IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC 2012/2072-2075

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION) (ENGLAND)

B E T W E E N : -

THE QUEEN
on the application of

EM (ERITREA)
and others

Appellants

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

I. INTRODUCTION

UNHCR

1. UNHCR is well known to this Court. It has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention") and its 1967 Protocol. Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14

December 1950), UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, for seeking permanent solutions to their problems. As set out in the Statute (§8(a)), UNHCR fulfils its mandate inter alia by, "*promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto*". UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The supervisory responsibility is exercised in part by the issuance of interpretative guidelines and other materials. In the United Kingdom, UNHCR has a statutory right to intervene in the First Tier and Upper Tribunals (Immigration and Asylum Chamber). In this Court, UNHCR seeks, in appropriate cases, permission to intervene to assist through submission on issues of law related to its mandate. Such permission when sought, including the ability to attend the hearing and make brief oral submissions, has always been granted by the House of Lords and Supreme Court: as in this case, for which UNHCR is very grateful.

The Context

2. These appeals concern the circumstances in which the United Kingdom must in law refrain from transferring an individual to another EU Member State, either as an asylum seeker under Council Regulation 343/2003 ("the Dublin II Regulation") or as a recognised refugee, in order to comply with its human rights obligations including under the Human Rights Act 1998 ("the HRA") and the EU Charter of Fundamental Rights ("the Charter").

3. Although these cases concern risks under Article 3 ECHR / Article 4 of the Charter, UNHCR's position is that obligations not to transfer can also arise in circumstances such as where there is a real risk of a breach of other fundamental rights contained in the Charter, including the principle of *non refoulement* itself (Article 19(2)), the right to human dignity (Article 1), the right to an effective remedy (Article 47), and the right to asylum (Article 18).[1] This would

[1] Indeed, the Advocate General in *NS* accepted that an obligation not to transfer would arise where there was a risk that "*one or more of the asylum seeker's rights enshrined in the Charter may be violated*" (§116) and gave as examples violations of Articles 1, 4 and 18 (§§111-115). This point was

include serious breaches of minimum standards laid out in the EU Asylum Directives.

4. Two of the Appellants (EH and EM) are asylum seekers who fall within the scope of application of the Dublin II Regulation. Two (AE and MA) have already been recognised as refugees by Italy and so fall outside the scope of that Regulation.

5. At the heart of this appeal lie questions about the judgment of the Court of Justice of the European Union ("CJEU") in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* [2013] QB 102 ("*NS*"), in light of the judgment of the European Court of Human Rights in *MSS v Belgium and Greece* (2011) 53 EHRR 2 ("*MSS*"). UNHCR intervened in both of these cases.

6. The legal framework in this case involves four features in particular:

   (1) The arrangements under the Dublin II Regulation, for allocating responsibility for assessing asylum applications among EU Member States, include criteria for identifying the responsible State. As the CJEU confirmed in *NS*, the Dublin II Regulation must be read compatibly with principles of fundamental rights and this places constraints on the circumstances in which a Member State may transfer an asylum seeker to the putatively responsible State. Where the human rights obligations of a Member State preclude transfer, if necessary, the Member State may itself have to examine the asylum application.

   (2) The Human Rights Act 1998 imposes a statutory human rights obligation (section 6), upon the Secretary of State as a public authority, not to act incompatibly with ECHR-based Convention rights including Article 3 (scheduled to the Act). The domestic Court has the function of enforcing that duty, in proceedings involving a victim (section 7). A human rights claim may be a claim that removal to another country would be unlawful under section 6. Parliament has provided that such a claim can be the basis for a statutory appeal.

   (3) The Secretary of State has a domestic statutory function of certification of such a human rights claim, in the context of proposed return to a European country, if the claim is "clearly unfounded": Asylum and

---

developed in UNHCR's written and oral submissions to the CJEU in *NS*. The Court did not address the point.

Immigration (Treatment of Claimants etc) Act 2004 section 33, Schedule 3 §1(1) ("human rights claim"), §2 (list of countries) and §5 (certification function). It follows that the UK Parliament recognises that a human rights claim, in relation to removal to another *European* country, may or may not be unfounded; and it may or may not be clearly unfounded. If a characterisation of a human rights claim as "clearly unfounded" is not justified, considering the matter objectively, the certification will be contrary to law and will be quashed by the domestic Court on judicial review. In that situation, or the situation where no certification is made, the consequence of that is that the human rights claim is allocated to the immigration appellate authorities by means of an in-country statutory appeal.

(4) Under the EU Charter of Fundamental Rights, Article 4 contains a human rights protection in equivalent language to ECHR Article 3. The UK, as an EU Member State, is obliged to observe and promote the application of the Charter whenever implementing an instrument of EU law (see Article 51 of the Charter).

The Court of Appeal's Approach

7. In its judgment below, the Court of Appeal held as follows:

(1) There was no need to distinguish between the asylum seekers and the refugees in this case. According to the Court (§48), "*the reasoning of the CJEU in NS plainly calls for a uniform approach to the present cases*".

(2) On the basis of the evidence (§§12-28, 29-31), the Court was satisfied that there was a triable issue that return to Italy would expose the appellants to a real risk of Article 3 ill-treatment (§32). It was "*plainly … arguable*" that each appellant "*faces a real risk of inhuman or degrading treatment if returned to Italy*" (§61).

