Neutral Citation Number: [2012] EWCA Civ 1336

Case No: C4/2012/1711, C4/2011/3187: C4/2012/0437: C4/2012/0314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2012

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE SULLIVAN
and
SIR STEPHEN SEDLEY

- -

Between :

EM (ERITREA) & OTHERS	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Monica Carss-Frisk QC, David Chirico and Mark Symes (instructed by **Wilson Solicitors LLP**) for the **Appellants EM & AE**
Monica Carss-Frisk QC, David Chirico and Mark Symes (instructed by **Sutovic & Hartigan Solicitors**) for the **Appellant EH**
Monica Carss-Frisk QC and Melanie Plimmer (instructed by **Switalskis Solicitors**) for the **Appellant MA**
Alan Payne (instructed by the **Treasury Solicitors**) for the **Secretary of State**

Hearing dates : 18 - 20 September 2012

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Approved Judgment

Sir Stephen Sedley: :

This is the judgment of the court.

The principal issue

1. Albeit in differing circumstances, these four cases raise one central question: is it arguable that to return any of the claimants to Italy, either as an asylum-seeker pursuant to Council Regulation 343/2003 (better known as the Dublin II Regulation) or as a person already granted asylum there, would entail a real risk of inhuman or degrading treatment in violation of article 3 of the ECHR? If this is arguable, the Home Secretary's certification of each of the cases as clearly unfounded will fall, giving the entrant a right of in-country appeal against the decision to remove him or her to Italy.

2. The central answer advanced on behalf of the Home Secretary is that there is a presumption of law and of fact that Italy's treatment of asylum-seekers and refugees is compliant with its international obligations; that the presumption is rebuttable; but that, in the absence in the present cases of a legally sufficient rebuttal, evidence of a real risk to the claimants of inhuman or degrading treatment in Italy cannot prevent their return. If this is right, the claims will all have been properly certified, subject to a separate issue in MA's case as to whether it can be tenably argued that removal will violate a Convention right within the United Kingdom.

The legal framework

3. The Dublin II Regulation gives legal force within the European Union to what began as a treaty providing for asylum claims to be processed and acted on by the first member-state in which the asylum-seeker arrives, and for asylum-seekers and refugees to be returned to that state if they then seek asylum or take refuge elsewhere in the EU. The assumption underlying this system is that every member state will comply with its international obligations under what were initially the 1951 Refugee Convention and the European Convention on Human Rights but now include the Qualification Directive and the EU Charter. (There appears to be no system of cost-equalisation geared to the differing geopolitical burdens thrown on member states.)

4. When, therefore, it was established in *MSS v Belgium* [2011] ECHR 108 that Greece was in systemic default of its international obligations, the Grand Chamber of the European Court of Human Rights held Belgium to have breached article 3 of the Convention by returning asylum-seekers there. The argument of the appellants in the present group of cases is that the same can now be shown to be true of Italy, setting the United Kingdom in the same position as Belgium in *MSS*.

5. By virtue of s. 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 and of para. 5(4) in part 2 of Sch. 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, claims concerning removals to a listed country (of which Italy is one) are to be certified as clearly unfounded unless the Home Secretary is satisfied that they are not. The Home Secretary in each instance has decided that the contention that Italy is in systemic breach of its material international obligations is clearly unfounded, and that there is no separate reason to abstain from removal. Certification forbids any appeal while the applicant remains in the United Kingdom.

6. In deciding whether the Home Secretary was entitled to conclude that the statutory presumption applied to each of these cases, Alan Payne, her counsel, accepts that in most cases, these included, the court is as well placed as the Home Secretary is to evaluate whether a claim, if brought before an independent tribunal, would be bound to fail: see *R v Home Secretary, ex p. Yogathas* [2002] UKHL 36, #34; *R(L) v Home Secretary* [2003] EWCA Civ 25; *ZT (Kosovo)* [2009] UKHL 6. This concession is properly made, not least because to accord presumptive finality to the view of the Secretary of State would be to constitute her judge in her own cause. It means that we are not required to embark on the near-metaphysical question whether, even if the court takes a contrary view, a rational Home Secretary could consider the claim unfounded. The question for the court, as for the Home Secretary, is whether any tribunal could lawfully determine the material claim to be well-founded.

