terms in

³⁴ See further, Recital (5) to the Reception Directive; Recital (10) to the Qualification Directive; and Recital (8) to the Procedures Directive.

³⁵ For a comprehensive analysis leading to this conclusion see M-T Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union’s Law* [2008], *Refugee Survey Quarterly*, vol. 27 no. 3, pages 33-52 (Annex 21).

any international human rights instrument applicable in the European Union, or that the Charter was intended to be a reaffirmation of existing rights rather than a source of new ones.³⁶

32. In this context, UNHCR submits that in the application of the Dublin II Regulation, respect for the right to asylum requires the Transferring State to be satisfied of the existence and accessibility of a functioning asylum system in the Responsible State.

Article 19(2)

33. Article 19(2) provides:

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

34. To consider first the 1951 Convention, it is of note that the obligation of Contracting States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion is a cardinal protection principle enshrined in Article 33 of this 1951 Convention. This is generally referred to as the obligation of *non-refoulement*.
35. The obligation of *non-refoulement* is also reflected in Article 3 ECHR³⁷, and the relevant ECtHR’s case law on this shall be discussed further in paragraphs 73 - 79.
36. The Dublin II Regulation underscores the primacy of these international obligations where it provides in its 12th Recital:

“With respect to the treatment of persons falling within the scope of the Regulation, Member States are bound by obligations under instruments of international law to which they are a party.”

³⁶ *Ibid*, at 46.

³⁷ Relevant in this context is also the obligation of *non-refoulement* reflected in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Annex 22).

37. The *non-refoulement* obligation is also referred to in Article 21 of the Qualification Directive and Recital 2 of the Dublin II Regulation.
38. Importantly in the context of Dublin transfers and respect for Charter rights, the obligation of *non-refoulement* extends both to direct and indirect *refoulement*.³⁸ In the context of the Dublin II Regulation, a proposed transfer may give rise to a real risk of a breach of a Member State's *non-refoulement* obligations under international and EU law either via direct or indirect *refoulement*.

Article 47

39. Article 47 provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

40. This requires that an asylum claimant whose rights under the Charter are violated must be afforded an effective remedy.³⁹

³⁸ ECtHR, *T.I. v UK*, Appl. No. 43844/98, 4 February 2000, [2000] INLR 211 (Annex 23); ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. No 30471/08, 22 September 2009, paras. 88-89 (Annex 24).

³⁹ The right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR; Case C-50/00, *Union de Pequenos Agricultores v Council of the European Union* [2002] ECR I-6677, para 39. See also Case C-19/08, *Migrationsverket v Edgar Petrosian & Others* [2009] ECR I-495, paras 41 and 48. See also UN High Commissioner for Refugees, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21 May 2010 (Annex 25).

UNHCR's EVIDENCE CONCERNING COMPLIANCE WITH THESE RIGHTS BY GREECE

41. UNHCR's research and evidence indicates that the above fundamental rights are currently being infringed on a widespread basis by Greece. In particular, as explained above, these concerns relate to:
- a) Deficient asylum procedures and access to those procedures in practice;
 - b) Overall protection rates which are very low;
 - c) The widespread detention of asylum-seekers and the inadequate detention conditions, which have been found to be degrading in several facilities⁴⁰;
 - d) Inadequate reception conditions, which have also been found degrading in certain instances⁴¹, and the fact that many asylum-seekers outside detention live in conditions of destitution;
 - e) The risk of expulsions to Turkey of people with protection needs;
 - f) The absence of any special treatment for children in line with their rights and best interests.
42. In such circumstances, Greece, where it is the Member State responsible under Article 3(1) of the Dublin II Regulation, fails to guarantee the fundamental rights of the asylum-seekers. The transferring Member States cannot be discharged of its obligations under the Union's asylum *acquis* vis-à-vis an asylum applicant and is obliged to examine the asylum application lodged in its territory. Article 3(2) of the Dublin II Regulation is in that context a particular procedural mechanism which permits and facilitates the effective fulfilment of the would-be transferring Member State's own obligations towards asylum-seekers.

⁴⁰ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011 (Annex 5)

⁴¹ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011 (Annex 5) para. 263.

THE QUESTIONS REFERRED

43. Seven UK and two Irish questions were referred. These questions shall be set out individually. However, where substantive overlap in the two sets of questions occurs, this shall be indicated and the questions addressed together accordingly.

Question relating to the Scope of EU Law

44. The first question referred by the Court of Appeal of England and Wales is as follows:

Does a decision made by a Member State under Article 3(2) of Council Regulation 343/2003 ('the Regulation') whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 of the Treaty of European Union and/or Article 51 of the Charter of Fundamental Rights of the European Union ('the Charter')?
(UK Question 1)

45. This question did not emerge for referral from the Irish proceedings, although it was a matter to which detailed submissions were addressed before the Irish High Court, in advance of the reference, and is, if submitted, implicit in the first Irish question.
46. UNHCR submits that the answer to this question is 'yes'. Decisions of a Member State under Article 3(2) of the Regulation do fall within the scope of EU law and must therefore be compatible with the Charter of Fundamental Rights of the European Union.
47. Article 51 of the Charter provides that the provisions of the Charter "are addressed to...the Member States only when they are implementing Union law".