(3) That was because, notwithstanding evidence relied on by the Secretary of State as to "*the system in theory*", the appellants could point to: "*their own experience and that of many others*", supported by "*independent reports*", as evidence of "*what happens in reality to a very considerable number both of asylum seekers and of recognised refugees*", in an Italian system which is "*in large part dysfunctional*" and results in "*a very real risk of destitution*" (§§31 and 61).

(4) Such evidence was, however, no longer enough. As a consequence of the CJEU's judgment in NS, the Court had "*no choice*" (§48) but to adopt

an approach (§47) which served to *"elevate"* into a *"sine qua non of intervention"* – a *"condition of intervention"* which was now *"necessary"* (§47) and *"the sole ground"* (§62) – the following requirement:

(a) There must be *"a true systemic deficiency"* (§46). Nothing else would do.
(b) This was a *"threshold"*, and one *"which exists nowhere else in refugee law"*, but *"which is now the law"* (§61).
(c) It could not suffice that there were *"operational problems"*, and risks *"arising from operational problems"* (§§46-47).
(d) It could not suffice that there was *"proof of individual risk, however grave"* and however *"arising"* (§47). Absent a *"systemic deficiency … powerful evidence of individual risk is of no avail"* (§62).

(5) This was a context where – for good reason (§41) – UNHCR's opinion had, in previous cases of transfer to another EU Member State, been treated as *"pre-eminent and possibly decisive"* (§39). However, the Court concluded that UNHCR's July 2012 recommendations on aspects of refugee protection in Italy (§50) could be said to be *"an essay in diplomacy rather than a critical or objective appraisal"*, which left a *"gap"* to be filled (§52), and which other – albeit *"extremely troubling"* – evidence could not fill (§63).

UNHCR's Position

8. For the reasons developed below, UNHCR submits that the correct position on these matters (§7 above) is as follows:

(1) The claims of the asylum seekers and the refugees should be treated differently. Only the Appellants seeking asylum fall within the scope of application of the Dublin II Regulation (and therefore within the scope of the CJEU's ruling in *NS*).

(2) The Court was entitled to be satisfied that there was a triable issue under the well-established and conventional test, namely whether the appellants face a real risk of Article 3 ill treatment. That remains the relevant test, and answering it is sufficient.

(3) It was legally appropriate for the appellants to put forward evidence of their *"experience"*, and *"what happens in reality"*.

(4) The CJEU's judgment in *NS* has not *'elevated'* evidence of systemic deficiency into a necessary precondition for an asylum-seeker not to be

transferred under Dublin to another "Dublin" State. There is no "*sole ground*" of "*true systemic deficiency*". Establishing a "systemic deficiency" is only one way of proving that an asylum-seeker would face a real risk of Article 3 ill treatment and therefore that he or she must not be transferred to the other Dublin State. The issue is not the source of risk ("systemic deficiencies" or otherwise) but simply that there are substantial grounds for believing that that individual would face a real risk of being subjected to treatment contrary to Article 3.

(5) Depending on its nature and context, a UNHCR report may indeed be "*pre eminent and possibly decisive*" as to the existence of relevant risks or inadequacies. However, UNHCR's July 2012 Recommendations did not purport to reach general conclusions on Dublin II returns and was intended, among other things, to encourage the Italian authorities to take steps to address problems in the asylum system. Thus those Recommendations should not be seen as conferring, in effect, a 'clean bill of health' on the Italian asylum system. On the contrary, the problems identified in the Recommendations were capable of giving rise to a relevant real risk, approached on a case by case basis.

II. STRASBOURG AND ECHR ARTICLE 3

ECHR Article 3: First Principles

9. Article 3 of the ECHR imposes an obligation on a contracting state not to remove a person to a country where substantial grounds have been shown for believing that that person would face a real risk of being subjected to treatment contrary to Article 3. This is the well-known *Soering* principle, recognised in 1989, and endorsed and applied ever since: see e.g., the judgment of the Grand Chamber in *Saadi v Italy* (2009) 49 EHRR 30. It is the conventional test which the Court of Appeal regarded as raising a triable issue on the evidence (§32).

10. As Lord Hutton explained in *Yogathas* (§13 below) at §61(1) and (2), the relevant treatment contrary to Article 3 may concern (a) serious harm experienced in the receiving country (eg. living conditions or conditions of detention) or (b) risks of onward removal to face serious harm in a country of ultimate return. Relevant risk of either of these will suffice.

11. Further:

(1) The question of real risk necessarily calls for an assessment of the situation in the receiving country: see *Saadi v Italy* §126. The assessment of real risk must necessarily be a rigorous one: this was recognised in *Chahal v United Kingdom* (1997) 23 EHRR 413 §96, and *Vilvarajah v United Kingdom* (1991) 14 EHRR 248§108: and see eg. *Saadi v Italy* §128.

(2) It is initially for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he would be exposed to the real risk of relevant ill-treatment. However, where such evidence already exists and is, or ought to be, known it is for the Government to dispel any doubts about it. See *Saadi v Italy* §129.

(3) The Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind both:

(a) the general situation there; and
(b) the applicant's personal circumstances.

This was recognised in *Vilvarajah* §108, and has been ever since: see *Saadi v Italy* §130.

(4) In considering the general situation, importance will be attached to recent reports from independent international human rights protection associations or governmental sources. See *Saadi v Italy* §131.