The four cases

7. Two of these cases, those of EH and AE, come before this court pursuant to CPR 52.15(3) and (4). Permission to apply for judicial review was refused at first instance but was granted on application to this court, which has retained the substantive cases. In these two cases, therefore, the court sits as a forum of judicial review.

8. The other two cases, those of EM and MA, are appeals against substantive decisions of the Administrative Court. Permisssion to appeal was granted by the trial judge, Kenneth Parker J, in EM's case and by Rix LJ in MA's case, having been refused by Langstaff J.

9. The four cases have been argued on the same basis. The Home Secretary accepts that MA should have the benefit of any finding in favour of the other three notwithstanding her somewhat different situation; but in MA's case a separate ground has been advanced contingently on the failure of the principal ground.

10. The factual detail of the four cases has been painstakingly set out for us by counsel. No disrespect is intended to those who have worked so hard on it if this judgment refers only to parts of it. Likewise we shall not make detailed citations from the judgments below. That of Langstaff J in *MA (Eritrea)* is recorded at [2012] EWHC 56 (Admin); that of Kenneth Parker J in *EM (Eritrea)* at [2011] EWHC 3012 (Admin) and [2012] EWHC 1799 (Admin). In the other two cases permission to apply for judicial review was refused in reasoned judgments after argument before deputy judges – C.M.G. Ockelton, recorded at [2011] EWHC 3826 (Admin), and Stephen Males QC, recorded at [2012] EWHC 512 (Admin).

11. Mr Payne accepts that for present purposes the court may consider fresh material that has come into being since the hearings in the Administrative Court. He has waived any objection to fresh or late evidential material and, without objection, has put in some of his own.

The appellants

12. The accounts set out below summarise the claimants' cases at face value. This is because, when deciding whether an asylum claim is capable of succeeding, it is ordinarily necessary to take the facts at their highest in the claimant's favour.

(i) EH

13. EH is an Iranian national who initially arrived in Italy and must have made himself known to the authorities there, since he was fingerprinted on 11 November 2010. After a short while he left the country and made his way eventually to the United Kingdom, where on 11 March 2011 he applied for asylum on the ground that he had been tortured as a political detainee in Iran. The Italian authorities were contacted and accepted responsibility for his claim under Dublin II. His claim was certified as meeting the conditions set out in paragraphs 4 and 5 in part 2 of Sch.3 to the 2004 Act, and the case has proceeded on the basis that this was a certification that the claim was clearly unfounded. Removal directions were set.

14. The judicial review proceedings now before this court seek to challenge the decision to certify and the removal directions on the ground that there is a real risk that EH will be subjected in Italy to inhuman and degrading conditions. He relies not on his own experience of reception in Italy, which was brief, but on that of others.

15. There is a great deal of evidence that EH is now severely disturbed and suffering from PTSD and depression, both of which require treatment. It is sufficient for present purposes that we accept that this is the case, and that there is on the evidence (to which we will come) a real risk that EH, whether as an asylum-seeker or as an accepted refugee, will find himself street-homeless if returned to Italy.

(ii) EM

16. EM is an Eritrean national who left the country for fear of persecution as an Orthodox Pentecostal Christian. He made his landfall on Lampedusa, where he was fingerprinted and then placed in a hotel in Badia Tedalda. After about 2 months he and the other asylum-seekers there were told, presumably by a corrupt official, that they must each pay €120 for further processing of their applications. Having no money, he was given a train ticket to Milan, where for some three weeks he found himself homeless and destitute, living among other asylum-seekers in similar circumstances.

17. A fellow asylum-seeker helped him to travel clandestinely to the United Kingdom, where he claimed asylum. His fingerprints having been found to correspond with fingerprints on record in Italy, Italy was asked to accept responsibility for his claim and, having failed to respond, was deemed to have accepted responsibility. Removal directions were set, but were challenged by an application for judicial review. On 1 June 2010 the Home Secretary certified EM's asylum claim as clearly unfounded. This too is challenged in the judicial review proceedings.

(iii) AE

18. AE fled from Eritrea because of the ill-treatment of her husband and herself by the Eritrean authorities. She was screened on arrival in Italy, placed in a hotel, interviewed and, after some three months, recognised as a refugee and granted a 5-year residence permit.