48. This is explained further in the Explanations Relating to the Charter which constitute a source of interpretation of the Charter as explicitly required by Article 6(1) TEU, and which provide as follows in relation to Article 51:⁴²

“As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493)...” [emphasis added].

49. Thus:

- a) The Charter is intended to bind the Member States in the same circumstances as this Court has held the general principle of protection of fundamental rights to bind Member States, *viz* whenever a Member State acts within the scope of EU law; and
- b) It is clear from the Court’s case law (see e.g., its judgment in *ERT*⁴³ referred to expressly in the Explanations) that a Member State acts within the scope of EU law both when it implements EU law and even when it derogates from EU law.⁴⁴

50. Applying these principles, a decision whether or not to accept responsibility under Article 3(2) is plainly a decision which falls within the scope of EU law. In particular, a Member State which decides to assume responsibility under Article 3(2) of the Dublin II Regulation does so pursuant to a power granted to it by the Regulation. It is thereby implementing and acting in accordance with the Regulation. Once the Member State decides to examine an asylum

⁴² Explanations Relating to the Charter of Fundamental Rights of the European Union [2007] OJ C 303/17.

⁴³ Case C-260/89, *ERT* [1991] ECR I-2925.

⁴⁴ See further Advocate-General Sharpston’s Opinion in Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi* (not yet reported), in which she suggests at para. 163 that EU fundamental rights protection is applicable in respect of the acts of Member States wherever the EU has competence (whether exclusive or shared) in a particular area of law.

application under Article 3(2), it then becomes “*the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility*”. Consequently, neither the decision to apply Article 3(2) nor the effect of such decision can be regarded as an opt-out of the Regulation. On the contrary, the assumption of responsibility under Article 3(2) remains squarely within the framework of the Dublin II Regulation and the rules of Union’s asylum *acquis*. For example, a Member State which assumes responsibility under Article 3(2) is then subject to the obligation to take charge of the asylum-seeker imposed by Article 16 of the Regulation.

51. It has been argued, in the context of the domestic proceedings concerning the *N.S.* case, that a decision under Article 3(2) falls outside the scope of EU law because it is akin to a right to introduce more favourable rules than those required by EU legislation. Such argument was put forward with reference to this Court’s judgment in Case C-144/95 *Maurin* [1996] ECR I-2909.
52. But that was a very different case to the present. At issue in *Maurin* was a decision to charge a trader with selling food past its use-by date. The trader argued that this decision fell within the scope of Directive 79/112 requiring the labelling of foodstuffs to indicate their use-by dates and requiring states to prohibit trade in non-compliant products. The Court held that the decision was outside the scope of the Directive because the latter only concerned the labelling. The Directive simply did not seek to address the subsequent sale of products that had passed their use-by date. Consequently, the decision did not fall within its ambit and so did not fall within the scope of EU law.
53. By stark contrast, a decision taken under Article 3(2) is a decision which plainly falls within the ambit of the Dublin II Regulation because it is taken pursuant to powers conferred by the Regulation.

Question relating to the Scope of Protection Provided by the Charter

54. The fifth question of the Court of Appeal of England and Wales is as follows:

Is the scope of the protection conferred upon a person to whom the Regulation applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, 18, and 47 of the Charter wider than the protection conferred by Article 3 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention')? (Question 5)

55. Although this question did not emerge in terms for referral from the Irish proceedings, the two questions referred by the Irish High Court are predicated on the assumption that the transfer of the claimants in those proceedings raises no issue under Article 3 ECHR. This is *not* an assumption made in the UK proceedings. Therefore, it is submitted that the answer to the fifth UK question is of central relevance to the questions raised in the Irish reference, and for convenience is addressed out of sequence here.

56. UNHCR contends that the answer to this question is 'yes'.

57. This question arises in the context of the approach that the English High Court adopted, in the national proceedings, to the assessment of the claimant's fundamental rights. Having noted that the Secretary of State had failed to consider the claimant's rights under Articles 1, 18 and 47, it concluded:

"However, had the Secretary of State considered fundamental rights I cannot see that it would have added anything to this claimant's case. He is not in a vulnerable category and, on any of his accounts, he has demonstrated a great deal of resourcefulness. The impact of his return to Greece on his human dignity has been considered as part of his Article 3 claim. So, too, has the issue of exercising his right to asylum in an effective manner. In this sense this claimant's case in relation to the sovereignty clause is academic."⁴⁵

58. The above passage seems to suggest that a state's assessment of a claim under the Charter is exactly the same as that required under Article 3 ECHR.

⁴⁵ *The Queen on the application of Saeedi v Secretary of State for the Home Department* [2010] EWHC 705 (Admin), para. 158 (Annex 26).