12. What follows is that:

(1) In relying on Article 3 to impugn a proposed removal, a human rights claimant is entitled to rely on the arrangements in the country of return and how they operate in practice. Those arrangements constitute part of the asylum systems of those countries, meaning they are among the 'systemic' features of the asylum framework. That is part of the general situation: see §11(3)(a) above. Reports from reliable sources will be very relevant: see §11(4) above.

(2) In relying on Article 3 to impugn a proposed removal, a human rights claimant is also entitled to rely on their individual position, characteristics or experiences. That is part of the personal circumstances: see §11(3)(b) above.

(3) Whatever sources and materials are relied on, the test remains the same – have substantial grounds been shown for believing that this person

would face a real risk of being subjected to treatment contrary to Article 3 (§9 above)? As explained at §11(2) above, while it is initially for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he or she would be exposed to the real risk of relevant ill-treatment, where such evidence already exists and is, or ought to be, known it is for the Government to dispel any doubts about it (See *Saadi v Italy*, §129; See also §24 below).

***TI v UK* (followed in *Yogathas v SSHD*)**

13. The invocation of Article 3 in the context of Dublin returns was considered by the European Court of Human Rights in *TI v United Kingdom* Application No.43844/98 [2000] INLR 211. The decision in *TI* was applied by the UK House of Lords in *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920. The applicants in both these cases were Sri Lankan nationals whom the Secretary of State wished to return to Germany under Dublin I (the Dublin Convention 1990). They relied on a risk of onward removal (from Germany to Sri Lanka). They relied, in particular, on asylum arrangements in Germany: the nature of the hearing which would be available; the evidence that would be admitted; and the practice at the time of not recognizing 'non-State agents' as potential persecutors. Their human rights claims failed, because the Courts were satisfied that there was no protection gap in practice: the applicants would be entitled to make their substantive claims in Germany and, if well-founded, secure protection under section 53(6) of the Aliens Act.

14. The cases of *TI* and *Yogathas* are significant, because:

    (1) The Courts applied the established standards and test under Article 3. The ECtHR in *TI* identified as applicable the *Soering* principle (§9 above): the obligation not to return a person to a country where substantial grounds have been shown for believing that person would face a real risk of being subjected to treatment contrary to Article 3 (see *TI v UK* at p.227-228). The Court applied it: TI failed because *"it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3"* (p.231). The test was identified as applicable in *Yogathas* by Lord Bingham at §11 (p.928D-E); Lord Hope at §§25 and 51; Lord Hutton at §61(1) and (2).

    (2) The Courts did not adopt a qualified standard or special threshold. Indeed, in *TI* the United Kingdom had argued for an adjusted approach: (a) that the Court should be *"slow to find that the removal of a*

person from one [ECHR] Contracting State to another would infringe Article 3"; (b) that applicants could pursue ECHR arguments in German courts; (c) that it was *"wrong in principle"* to have a *"policing function of assessing whether another Contracting State such as Germany was complying with the [ECHR]"*; and (d) that it would *"undermine the effective working of the Dublin Convention … to allocate in a fair and efficient manner State responsibility within Europe for considering asylum claims"* (see *TI v UK* p.226). None of these considerations affected the test or its application. The Court said (p.228, emphasis added):

> *"the indirect 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 its decision to expel, exposed to treatment contrary to Article 3 of the Convention."*

It continued:

> *"Nor can the United Kingdom 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 … It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention …"*

See too, in this regard, Lord Hutton in *Yogathas* at §61(3).

15. *Yogathas* was a case about certification and unfoundedness. As has been seen (§6(3) above), the UK Parliament has recognised that a human rights claim in relation to removal to another European country may, or may not, be unfounded. If clearly unfounded, it may be certified. If not, it may be appealed, and the appeal will either succeed or fail on its merits.

***MSS v Belgium* (after *KRS v UK*)**

16. *MSS v Belgium* was a case in which the applicant, an asylum-seeker from Afghanistan who had faced Dublin return (Belgium to Greece), relied in various ways on arrangements (cf. §12(1) above). He succeeded in demonstrating that the test was satisfied, and that his Dublin removal by Belgium to Greece had violated Article 3.

17. In *MSS*, the Applicant relied on evidence in relation to the general situation (see §11(3)(a) above) in three different ways:

(1) First, as to Greece's asylum procedures. This part of the case was about onward-removal (Greece to Afghanistan): see §10(b) above. Where the applicant in *TI* had failed (§13 above), in arguing that Germany's asylum procedures would fail to protect him against onward removal (Germany to Sri Lanka), the applicant in *MSS* succeeded: Greece's asylum procedures would fail to protect him against onward removal (Greece to Afghanistan). There was a risk of return to Afghanistan, because of the enhanced risk category into which the Applicant fell, as assessed in UNHCR's Eligibility Guidelines: see §§294-297. The way Greek asylum legislation was "*applied in practice*" and the "*major structural deficiencies*" in the procedure meant that "*asylum seekers have very little chance of having their applications and their complaints … seriously examined by the Greek authorities*": see §300. As the Applicant had put it (§324): "*the asylum procedure in Greece was so deficient that his application for asylum had little chance of being seriously examined by the Greek authorities*". In the light of the "*reports and materials*" as to "*the practical difficulties*" and "*the deficiencies of the asylum procedure*" and the "*practice*" (see §347), the position was that "*the Belgian authorities knew or ought to have known that [the Applicant] had no guarantee that his asylum application would be seriously examined by the Greek authorities*": see §358. This meant there was a violation of Article 3 in effecting a Dublin return from Belgium to Greece: see §360.