19. Following this, she was sent to (probably) Arezzo, where with others, both men and women, she was given accommodation in crowded and insanitary premises which had

to be vacated during the day. She was given food vouchers which ran out, leaving her dependent on charitable handouts. After three months even this accommodation was withdrawn. After a spell of living in cramped accommodation, shared with men, she left Italy and made her way to the United Kingdom, arriving on 19 January 2010. From here she was returned in October 2010 to Italy.

20. AE then found herself destitute in Milan, living in a squat where she was repeatedly raped by a number of men who threatened her with reprisal if she reported them. She had no money and relied on charity for food. Finally, with €100 borrowed from a fellow Eritrean, she made her way back to this country, where she was detained on arrival. A decision was made to remove her again to Italy. Her claim that to do so would violate her human rights was certified by the Home Secretary as clearly unfounded, and an application for permission to seek judicial review of the certificate failed before Holman J.

21. Following the submission of psychiatric evidence that AE was badly traumatised and suicidal at the prospect for return to Italy, the Home Secretary rejected an application to use her discretionary power to transfer AE's refugee status to the United Kingdom and confirmed the decision to remove her to Italy. Enquiries made by the Border Agency were said to have elicited an undertaking that AE would be accommodated on return in SPRAR accommodation (see below) in Prato, but her representatives, having failed to obtain disclosure, doubt this.

22. In response to a Rule 39 indication issued by the European Court of Human Rights, removal of AE has been stayed. On 10 November 2011 her renewed application for permission to apply for judicial review was refused by the Administrative Court. Her challenge to the refusal to transfer her refugee status to this country is not pursued; the challenge to the certification of her claim is.

(iv) MA

23. MA is an Eritrean woman who reached Italy in 2005 and in April 2006 was accorded refugee status there on the ground of fear of persecution as a Pentecostal Christian. In January 2008 an agent brought her three children to Italy to join her: Marta, born 16 January 1994 and now therefore an adult; Daniel, born 20 May 1998; and Yared, whose date of birth we do not know.

24. MA's evidence is that the family, despite being recognised as refugees, had to live on the streets, sleeping under bridges, lighting fires for warmth when rain permitted and relying on charitable handouts for food. After three months MA brought her children clandestinely to the United Kingdom. In the course of embarking in a lorry at Calais in the dark, she lost Yared, whose whereabouts are still not known. The other two are now settled in secondary and tertiary education here and are both doing well.

25. Because of their failure to respond to the UK's request, the Italian authorities in July 2008 were deemed under Dublin II to have accepted responsibility for MA and her children. Removal directions were set but were cancelled because the Italian police had discrepant details about the children and would not accept them. MA would not cooperate with attempts to interview her about this. Instead she sought to oppose removal by reliance on medical evidence that she was HIV positive. By July 2009 Italy had accepted responsibility and fresh removal directions were set. They were

cancelled because of a new application for judicial review, which was later withdrawn. They were re-set for July 2010, but the family failed to check in. MA then made further allegations about her treatment both in Eritrea and in Italy.

26. In August 2010 the Home Secretary certified her claim as clearly unfounded. She refused to transfer MA's refugee status to the United Kingdom and re-set removal directions. These were cancelled when the present proceedings were brought.

27. MA herself has on any view displayed considerable deviousness, lacerating her fingertips to prevent identification on arrival here and using a different name in Italy. Further, it was only after a third set of removal directions was given that, for the first time, she gave an account of being serially raped in both Italy and Eritrea. But it is sufficient for present purposes to record, first, that late accounts of rape do not necessarily make them incredible and, secondly, that MA's account of the effects of her experiences is now supported by what appears to be cogent medical evidence.

28. As to MA's two children, Marta, although now legally an adult, continues to form part of the mother's human rights claim. She is taking a BTEC course at Kirklees College, who speak highly of her. Daniel is at a school which has reported favourably on both his behaviour and his academic progress. Neither child has any desire to be returned to Italy, with its associations of misery and hardship, and the mother is reportedly suicidal at the prospect of enforced return.