59. This is incorrect. Article 3 ECHR prohibits torture and inhuman and degrading treatment or punishment. In the context of asylum, it requires Member States not to *refouler* an asylum-seeker to territories where he or she would be at risk of such ill treatment. It also requires the receiving state to ensure that the asylum-seeker's living conditions are not inhuman or degrading.
60. The rights conferred by Article 3 ECHR are reflected in Article 4 and Article 19(2) of the Charter.
61. However, Articles 1, 18 and 47 go beyond the protection conferred by Article 3 ECHR. This is apparent, *inter alia*, from their very wording. Thus:
- a) A State's conduct may well infringe Article 1 (respect and protection for human dignity) without affecting its responsibility under Article 3 ECHR, which requires a minimum level of severity for treatment to fall within the scope of Article 3.
 - b) Article 18 of the Charter enshrines the right to asylum. As explained above, the scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met.
 - c) Article 47 provides asylum-seekers with an effective remedy in respect of their asylum application and encompasses not only the procedural

safeguards enshrined in Articles 3 and 13 ECHR but also the relevant guarantees of a fair trial as outlined in Article 6 ECHR.⁴⁶

Questions relating to the Obligation of a Transferring State to comply with Fundamental Rights and Minimum Standards

62. The second, third and fourth questions of the Court of Appeal of England and Wales in the *N.S.* reference are as follows:

Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum-seeker to the Member State which Article 3(1) designates as the responsible State in accordance with the criteria set out in Chapter III of the Regulation ('the Responsible State'), regardless of the situation in the Responsible State? (UK Question 2)

In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the Responsible State will observe (i) the claimant's fundamental rights under EU law; and/or (ii) the minimum standards imposed by Directives 2003/9/EC ('the Reception Directive'); 2004/83/EC ('the Qualification Directive') and/or 2005/85/EC ('the Procedures Directive') (together referred to as 'the Directives')?(UK Question 3)

Alternatively, is a Member State obliged by EU law, and if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the Responsible State would expose the claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2), and/or 47 of the Charter, and/or to a risk that the minimum

⁴⁶ By contrast, the ECtHR held that Article 6 ECHR is not applicable to the asylum procedure, ECtHR, *Maaouia v. France*, Application No. 39652/98, 5 October 2000 (Annex 27).

standards set out in the Directives will not be applied to him? (UK Question 4)

63. In relation to the questions of the Court of Appeal of England and Wales (see paragraph 62 above), UNHCR contends that the answer to Question 2 is ‘no’; the answer to Question 3 is ‘yes’; and the answer to Question 4 is ‘yes’.
64. The two questions of the High Court of Ireland in the *M.E.* reference, which are predicated on the assumption that the transfer of the claimants raises no issues under Article 3 ECHR, are as follows:

Is the transferring Member State under Council Regulation (EC) No. 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter of Fundamental Rights and Freedoms of the EU, Council Directives 2003/9EC, 2004/83/EC and 2005/85/EC and Council Regulation (EC) No. 343/2003? (Irish Question 1)

If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member State obliged to accept responsibility for examining the application under Article 3(2) of Council Regulation (EC) No. 343/2003? (Irish Question 2)

65. In relation to the questions of the High Court of Ireland (see paragraph 64 above), UNHCR contends that the answer to both questions is ‘yes’.
66. It is convenient to address these questions together as they are all directed to the question of the consequences for Member States, when applying Articles 3(1) and 3(2) of the Dublin II Regulation, of their obligation to observe EU fundamental rights, in particular those set out in Articles 1, 4, 18, 19(2) and 47 of the Charter, and including the minimum standards set out in the secondary EU legislation.
67. In summary, UNHCR submits that, if the Member State responsible under Article 3(1) is in breach of its international and EU obligations to protect the

fundamental rights of the asylum-seeker, the transferring Member State cannot be discharged of its obligations under the Union's asylum *acquis* vis-à-vis the asylum applicant. In particular, it is submitted that, if there is sufficient evidence that transfer to the Responsible Member State would expose the claimant to a violation of his fundamental rights, including those fundamental rights which are articulated in the minimum standards of the EU asylum *acquis*, the transferring State is then obliged to examine the asylum application by exercising its power under Article 3(2) of the Dublin II Regulation and to derogate from the hierarchy of responsibility allocation criteria set out in Chapter III (UK Question 4 and Irish Question 2).

68. In UNHCR's view, while the evidential burden initially is on the asylum-seeker to displace the presumption of compliance by the responsible State with its obligations aforesaid, it will shift to the transferring State if the asylum-seeker adduces sufficient evidence of non compliance. As upheld by the ECtHR in its judgment *M.S.S. v. Belgium and Greece*⁴⁷, this shift will also occur where sufficient evidence already exists and is, or ought to be, known to the transferring Member State substantiating the Responsible State's failure to respect fundamental rights of the asylum-seeker. In such circumstances, the transferring Member State is obliged to assess, on a case-by-case basis, the compliance of the Responsible Member State with its legal obligations to observe EU fundamental rights with respect to the applicant (Irish Question 1).⁴⁸
69. It follows that a Member State's obligation to observe EU fundamental rights is not in the least discharged where it sends an asylum-seeker to the Responsible State regardless of the situation in that state (UK Question 2). Nor is it permissible for the Member State to operate on the basis of a conclusive presumption that each Responsible State will observe the

⁴⁷ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011, (Annex 5), paras 352 and 358.

⁴⁸ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011, (Annex 5), para. 359. According to the Court the Belgian authorities could not merely assume that the applicant would be treated in conformity with the ECHR standards, but, on the contrary, would first need to verify how the Greek authorities applied their legislation in practice.

claimant's EU fundamental rights and/or the minimum standards imposed by the Directives (UK Question 3).