(2) Secondly, as to Greece's detention and welfare arrangements. This part of the case was about conditions in the country of immediate return: see §10(a) above. Conditions in Greek detention centres had previously been characterised as involving inhuman and degrading treatment (see §§222 & 231), and on return (Belgium to Greece) the Applicant had been held in conditions which violated Greece's Article 3 obligations (see §§206, 233-234). As to living conditions while at liberty (and welfare arrangements), the situation described by the Applicant (§254) was supported by reports of "*the everyday lot of a large number of asylum seekers with the same profile as that of the applicant*" (§255), and violated Article 3 (see §263). His representative relied on this as a "*situation regarding the systematic violation of the fundamental rights of asylum seekers in Greece*" (§324). In the light of the Applicant's own experiences, and of facts which were well known and freely ascertainable from various sources (§366), the Belgian action of threatened Dublin removal of the Applicant to Greece was a violation of his Article 3 rights as it "*knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment*": see §367.

(3) Thirdly, as to Belgium's practice of Dublin removal. In successfully pursuing these complaints about Greece's arrangements (§§17(1) and 17(2) above), the Applicant made a point about Belgium's arrangements or systems for protection. The argument here was that Belgium had operated a presumption that Greece would adhere to its human rights obligations, as "*a systematic practice of the Belgian authorities*" (see §325, last sentence). The Court agreed, and this featured in its reasoning. It found that the Belgian process did not even allow the "*possibility for the applicant to state his reasons militating against his transfer to Greece*" (§351), so that the Belgian Aliens Office "*systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception*" (§352), and "*the Belgian authorities applied the Dublin Regulation systematically*" (§366). From this too, the court concluded that Belgium's transfer of the applicant to Greece gave rise to a violation of Article 3 ECHR (§360).

18. So, in all these ways, the focus in *MSS v Belgium* was on arrangements (§12(1) above). However, *MSS* did not involve some new and different test, or threshold for meeting a test. The points about arrangements – considered alongside the Applicant's position as to enhanced risk (§296), the position in practice ("*everyday lot*") of those with "*the same profile*" (§255), and his own personal experiences (§§233-234; 253-264; 366 fn.163) – were sufficient to establish that the Article 3 test was met. In particular:

(1) The Court identified "*principles*" (see the heading at §344), by reference to the previous case-law, including *TI v UK* (which it discussed at §342) and the relevant obligation (§9 above), to which it referred (§342): "*in accordance with the well-established case-law, not to deport a person where substantial grounds had 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*" (emphasis added).

(2) The Court identified that "*approach*" as "*confirmed and developed*" (see §343) in the previous case of *KRS v United Kingdom* (2009) 48 EHRR SE8. That case had itself applied *TI v UK* (§§13-14 above) to removal under the Dublin II Regulation. It had reflected the onus on the Applicant (see §11(2) above), in terms of assuming compliance with obligations, but only "*in the absence of proof to the contrary*" (*MSS* at §343). The *KRS* decision had repeated and applied the *Soering* test (from *Saadi v UK* §125) (see *KRS* p.142), and had held that the application of that obligation in a Dublin removal context (seen in *TI v UK*) "*must apply with equal force*" to the Dublin Regulation (see *KRS* p.143).

(3) There was in *MSS* no identification of any different or alternative test or threshold. On the contrary, the test was specifically repeated, there being an "*obligation*" not to return (see §365):

> "*where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country.*" (emphasis added)

(4) It was this test (§§342, 365) which was applied in finding that Article 3 had been violated (§§360, 368).

(5) Nothing in *MSS* restricted an applicant's ability to rely on (a) the general situation and/or (b) personal circumstances (§11(3) above). Rather, the position was that this was a context which involved an applicant who was relying principally on the general situation: see §17 above.

(6) The link between the general arrangements and the individual was emphasised throughout. The Greek Government had argued that any "*deficiencies … in the asylum procedure*" were such as "*had not affected the applicant's particular situation*" (§303). The Belgian Government had argued that the applicant had to show that "*he was at risk*" with "*a link between the general situation complained of and the applicant's individual situation*" (§326). The Court held that the applicant had indeed been at real risk (§§358, 367). It described the link in this way (§359):

> "*the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable*".

19. The position reflects ECHR Article 3 first principles (§§9-12 above), so that:

(1) *MSS* illustrates that in relying on Article 3 to impugn a proposed removal, a human rights claimant is entitled to rely on the arrangements in the country of return and how they operate in practice (§12(1) above), looking at the general situation (see §11(3)(a) above), as to which reports from reliable sources are very relevant (see §11(4) above).

(2) *MSS* does not detract at all from the fact that in relying on Article 3 to impugn a proposed removal, a human rights claimant is also entitled to

rely on their individual position, characteristics or experiences (§11(3)(b) above). Indeed, the applicant in MSS did rely on his characteristics and experiences. See §§17(2) and 18 above.

(3) *MSS* endorses what it is for the applicant to adduce and the Government to dispel (see §11(2) above): see *MSS* §§352, 359-359.

(4) *MSS* confirms that, whatever sources and materials are relied on, the test remains the same (§§9 and 12(3) above): have substantial grounds been shown for believing that this person would face a real risk of being subjected to treatment contrary to Article 3?