The Home Secretary's evidence

29. The Home Secretary has put a substantial body of evidence before the court describing Italy's system for the processing, reception, accommodation and support of asylum-seekers and refugees. We will come in due course to the legal materiality both of this evidence and of the countervailing evidence of the four claimants which is summarised above. In essence, as set out in the Italian government's *Guida Practica* exhibited to the witness statement made in MA's case by Carl Dangerfield, the UK Border Agency's Italian liaison officer, it is as follows.

30. Asylum seekers are accommodated in a reception centre for long enough for the Territorial Commission to evaluate their claims. If accepted as refugees, or while awaiting a decision, they are given an international protection order and assigned to a "territorial project" which forms part of SPRAR, the national system for the protection of asylum-seekers and refugees. SPRAR will either provide accommodation or transfer the claimant to a public or private local provider. Access to SPRAR is by referral only. It provides food and lodging and courses designed to assist integration, but (with few exceptions) the limit of stay there is 6 months. On leaving, claimants can apply to charitable or voluntary providers but there is no guarantee of success. However, the international protection order affords access to free healthcare and social assistance (which does not extend to social security) equivalent to that enjoyed by nationals. This requires a fiscal code number, which in turn depends on having an address which can be verified by the police. An international protection order also allows the holder to take employment or undertake self-employment, to marry, to apply for family reunification, to obtain education, to seek recognition of foreign qualifications, to apply for public housing and, after 5 years, for naturalisation. For those denied these rights, there is, says Mr Payne, access to the Italian courts.

31. The claimants' case is that this may be the system in theory, but their own experience and that of many others, to which independent reports attest, is that it is not what happens in reality to a very considerable number both of asylum-seekers and of recognised refugees. In short, they say, Italy's system for the reception and settlement of asylum-seekers and refugees is in large part dysfunctional, with the result that anyone arriving or returned there, even if they have children with them, faces a very real risk of destitution.

The legal position

32. If the matter stopped here, we would be bound, on the evidence we have summarised, to conclude that there was a triable issue in all four cases as to whether return to Italy entailed a real risk of exposing each claimant to inhuman or degrading treatment contrary to article 3 of the ECHR. It would follow that the Home Secretary's certificates were of no effect and that an in-country appeal against removal was available, in which the nature and gravity of the risk to each claimant would be set against the legal and case-specific reasons for his or her removal. But it is the Home Secretary's case that none of this arises unless and until it can be shown that Italy is in systemic rather than sporadic breach of its international obligations, and that the requisite standard and mode of proof of this are beyond anything adduced in the present cases.

33. How this position has been reached can be tracked through three recent cases, two of them decided by the European Court of Human Rights and therefore of persuasive but not binding force, the third decided by the Court of Justice of the European Union and binding upon us.

34. *KRS v United Kingdom* [2008] ECHR 1781[1] concerned an Iranian asylum-seeker who had entered Greece before seeking asylum here and whom the Home Secretary therefore proposed to return to Greece. His removal had been halted by a Rule 39 indication, but the Fourth Section found his claim inadmissible. It noted seriously adverse reports on Greece's treatment of asylum-seekers and returnees, principally from the United Nations High Commissioner for Refugees, supported by reports from Amnesty International and from three NGOs including Greek Helsinki Monitor; but it concluded that Greece's international commitment to the European asylum system and her presumed compliance with it afforded a complete answer. The court took the view that the UNHCR's position paper of 15 April 2008, while advising member states to suspend returns to Greece under Dublin II and to use their power under article 3(2) to deal with these applications domestically, had not displaced "the presumption … that Greece will abide by its obligations" under the material Directives, in particular because Greece had no policy of refoulement to Iran and no block on access to its own courts.

35. In the course of reaching this conclusion the court placed critical weight on the report of the UNHCR "whose independence, reliability and objectivity are, in its view, beyond doubt" (p.17).

36. When, therefore, the UNHCR in April 2009 pointed out that the court in *KRS* had seemingly overlooked its other criticisms of Greece, its further intervention proved

[1] The text of the judgment is undated, but the Chamber sat in December 2008 to decide the case..

decisive. In *MSS v Belgium and Greece* [2011] ECHR 108 the Grand Chamber noted the UNHCR's letter sent to Belgium in April 2009. The letter noted that the Fourth Section of the court in *KRS* had decided that transfer to Greece did not carry a risk of refoulement, but went on:

> "However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum-seekers were in conformity with regional and international standards of human rights protection, or whether asylum-seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."