70. These submissions are explained more fully below.
71. As outlined above, EU fundamental rights (in particular, those laid down in Articles 1, 4, 18, 19(2) and 47 of the Charter) involve substantive requirements concerning the treatment of an asylum-seeker by the Responsible State.
72. A Member State making a decision under Article 3(1) or Article 3(2) must ensure that its decision complies with fundamental rights. There are two reasons for this:
 - (a) *First*, as explained above in response to UK Question 1, a decision under Article 3(2) falls within the scope of EU law. It follows that, in making such a decision, a Member State must comply with fundamental rights. This is a separate and independent obligation to that which also applies to the Responsible State.
 - (b) *Second*, the fundamental rights contained in the Charter require a Member State not only to ensure the rights of asylum-seekers in its own territory but also that these rights are ensured in the Responsible Member State upon transfer. That would be the case, for example, where it is demonstrated that transfer to another Member State would lead to a violation of fundamental rights contained in Articles 1, 4, 18, 19(2) and 47 of the Charter, i.e. where a risk of *refoulement* exists, access to fair and efficient asylum procedures is not guaranteed in that Member State, where conditions of reception, including detention, are inadequate and may even amount to inhuman or degrading treatment, or where in any other respect the Member State may not be in a position to deliver on other fundamental rights guaranteed in EU and international law.

73. The ECtHR has confirmed this principle. In *TI v UK*⁴⁹, that Court held that:
- a) Article 3 ECHR imposes an obligation on contracting States not to expel a person to a country where substantial grounds have been shown for believing he would face a real risk of being subjected to treatment contrary to Article 3; and, importantly,
 - b) this obligation applies even where a Member State is removing a person to an intermediary country where there is no risk of treatment contrary to Article 3.

74. In other words, Article 3 protects against indirect *refoulement*. Thus the Court stated that:

“...the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country...In the present case, the applicant is threatened with removal to Germany where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not as such threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is, however, one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face a real risk of such treatment. The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the UK to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”.⁵⁰

75. The ECtHR went on to hold that the existence of the then Dublin Convention did not remove this obligation from the United Kingdom, stating that:

“Nor can the UK rely automatically in that context on the arrangements

⁴⁹ ECtHR, *T.I. v UK*, Appl. No. 43844/98, 4 February 2000 [2000] INLR 211 (Annex 23).

⁵⁰ *Ibid.* page 18.

made in the Dublin Convention concerning the attribution of responsibility of the UK to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Where States establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may 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 responsibility under the Convention in relation to the field of activity covered by such attribution.”⁵¹

76. The ECtHR confirmed these principles in *KRS v United Kingdom*,⁵² a case which raised the question whether the transfer of an asylum-seeker by the United Kingdom to Greece contravened his Article 3 rights in circumstances where he might then be removed to Iran. The Court held that the evidence did not then establish that Greece removed people to Iran, so there was no breach of Article 3. However, the Court confirmed as a matter of principle that Article 3 bound the United Kingdom despite the fact that it proposed to remove the claimant to an intermediary country.
77. Furthermore, the ECtHR held that this obligation was not altered by the existence of the Dublin II Regulation which was by that time in force. The conclusion it reached in *TI v UK* that the Dublin Convention did not remove the UK’s obligation to protect the claimant’s Article 3 rights “*must apply with equal force to the Dublin Regulation*”.⁵³
78. The Court held further that the existence of the Union’s asylum *acquis* meant that, in the absence of any proof to the contrary, there was a presumption that Greece would abide by its obligations. Importantly, however, this did not absolve the UK of its own obligations in the event that there was proof to the contrary. The Court specifically noted that, in such circumstances, Article

⁵¹ *Ibid.* page 18

⁵² ECtHR, *K.R.S. v. United Kingdom*, Appl. No. 32733/08, 2 December 2008 (Annex 3).

⁵³ *Ibid.*, Part I B.

3(2) of the Dublin II Regulation would permit the United Kingdom to fulfill its own obligation to protect the claimant's human rights.

79. The ECtHR upheld the above principles in its recent Grand Chamber judgment *M.S.S. v. Belgium and Greece*.⁵⁴
80. It follows from the above that a Member State deciding whether to transfer an asylum-seeker to the Responsible State has its own obligation to protect the asylum-seeker's fundamental rights. This obligation is plainly not discharged simply by transferring the asylum-seeker regardless of the situation in the Responsible State (UK Question 2).
81. For the same reasons, a Member State cannot discharge its obligations to protect fundamental rights by applying a conclusive presumption that the asylum-seeker's rights will be protected in the Responsible State (UK Question 3).
82. As stated above, such an approach would be inconsistent with the ECtHR's decisions in *TI v UK* and *KRS v UK* and with its judgment in *M.S.S. v. Belgium and Greece*. There are three further points to be made:
 - a) *First*, it would be inconsistent with the very nature of fundamental rights protection, which requires in every case a fact-specific assessment of the risks faced by that individual at that time. The operation of a conclusive presumption that the individual's rights would be met elsewhere would seriously undermine the protection afforded by the Charter.
 - b) *Second*, as a matter of fact, it is clearly established by UNHCR's extensive research and information obtained through its representation in Greece (referred to above), that the operation of a conclusive presumption would not, so far as transfer to Greece is concerned, be compatible with the protection of an asylum-seeker's rights under the Charter. In this regard, the pending infringement procedures initiated by