(5) *MSS* does not detract from the importance of evidence of the reality, and of how arrangements operate in practice. On the contrary, the Strasbourg Court focused on evidence as to "*the everyday lot of a large number of asylum seekers*" (§255); and as to how Greek legislation was "*being applied in practice*" (§300), so that the Belgian authorities needed to "*verify*" (§359) "*how the Greek authorities applied their legislation on asylum in practice.*"

Strasbourg Cases post-*MSS*

20. There have been ECtHR decisions, subsequently to *MSS*, where applicants have relied on arrangements in the context of Article 3 and Dublin removal. In *Hussein v Netherlands* Application No.27725/10, the Court said, in the context of "*the general situation and living conditions in Italy of asylum seekers*", that the material did not "*disclose a systemic failure to provide support or facilities catering for asylum seekers … as was the case in MSS*" (§78). In *Daytbegova v Austria* Application No.6198/12, the Court said, in the context of Italian asylum procedures ("*obstacles to the lodging of asylum applications*") and "*the general situation and living conditions for asylum seekers in Italy*", that the material did not support "*such a systemic failure as was the case in MSS*" (§66).

21. However, the Court has held to the applicable test (§9 above). That is the test which the materials relied on – whether general or individualised – need to meet.

22. The Court has maintained the other Article 3 first principles (§§10-12 above), in particular the key points (with supporting references) that:

(1) The question of real risk necessarily calls for an assessment of the situation in the receiving country: *Hussein* §68; *Daytbegova* §60. The assessment of real risk must necessarily be a rigorous one: *Hussein* §68.

(2) It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he would be exposed to the real risk of relevant ill-treatment. *Hussein* §68; *Daytbegova* §60.

(3) The Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind both: (a) the general situation there; and (b) the applicant's personal circumstances. *Hussein* §69; *Daytbegova* §61.

23. Individual circumstances and individual risk plainly remain relevant and have been treated as such. In *Hussein*, the Court specifically went on to consider "*the manner in which the applicant was treated upon her arrival in Italy*" (§78) and *"her future prospects if returned to Italy"* (§78), having addressed the circumstances which would apply to her and her family (§77). In *Daytbegova*, the Court went on to address the applicant's health conditions and needs (§§67-69).

Onus and presumptions

24. As to onus, the correct position in relation to Article 3 ECHR cases is as follows:

(1) It is well-established that it is initially for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he or she would be exposed to the real risk of relevant ill-treatment. The same case-law establishes that where such evidence already exists and is, or ought to be, known it is for the Government to dispel any doubts about it. See *Saadi v Italy* §129. See §11(2) above.

(2) In the absence of such evidence which is capable of such proof, the courts are entitled to assume that another ECHR Member State will comply with its obligations: see *MSS* §343, referring to *KRS*.

(3) Where sufficient evidence is known or should have been known to the removing State, the applicant cannot be expected to bear the entire burden of proof: see *MSS* §352.

(4) It is for the removing State to verify what the true position is: see *MSS* §359.

Implications of the ECHR Article 3 Analysis

25. As has been seen (§7(2) above), the Court of Appeal considered that the Appellants in the present case had identified, by reference to the general situation and their personal circumstances, a properly arguable case based on the *Soering* test. Further, they recognised that nothing in the *MSS* case in Strasbourg stood in the way of that conclusion. The Strasbourg Court in *MSS* concluded that certain evidence was sufficient to support a finding of a violation (see §32 below). The Strasbourg Court was not treating some new condition or test as being necessary. The Court of Appeal held that – leaving aside the CJEU's judgment in *NS* and the idea of a new and narrower precondition – the certifications could not be maintained and the appellants were entitled to pursue their human rights claims on an in-country appeal.

26. UNHCR submits that on that basis, the appeals in this case should have been allowed by the Court of Appeal. The reasons are:

    (1) The HRA s.6 duty is intended to reflect the United Kingdom's obligations under the ECHR, as applied in Strasbourg. It is the Strasbourg Court which authoritatively expounds the correct interpretation of the ECHR and provides the authoritative guidance: cf. *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 §20.

    (2) As far as all the Appellants are concerned, that is the end of the matter. Nothing in the Dublin II Regulation or in the CJEU's ruling in *NS* can or does absolve the UK authorities from complying with their duty under s.6 HRA.

    (3) Appellants AE and MA are refugees who are not within the scope of the Dublin II Regulation (or the ruling in *NS*).

    (4) As for Appellants EH and EM, under the Dublin II Regulation, there is a discretionary power to assume responsibility (Article 3(2)). Where a domestic statutory duty of non-return arises, as under HRA s.6, even if a Member State is obliged to exercise its power under Article 3(2), there is no clash with EU law.

    (5) The Court of Appeal referred to the Dublin system as *"enshrined in EU Regulations"* and *"justiciable, with binding effect, before the judicial organs of the Community"* so that a CJEU's judgment *"alone binds us"* (§43). In fact, there can be nothing which *"binds"* the domestic Court as to the application of section 6 of the Human Rights Act 1998, in circumstances where the relevant provision of EU law contains a discretion. Nothing in

EU law purports to identify the United Kingdom as being under a duty to remove an individual under the Dublin Regulation where this would be incompatible with a domestic statutory human rights duty. Even if the CJEU in *NS* purported to adopt a more restrictive approach to Article 4 of the Charter than is applied under the ECHR to Article 3 (which it did not), it did not seek exhaustively to define the circumstances in which individual Member States may have a duty under their own domestic laws not to transfer an asylum seeker under the Dublin II Regulation. Its ruling did not extend beyond addressing a question of whether EU law precludes transfer.