⁵⁴ ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011, (Annex 5), paras. 341-343.

the European Commission against Greece⁵⁵ as well as several ECtHR judgments finding violations by Greece of Articles 3, 5 and 13 ECHR⁵⁶ and the ECtHR's concerns about the detention conditions "*not least given Greece's obligations under Council Directive 2003/9/EC*"⁵⁷ are also concrete evidence of Greece's systematic failure to comply with its obligations under the Charter and under the Union's asylum *acquis*.

c) *Third*, it does not follow from the fact that the Dublin II Regulation puts in place a system for allocating responsibility as between Member States that it also operates to exclude the human rights obligations that would otherwise apply to transferring States. On the contrary, the purpose of the Regulation is to enhance human rights protection for asylum-seekers. This is evident from, inter alia:

- 1) The Treaty provisions on which it is based (ex Article 63 EC Treaty now Article 78 TFEU) which place human rights protection at the very heart of the EU's activities in the area of asylum;
- 2) The Recitals to the Dublin II Regulation itself which make clear that the key purposes of the Regulation are the observance of "*fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18*" (Recital 15); the compliance by Member States with "*obligations under instruments of international law to which they are party*" (Recital 12); and "*ensuring that nobody is sent back to persecution, ie, maintaining the principle of non-refoulement*" (Recital 2); and
- 3) The wording of Article 3(2) of the Regulation itself. Nothing in the Regulation requires a Member State to transfer an asylum-

⁵⁵ Case C-130/08, *Commission of the European Communities v Hellenic Republic* [2008] OJ C128/25.

⁵⁶ ECtHR, *S.D. v. Greece*, Appl. No. 53541/07, 11 June 2009 (Annex 9); ECtHR, *Tabesh v. Greece*, Appl. No. 8256/07, 26 November 2009 (Annex 10); ECtHR, *A.A. v. Greece*, Appl. No. 12186/08, 22 July 2010 (Annex 11); ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011 (Annex 5).

⁵⁷ ECtHR, *K.R.S. v. United Kingdom* Appl. No. 32733/08, 2 December 2008 (Annex 3).

seeker to the Responsible State. On the contrary, Article 3(2) and (3) expressly permit the Member State to do otherwise as acknowledged by the ECtHR in its judgment *M.S.S. v. Belgium and Greece*.⁵⁸ The reason for this is evident from the *travaux préparatoires* of the Regulation. The Explanatory Memorandum attached to the Commission's Proposal for the Regulation states "A Member State may sovereignly decide, for political, humanitarian or practical considerations, to agree to examine an asylum application lodged with it by a third-country national, even if it is not responsible under the criteria in the Regulation".⁵⁹

83. UNHCR submits that these *travaux préparatoires* reveal that the purpose of Article 3(2) is precisely to permit a Member State to assume responsibility itself in circumstances, for example, where it determines that the fundamental rights of the asylum-seeker will not otherwise be protected. This is acknowledged by the Commission in its evaluation of the Dublin system where it states that "Member States apply the sovereignty clause for differing reasons, ranging from humanitarian to purely practical."⁶⁰ The Commission concluded that the "application of the sovereignty clause for humanitarian reasons should be encouraged, as this appears to correspond with the underlying objective of this provision."⁶¹ In 2008, the Commission examined the Dublin II Regulation with a view to recasting certain provisions. It proposed that the sovereignty clause "be used mainly for humanitarian and compassionate reasons."⁶² Significantly, the Commission's proposal confers

⁵⁸ Annex 5, paras. 339-340: The ECtHR noted that:

"Article 3 § 2 of the Dublin Regulation provides that (...) each Member State may examine an application for asylum lodged with it by a third-country national (...) » and that, in the present case, "the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention."

⁵⁹ Explanatory Memorandum attached to "Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national" presented by the Commission, COM(2001) 447 final, 2001/0182 (CNS), pp. 10-11.

⁶⁰ Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, dated 6 June 2007, SEC(2007) 742, pp. 6-7.

⁶¹ *Ibid.*, p. 7.

⁶² Explanatory Memorandum attached to the European Commission's "Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person", (Recast), 2008/0243 (COD), pp. 9, 17,

on it a new power to propose suspension of transfer where it considers that the circumstances prevailing in a Member State may lead to a level of protection for asylum-seekers which is not in conformity with EU law, in particular with the Qualification Directive and the Reception Directive. It also provides for a Member State to request that the Commission order a suspension where it is concerned that the other Member State is not providing asylum-seekers with the protection to which they are entitled under EU law.

84. Consequently, UNHCR submits that where there is no evidence to the contrary, a Member State would be entitled to presume that an asylum-seeker's fundamental rights will be respected in the Responsible State if he is transferred. This presumption under the Regulation that Member States are in compliance with EU fundamental rights, including minimum standards under the Directives, is necessary for the integrity of the system governed by the Dublin II Regulation as an operational instrument, allocating the responsibility among Member States for the examination of asylum claims. However, UNHCR submits that it is vital that this presumption is a rebuttable, and not a conclusive presumption.
85. Therefore, if there is sufficient evidence provided or available that shows that there is a real risk that the Responsible State will not comply with its obligations to protect an asylum-seeker's fundamental rights, then the transferring Member State must consider that evidence and determine whether or not, on the basis of that evidence, the fundamental rights of the asylum-seeker are not guaranteed. If so determined, the Member State where the asylum application is lodged is obliged to examine it and Article 3(2) is in that context the procedural tool allowing that Member State to effectively fulfil its own obligations towards asylum-seekers (UK Question 4 and Irish Question 2). It is well established in law that this will be the case, for example, where the asylum-seeker is at risk of being *refouled*; subjected to torture or inhuman or degrading treatment or punishment; or where access to fair and efficient asylum procedures is not guaranteed.⁶³ Evidence of serious breaches of other

36–7.

⁶³ E.g. see ECtHR, *M.S.S. v. Belgium and Greece*, Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011 (Annex 5)

substantive and/or procedural minimum standards required by the Reception, Qualification and Procedures Directives will also be sufficient.

86. It is UNHCR’s view that a Member State’s duty to guarantee the right to asylum, including by providing access to a fair and efficient asylum procedure, adequate reception conditions and to offer protection against *refoulement* is not affected by the responsibility-allocation criteria under the Dublin II Regulation. Whilst the Dublin II Regulation refers to the objective of ‘rapid processing of asylum applications’; this is in the immediate context of guaranteeing ‘effective access to the procedures for determining refugee status’ and the wider context of the full and inclusive application of fundamental rights guaranteed in international law, including the Charter rights.⁶⁴ Notably, in *Migrationsverket v Edgar Petrosian & Others*, a judgment of the CJEU in the context of the *Dublin II Regulation*, the Court turned to the *travaux préparatoires* for the Regulation in coming to its interpretation of Article 20(1)(d), which interpretation was supported *inter alia* by its finding that “the Community legislature did not intend that the judicial protection guaranteed by the Member State...[in the context of Article 21(d)] should be sacrificed to the requirement of expedition in processing asylum applications.”⁶⁵ Judicial protection of Community law rights is a fundamental right and as such a general principle of EU law. Equally, the mechanism provided for under Article 3(2) of the Regulation provides a means to allow fundamental rights to take precedence over expediency concerns, and should be applied accordingly.⁶⁶

Question relating to Prevention of Consideration of Indirect Refoulement

87. The Court of Appeal of England and Wales’ sixth question is as follows:

Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a Court, for the purpose of

⁶⁴ Dublin II Regulation, Recitals 2, 4 and 12

⁶⁵ Case C-19/08, *Migrationsverket v Edgar Petrosian & Others*, [2009] ECR I-495, paras 41 and 48.

⁶⁶ Also, in certain circumstances, it may be appropriate for States to apply Article 15 of the Dublin II Regulation, which provides for bringing “together family members, as well as other dependent relatives, on humanitarian grounds...”.

determining whether a person may lawfully be removed to another Member State pursuant to the Regulation, to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the Convention or his rights pursuant to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees? (UK Question 6)

This question did not emerge for referral from the Irish proceedings.

88. UNHCR submits that the answer to this question is ‘no’. Article 47 precludes a transferring Member State from requiring by its law that a court treats the Responsible Member State as safe for the purpose of determining whether a person may lawfully be removed to that Responsible Member State.
89. The requirement referred to in this question prevents the court from considering the risk of chain *refoulement*. In so doing, it effectively excludes judicial scrutiny of transfer decisions for breach of the *non-refoulement* obligation where the breach arises from chain *refoulement*.⁶⁷
90. This, in UNHCR’s view, is plainly contrary to Article 47, as it removes the claimant’s ability to challenge a transfer decision for breach of his right to *non-refoulement* where the *refoulement* occurs through an intermediary State. It does not permit a person affected by a transfer decision “*the safeguard of an exhaustive examination of the expediency of the measure in question and for that reason does not meet the requirements of sufficiently effective protection*”.⁶⁸
91. UNHCR recalls this Court’s judgment in *Johnston*,⁶⁹ where it held that the principle of effective judicial control in Articles 6 and 13 ECHR prohibited “a

⁶⁷ Incidentally, unlike the requirement expressed in this question, the provision that is the subject of the national proceedings is not limited to excluding chain *refoulement*. See paragraph 22 of the first schedule to the reference Order in *N.S. v Secretary of State for the Home Department* sent from the Court of Appeal of England and Wales to this Court (Annex 28).

⁶⁸ Case C-136/03, *Dörr v Sicherheitsdirektion für das Bundesland Kärnten* [2005] ECR I-4759, para 47.

⁶⁹ Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts."⁷⁰

The Court found that such a requirement deprived an individual of the possibility of asserting their rights by judicial process. UNHCR submits that the requirement referred to in this question is analogous to that in *Johnston*, as it also requires the court to take the state's pronouncement of its compliance with an obligation under Community law as conclusive evidence thereof, thus removing the scope for legal challenge.

92. Finally, it follows from UNHCR's responses to UK Questions 2, 3 and 4 and Irish Questions 1 and 2 above that the requirement referred to in this question, in imposing a disregard for chain *refoulement*, is also contrary to the transferring state's substantive obligation to respect the claimant's rights of asylum and *non-refoulement* under Articles 18 and 19(2) of the Charter.

Question relating to the Effect of Protocol (No. 30)

93. The seventh question referred by the Court of Appeal of England and Wales is as follows:

Insofar as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to Questions 2-6 qualified in any respect so as to take account of the Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom? (Question 7)

This question naturally did not emerge for referral in the Irish proceedings.