III. LUXEMBOURG AND ARTICLE 4 OF THE CHARTER

ECHR Article 3 Standards and EU Law

27. Article 4 of the EU Charter of Fundamental Rights is expressed in identical terms to Article 3 ECHR. As Article 52(3) of the Charter and the Explanations Relating to the Charter (2007 OJ C 303/2) make clear, Article 4 of the Charter and Article 3 ECHR are intended to have the same meaning. This means that the CJEU is bound to interpret Article 4 of the Charter consistently with Article 3 ECHR.

28. As a matter of EU law, the Dublin II Regulation must be applied compatibly with Article 4 of the Charter and Article 3 ECHR. As regards Article 4 of the Charter, this follows inter alia from Article 6(1) TEU which provides that the provisions of the Charter "*shall have the same legal value as the Treaties*" and from the CJEU's ruling in *NS* which establishes (see §42(1) below) that a decision by a Member State taken pursuant to Article 3(2) is a decision "*implementing European Union law within the meaning of Article 51(1) of the Charter*" *(NS* §69).

29. As regards Article 3 ECHR, this follows inter alia from Article 6(3) TEU which provides that the rights contained in the ECHR "*shall constitute general principles of the Union's law*", and from the well-established case-law of the CJEU which establishes that the general principles of EU law, including the protection of fundamental rights, bind Member States when they exercise a discretionary power conferred by EU law (See, for example, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (Case 5/88) [1989] ECR 2609). The Dublin II Regulation, which seeks to rationalise the treatment of asylum claims within the European Union by determining a *single Member State*

responsible for each claim, was "conceived in a context" in which it was assumed "*that all the participating states...observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the member states can have confidence in each other in that regard*" (*NS* §78). There is a said to be a presumption that "*asylum seekers will be treated [within the EU] in a way which complies with [their] fundamental rights"*, but that presumption "*must be regarded as rebuttable" (NS* §104).

The CJEU's ruling in *NS*

30. UNHCR's position is that *NS* should not be interpreted as laying down a requirement under EU law, that there be evidence of 'sys*temic*' deficiencies – and "true" systemic deficiencies and not 'operational' ones – in the asylum system of the responsible State before return becomes inappropriate and requiring Article 3(2) of the Dublin II Regulation (see §7(4) above). Such an interpretation of the *NS* judgment is neither consistent with legal principle nor compelled by the terms of the ruling itself.

31. As to the terms of the ruling in *NS*, the reference to "*systemic deficiencies*" must be seen in context. The use of this language arose out of the judgment of the European Court of Human Rights in *MSS*, and the focus in that case on arrangements in Greece: see §17 above. The *MSS* claim had recently succeeded, in a judgment handed down just a few months earlier. *MSS* made this aspect of the *NS* case much more straightforward than it would otherwise have been. *MSS* constituted, as the Court of Appeal recognised (§39), Strasbourg jurisprudence which *"for the present … placed Greece outside the Dublin II system"*. Returns to Greece, of those in respect of whom a relevant risk arose, could not be undertaken compatibly with Article 3. Whether Article 3 standards were violated had been asked and answered by Strasbourg.

32. As has been seen (§§16-19 above), far from requiring evidence of "true" and "systemic" deficiencies as <u>necessary</u>, the Strasbourg Court in *MSS* was making clear that the evidence in that case was <u>sufficient</u> to establish risk, even if it was based on general arrangements and no individualised evidence were presented. The Court of Appeal understood this (CA §47), referring to: *"What in the MSS case was held to be a sufficient condition of intervention"*. Indeed, if anything, the Strasbourg Court was acknowledging that individualised evidence of risk would normally constitute better evidence but that, in the absence of that, evidence of 'systemic' deficiency could suffice (see §18(6) above). In fact, as has been seen (§17(2) above), the evidence in *MSS* did include evidence of the Applicant's own experiences, both as to

detention conditions and living arrangements. It also included evidence as to the practical experience of – and the reality for - groups of asylum-seekers in the class of which he was a member.

33. In *NS* the CJEU referred to the Strasbourg findings in the *MSS* judgment, of systemic deficiencies in Greece. In fact, the Court in *NS* did this in order to refute the arguments made by several Member States that they "*lack the instruments necessary to assess compliance with fundamental rights by the member state responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that member state*": see *NS* §91. The CJEU held that this argument was ill-founded on the basis that "*information such as that cited by the European Court of Human Rights enables the member states to assess the functioning of the asylum system in the member state responsible, making it possible to evaluate those risks*". It does not follow from this (and the CJEU did not hold) that evidence of an individualised risk that Article 3 ECHR/ Article 4 of the Charter would be breached would be insufficient to trigger a duty on the part of a Member State not to transfer under Dublin II and, if necessary, to consider the claim itself under Article 3(2) of the Dublin II Regulation. The CJEU was simply not dealing with that question.[2]

34. Moreover, the CJEU's conclusion was clearly based on the context. It arose out of the claims that were being advanced. In fact, the Court was careful to say: "*in <u>situations such as that at issue</u> in the cases in the main proceedings*" (§94). In other words, it was concerned with the situation where the applicant was relying on systemic deficiencies as the basis for the individual real risk and was seeking to make good that case.