94. UNHCR submits that the answer to the UK Questions 2-4 are not qualified in any way by the Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom.
95. The relevant provision of the Protocol is Article 1(1) which provides:

⁷⁰ *Ibid*, para. 21.

“The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”⁷¹

96. As is clear from the use of the word “*extend*”, Article 1(1) of the Protocol merely confirms that the Charter does not create new rights outside the competency of EU law. Similarly, the 8th and 9th recitals to the Protocol state that its purpose is to “*clarify*” the application of the Charter. These state:

“Noting the wish of Poland and of the United Kingdom to clarify certain aspects of the application of the Charter;

Desirous therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and the United Kingdom”⁷²

97. The purpose and effect of the Protocol is thus to clarify that the Charter does not create new rights applicable in relation to the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom.
98. This is, in any event, evident on the face of the Charter itself. The Preamble to the Charter states that it “*reaffirms...the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council*

⁷¹ Protocol on the Application of the Charter of Fundamental rights of the European Union to Poland and to the United Kingdom [2007] OJ C 306/156.

⁷² *Ibid.*

of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".⁷³

99. In other words, the Charter does not create new rights but reaffirms those which are already protected as part of the general principles of EU law, namely the protection of fundamental rights. As outlined above (See para. 12), such general principles (a) occupied the same position as Treaty provisions in the hierarchy of EU law, and governed the validity and interpretation of secondary Community legislation, as well as national implementing measures; and (b) included the right to asylum.
100. The purpose and effect of the Protocol is simply to confirm this. As the House of Lords European Union Committee concluded in its impact assessment on the Treaty of Lisbon,⁷⁴ "*the Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member State... Indeed, given that, despite media reports, it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States.*"
101. In the present case, the Protocol has no impact on the answers to the questions referred by the Court of Appeal of England and Wales.

CONCLUSION

102. One of the driving forces behind the Dublin II Regulation is responsibility sharing between Member States. Where in a particular Member State, such as Greece, a risk of *refoulement* exists, or where access to fair and efficient asylum procedures is not guaranteed, conditions of reception, including detention, are inadequate and may even amount to inhuman or degrading treatment, or in any other way the State may not be in a position to deliver on other fundamental rights guaranteed in EU and international law when operating its asylum system, it is UNHCR's view that it is the responsibility of

⁷³ Charter of Fundamental Rights of the European Union [2010] OJ 83/02

⁷⁴ The Treaty of Lisbon: an impact assessment, House of Lords Paper 62-I, 13 March 2008, at para. 5.103(d) (Annex 29).

other Member States to take on the responsibility for the examination of an asylum application. This can and should be done by applying Article 3(2) of the Dublin II Regulation, which is the particular procedural mechanism which permits and facilitates the effective fulfilment of the transferring Member State's own obligations towards asylum-seekers in this context.

103. UNHCR submits that, in certain circumstances, a transferring Member State is obliged to assess the compliance of the Responsible Member State with its obligations to protect an asylum-seeker's fundamental rights. In particular, it is submitted that, if there is sufficient evidence provided or available such as to rebut the presumption of compliance by the Responsible State with such obligations, the transferring Member State is then obliged to examine the asylum application by exercising its power under Article 3(2) of the Dublin II Regulation.
104. In the submission of UNHCR, and in accordance with the general principle as applied in asylum cases, such evidence need not emanate from the asylum-seeker, and it may in particular consist of or include evidence of which the transferring Member State is otherwise aware or ought to be aware. In such circumstances, the transferring Member State is obliged to assess, on a case-by-case basis, the compliance of the Responsible Member State with its obligations to protect the asylum-seeker's fundamental rights.
105. It is UNHCR's position, supported by the *travaux préparatoires* of the Dublin II Regulation, that what is envisaged by Article 3(2) includes treatment falling below the level which engages Article 3 ECHR.
106. It is clear that the application of Article 3(2) may as a matter of discretion extend to a wide range of 'political, humanitarian or practical considerations'. However, in circumstances where the responsible State is not in a position to comply with its obligations to respect fundamental rights, notably under Articles 1, 4, 18, 19(2) and 47 of the Charter, it is submitted that the discretion of the transferring Member State under 3(2) of the Dublin II Regulation becomes absolutely constrained and translates to an obligation, deriving from superior norms of European Union law, to protect those

fundamental rights by taking responsibility for the consideration of the asylum claim.

107. The application of Article 3(2) of the Dublin II Regulation in such cases, as appropriate, is in accordance with the principles stipulated in the Dublin II Regulation as well as with its object and purpose, and further it will serve to protect the integrity and efficiency of the Dublin II system and the fundamental rights of the individuals in question. In addition, it will allow affected Responsible States, in this case Greece, to address and improve reception and other conditions within its asylum system so that transfers can again take place in accordance with international law and fundamental rights.
108. UNHCR wishes to emphasize that it has taken a solutions focused approach to the situation in Greece. In its view the proper interpretation and application of Article 3(2) in circumstances such as those in Greece at present are part of that solution. It affords Greece, other Member States, and UNHCR the time and opportunity to address the asylum conditions obtaining in that Member State, and in the meantime ensures that asylum claims are processed fairly, in accordance with the shared responsibilities of Member States in this context, until such time as conditions in Greece are in line with international standards and conform with the guarantees provided for in international law.