35. In the judgment below, the Court of Appeal placed weight on §§81-82 of the CJEU's judgment in which, the Court of Appeal said (CA §46), the CJEU "*took care... to distinguish a <u>true</u> systemic deficiency from '<u>operational</u> problems', even if these created 'a substantial risk that asylum seekers may... be treated in a manner incompatible with their fundamental rights*". That observation, with respect, involves reading §§81-82 out of their proper context. The CJEU did not say that "*operational problems*" could never found a successful challenge: take the situation where, for so-called "*operational*" reasons, there is the real risk that asylum claims will not be considered on their merits or detainees will be left without basic facilities.

[2] *NS* evidently did not adduce evidence of personal circumstances or individual risk but relied solely on evidence of shortcomings in the Greek asylum system, so recently described as fatal by the ECHR in *MSS*. It is unsurprising that the CJEU confined its judgment accordingly.

36. In this part of the judgment, the CJEU was seeking to focus on the substantive question of what fundamental rights infringements would trigger a duty not to transfer an asylum seeker to the putatively responsible Member State. It was seeking to ensure that the purpose of that Regulation would not be undermined by precluding Member States from transferring asylum seekers in the event of the risk of "*any infringement of a fundamental right*" (§82) or, indeed, in the event of "*the slightest infringement of Directives 2003/9, 2004/83 or 2005/85*" (*NS* §§82-83, emphasis added).

37. The CJEU was not, in *NS*, denying that a Member State would be precluded from transferring an asylum seeker in the event of evidence pertaining to a particular individual which demonstrated that the individual would face a real risk that their Article 3 ECHR (Article 4 of the Charter) rights would be infringed if returned to the responsible State. Still less was it addressing the position if a real risk arose out of the reality; or arose out of operational arrangements. The CJEU referred to "*systemic deficiencies*" because this had been established on the evidence by the Strasbourg Court in *MSS* and because such deficiencies were what *NS* was relying on to establish risk. It did not find that evidence of risks in reality, risks from operational matters, or individualised risks would be insufficient.

38. Nor are these concepts and distinctions which make sense in a human rights context. Article 3 ECHR and Article 4 of the Charter standards are intended to be practical and effective. They look at substance and not form. Why should the outcome be different where those placed in immigration detention face appalling conditions: (a) because policy decisions are taken to provide insufficient cells or beds or toilets or food; (b) because allocated resources are inadequate to have sufficient cells or beds or toilets or food; or (c) because detention staff 'operate' the system so as not to allow access to sufficient cells or beds or toilets or food?

39. Why should it matter that the applicant is within a group (perhaps of a particular national origin, or gender, or age) or is one of a very few or even an individual (perhaps one lacking relevant documentation) who would face individualised risk of serious harm? Why should a concrete, individualised risk on its own disqualify the individual? That would be to turn on its head the point which Greece and Belgium and the Strasbourg court had emphasised (see §18(6) above): the need for a risk faced by the individual. The upshot of the Court of Appeal's approach is that an asylum seeker who is able to demonstrate a real risk of inhuman and degrading treatment will not be afforded protection simply because he cannot prove that the entire system of the responsible State is deficient.

40. UNHCR respectfully submits that it is inconsistent with legal principle to interpret the CJEU's judgment in *NS* otherwise. In particular: (1) The interpretation placed on *NS* by the Court of Appeal would render that judgment inconsistent with the Strasbourg case law, including the judgment of the Grand Chamber in *MSS v Belgium and Greece*. As explained above (§§6-20), the Strasbourg Court takes account of the totality of the evidence available in order to establish whether there are substantial grounds for concluding that there is a real risk of treatment prohibited by Article 3 ECHR. (2) Nothing in the CJEU's judgment indicated that it was intending to take a different approach from that of the Strasbourg Court. On the contrary, the CJEU cited and relied upon the *MSS* judgment. (3) The CJEU is bound to interpret and apply Article 3 ECHR (and, hence, Article 4 of the Charter) in accordance with the principles laid down by the Strasbourg Court: see §24 above. (4) No principled distinction can be drawn between evidence of personal risk and evidence of general risk. The question for the authorities should be whether, on the totality of the evidence available, substantial grounds of a real risk of inhuman and degrading treatment have been demonstrated.

41. Furthermore, the interpretation placed on *NS* by the Court of Appeal would have the arbitrary result that different standards of protection would apply to refugees (who fall outside the scope of Dublin II and the ruling in *NS*) on the one hand, and to asylum seekers on the other.

42. What *NS* actually decided was as follows:

    (1) Article 4 of the Charter was engaged where the State was exercising its function under Article 3(2) of the Dublin II Regulation: see §69.

    (2) States could not operate a conclusive presumption that the putatively responsible State would observe the individual's Article 4 Charter rights: see §§71, 105.

    (3) Although not every infringement of every fundamental right or EU Directive (see §35 above), by the Member State putatively responsible, will affect the obligations of the other Member States (§§82-83), the returning State needed to assess and evaluate the risks to which the individual would be exposed (§91).

    (4) The threshold was and remained whether there were substantial grounds for believing that the individual would face a real risk of being subjected to inhuman or degrading treatment (§94).

(5) Relevant risks could arise in various ways, including from systems, and including the situation in practice and operational problems (§81).