RAZA HUSAIN Q.C.

1 February 2011

**WRITTEN OBSERVATIONS OF THE
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

JOINED CASES C-411/10 and C-493/10

N. S.

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT IN UNITED KINGDOM**

- & -

M. E. AND OTHERS

- and -

**REFUGEE APPLICATIONS COMMISSIONER AND THE MINISTER
FOR JUSTICE, EQUALITY AND LAW REFORM IN IRELAND**

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1.	UN General Assembly, <i>Statute of the Office of the United Nations High Commissioner for Refugees</i> , 14 December 1950, A/RES/428(V).	Para 2, Page 3.	16
2.	UN General Assembly, <i>Convention Relating to the Status of Refugees</i> , 28 July 1951, United Nations, Treaty Series, vol. 189.	Para 2, Page 3.	49
3.	ECtHR, <i>K.R.S. v. United Kingdom</i> , App. No. 32733/08, 2 December 2008.	Para 4, Page 4 Para 76, Page 29. Para 77, Page 29. Para 82(b), Page 29	18
4.	UNHCR Observations on Greece as a Country of Asylum, December 2009	Para 7, Page 4. Para 8, Page 7	23
5.	ECtHR, <i>M.S.S. v. Belgium and Greece</i> , Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011.	Para 7, Page 5. Para 10, Page 10. Para 22, Page 11. Para 41, Page 16. Para 68, Page 24. Para 79, Page 28. Para 82(b), Page 29 Para 82(c)(3), Page 30.	117

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6.	Submission by the Office of the United Nations High Commissioner for Refugees in the case of <i>M.S.S. v. Belgium and Greece</i> , Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011.	Para 7, Page 5.	15
7.	UNHCR's oral intervention in <i>M.S.S. v. Belgium and Greece</i> , Judgment (Grand Chamber), Appl. No. 30696/09, 21 January 2011.	Para 7, Page 5.	4
8.	UNHCR information note on the asylum situation in Greece including for Dublin transferees, 31 January 2011.	Para 7, Page 5. Para 8, Page 7.	7
9.	ECtHR, <i>S.D. v. Greece</i> , Appl. No. 53541/07, 11 June 2009.	Para 7(d), Page 6. Para 82(b), Page 29	21
10.	ECtHR, <i>Tabesh v. Greece</i> , Appl. No. 8256/07, 26 November 2009.	Para 7(d), Page 6. Para 82(b), Page 29	20
11.	ECtHR, <i>A.A. v. Greece</i> , Appl. No. 12186/08, 22 July 2010.	Para 7(d), Page 6. Para 82(b), Page 29	27
12.	UNHCR position paper on the return of asylum-seekers to Greece under the "Dublin Regulation", 15 April 2008.	Para 8, Page 7.	10
13.	Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece, 31 January 2010.	Para 10, Page 8.	15
14.	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.	Para 26, Page 11.	61
15.	UNHCR, Advisory Opinion on the Extraterritorial Application of <i>Non-Refoulement</i> Obligations under the	Para 26, Page 11.	19

	1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007.		
16.	UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001.	Para 26, Page 11.	13
17.	Executive Committee, Conclusion No. 81 (XLVIII) “ <i>General</i> ” (1997).	Para 26, Page 11.	3
18.	UNHCR Executive Committee, Conclusion No. 82 (XLVIII), “ <i>Safeguarding Asylum</i> ” (1997).	Para 26, Page 11.	2
19.	UNHCR Executive Committee, Conclusion No. 85 (XLIX), “ <i>International Protection</i> ” (1998).	Para 26, Page 11.	5
20.	UNHCR Executive Committee, Conclusion No. 99 (LV), “ <i>General Conclusion on International Protection</i> ” (2004).	Para 26, Page 11.	5
21.	M-T Gil-Bazo, “ <i>The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union’s Law</i> ” [2008], Refugee Survey Quarterly, vol. 27 no. 3, pages 33-52.	Para 31, Page 13.	20
22.	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.	Para 35, Page 14.	10
23.	ECtHR, <i>T.I. v UK</i> , , Appl. No. 43844/98, 4 February 2000, [2000] INLR 211.	Para 38, Page 15. Para 73, Page 25.	24
24.	ECtHR, <i>Abdolkani and Karimnia v. Turkey</i> , Appl. No. 30471/08, 22 September 2009.	Para 38, Page 15.	43
25.	UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, 21 May 2010.	Para 40, Page 15.	24
26.	<i>The Queen on the application of Saeedi v Secretary of State for the Home Department</i> [2010] EWHC 705	Para 57, Page 20.	34

	(Admin).		
27.	ECtHR, <i>Maaouia v. France</i> , Appl. No. 39652/98, 5 October 2000	Para 61(c), Page 22.	23
28.	First schedule to the Reference Order in <i>N.S .v Secretary of State for the Home Department</i> , sent from the Court of Appeal of England and Wales to the Court of Justice of the European Union.	Para 89, Page 33.	18
29.	The Treaty of Lisbon: an impact assessment, House of Lords Paper 62-I, 13 March 2008.	Para 100, Page 36.	27