(6) If there were substantial grounds for believing that real risks of Article 4 ill-treatment would arise, from systemic flaws in procedure or conditions (as had been found in *MSS*), then removal could not take place (§§86, 89, 94, 106).

(7) That conclusion gave the answer for situations such as that at issue in the particular cases before the Court (§94).

IV. UNHCR MATERIALS

43. The Court of Appeal stated at §39 of its judgment that, in assessing the risk of return, "*UNHCR's judgment remains pre-eminent and possibly decisive*". At §§40-41, the Court explained the reasons for this, which relate to UNHCR's mandate, authority, resources and experience (Cf. *R(Elayathamby) v SSHD* [2011] EWHC 2182(Admin) §56). Whilst making this observation, the Court of Appeal also recognised that UNHCR's views "*cannot be considered to be a legal necessity*" (§52) and that account should also be taken of the reports of other organizations and of individual testimony (§42, §52).

44. UNHCR respectfully agrees with the Court of Appeal's observations, subject to the need to recognise that:

(1) Account must be taken of the nature and purpose of the UNHCR document in question. For example, where UNHCR calls for a halt to all Dublin transfers to a particular country, UNHCR expects that its call will be given due weight. On the other hand, where a UNHCR report is more nuanced, the circumstances of the individual case may become more important in assessing whether the individual concerned is at risk of ill-treatment contrary to ECtHR Article 3 / Charter Article 4.

(2) In applying a test of substantial grounds for believing there is a real risk, relevant shortcomings identified by UNHCR in a recent assessment should be given due weight in determining -a claim. If UNHCR says that persons falling within a particular category should not be transferred, this should ordinarily be regarded as sufficient for the claims of the persons concerned to be upheld. Where UNHCR is less categorical, assessment of individual circumstances will also be required.

45. The Strasbourg Court in *MSS* considered UNHCR's report published in December 2009 entitled "*Observations on Greece as a Country of Asylum*". That report, as its introduction stated, superseded earlier reports on Greece published by UNHCR and specifically addressed the question of transfers to Greece under the Dublin II Regulation. Thus, as also stated in the report's introduction:

> "*Until the reform of the Greek asylum system is put in place, UNHCR has no choice but to recommend against transfers to Greece under the Dublin II Regulation or otherwise. This position is based on the problems observed in the Greek asylum procedure, which the Greek authorities also acknowledge, and which are set out in detail in this paper. UNHCR will keep the situation in Greece under active review and revise its position according to developments*.[3]

The Strasbourg Court (*MS* at §349, also §§194-195) also attached "*critical importance*" to a letter sent by UNHCR in April 2009 to the Belgian Minister for Immigration which "*contained an unequivocal plea for the suspension of transfers to Greece*" on the basis of UNHCR's findings of deficiencies in the asylum procedure and conditions of reception of asylum seekers in Greece. An important purpose of UNHCR's 2009 Report on Greece and of its letter to the Belgian authorities was specifically to address the question whether there were deficiencies in the Greek asylum system such that transfers to Greece under the Dublin II Regulation should be suspended generally.

46. In contrast, UNHCR's July 2012 Recommendations in relation to Italy did not call for a halt to all Dublin transfers to Italy. But this does not mean that UNHCR considered that there were no legal obstacles against any particular transfer taking place, as is evident from the Recommendations themselves. Those Recommendations should not be treated as conferring on the Italian asylum system a 'clean bill of health'. Further, other materials and other evidence need addressing, in order to consider all relevant risk, from the general position (including 'operational' matters) and individual circumstances, and from the combination of the two.

47. Finally, UNHCR has published (September 2013) its July 2013 recommendations on Italy, to which attention is invited. That report is similar in nature and purpose to the July 2012 document with which the Court of Appeal was concerned. UNHCR brought this to the attention of the parties, as soon as it was published.

[3] The conclusion of the report is expressed in similar terms.

48. UNHCR would suggest the following conclusions in relation to the weight to be given to its reports by courts considering whether to transfer an asylum seekers under the Dublin II Regulation:

(1) A UNHCR assessment should be given due weight in assessing a claim; but it is in no way necessary, and its absence does not of itself justify rejecting the claim.

(2) So, a UNHCR report which is up to date and which addresses a relevant question of fact or judgment relating to a relevant deficiency or risk, may in certain circumstances be regarded as "*pre-eminent and possibly decisive*" on that question; in other circumstances, additional material, including individual testimony, may need to be examined.

(3) However, the absence of a UNHCR report which addresses a situation which is relevant to a Dublin question, or the existence of a UNHCR report that identifies both positive and negative developments, should in no way be taken as an assessment of the absence of a relevant deficiency or risk, somehow conferring a UNHCR 'clean bill of health'.

(4) Any UNHCR report may contain evidence or assessment which does (or does not) support a claim that an asylum seeker would individually be at risk if returned to a particular State.

(5) At least where a Court concludes that there is no UNHCR assessment which identifies a relevant risk and is sufficient to support the claim, it will be necessary to examine all the relevant material before it in order to assess whether there is evidence of a relevant real risk.

MICHAEL FORDHAM QC

Blackstone Chambers

MARIE DEMETRIOU QC

Brick Court Chambers

Acting pro bono

TIM POUNTAIN-HOLES

Baker & McKenzie LLP

Acting pro bono

3rd October 2013