The High Commissioner accordingly reiterated his assessment of Greece and his recommendation that member states should suspend returns there.

37. The Greek government, as a party to the proceedings, relied on its account of the facilities provided by it for accommodation and finding work; but the Court concluded:

> "251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010 ...). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.
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> 252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.
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> 253. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia*, dec., no. 45603/05, ECHR 2009...).
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> 254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.

It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.

255. The Court notes in the observations of the European Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason the Court sees no reason to question the truth of the applicant's allegations.

…….

258. In any event the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings (see paragraphs 169, 244 and 242 above).

……..

262. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.

263. 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."

38. As to *KRS*, the Grand Chamber (at paragraph 343) took the view that it was still possible at the date that case was decided to assume that Greece was complying with its obligations in the respects identified by the Fourth Section. This, in their judgment, was no longer the case. They held:

> "343. …… [In *KRS*] the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention.
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> In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin.
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> Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court.
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> ….
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> 347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.
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> 348. The authors of these documents are the UNHCR and the European Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National

Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

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

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

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

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices

> resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008 ...).
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> ….
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> 358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.
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> 359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that 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 (see, *mutatis mutandis*, *Saadi*, cited above, § 132)."

39. Two things can be said of this jurisprudence, which for the present has placed Greece outside the Dublin II system. One is that the assessment of risk on return is seen by the Strasbourg court as depending on a combination of personal experience and systemic shortcomings which in total may suffice to rebut the presumption of compliance. The other is that in this exercise the UNHCR's judgment remains pre-eminent and possibly decisive.

The UNHCR

40. Why should this be? After all, knowledgeable and powerful evidence was before the Strasbourg court from such respected bodies as Amnesty International and the AIRE Centre. Why might this not be enough, at least if it was not controverted?

41. It seems to us that there was a reason for according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment

which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.

42. This said, we also take note of what the Grand Chamber of the ECtHR said recently in *Hirsi v Italy* (27765/09; 23 February 2012), at paragraph 118:

> "[A]s regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources …."

The Court of Justice of the European Union

43. Because the Dublin system is now enshrined in EU Regulations, it is justiciable, with binding effect, before the judicial organs of the Community. The consequent dual sovereignty – the EU's in relation to Council Regulations, the Council of Europe's in relation to human rights – is capable of giving rise to conflicting decisions. Although this is a risk of which both courts are very conscious and which they strive to avoid, the decision of the Grand Chamber of the CJEU in *NS v Secretary of State for the Home Department* [2011] EUECJ C-411/10 and C-493/10, handed down in December 2011, might have posed such a problem for us were it not for the fact that it alone binds us.

44. *NS* concerned applications by two asylum-seekers, one against the United Kingdom and one against Ireland, for a preliminary ruling on a series of questions which for present purposes amounted to this: in deciding whether to exercise the power under art. 3(2) of the Dublin II Regulation to examine a claim which is the responsibility of another state, is a member state required to presume conclusively that the other state's arrangements are compliant with its international obligations, or is it obliged to examine whether transfer would bring a risk of violation either of Charter rights or of the EU's minimum standards?

45. The Court concluded that a presumption of compliance existed but was rebuttable[2]. Rebuttal, however, required proof that the receiving state was aware that there were in the state of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment…" (paragraph 106). This conclusion followed an analysis of *MSS* which concluded (paragraphs 88-9) that the extent of Greece's default established in that case amounted to "a systemic deficiency". The Court then said:

[2] Parker J, in paragraphs 14-15 of his judgment in *EM*, offers a valuable explanation of the macro- policy underlying this approach.

> "90. In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350)."

46. The Court took care (paragraphs 81-2) to distinguish a true systemic deficiency from "operational problems", even if these created "a substantial risk that asylum seekers may … be treated in a manner incompatible with their fundamental rights".

47. It appears to us that what the CJEU has consciously done in *NS* is elevate the finding of the ECtHR that there was in effect, in Greece, a systemic deficiency in the system of refugee protection into a sine qua non of intervention. What in *MSS* was held to be a sufficient condition of intervention has been made by *NS* into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II.

48. We have no choice but to approach the present claims on the same footing. Although questions were raised in the course of argument as to whether the return to Italy of a claimant already granted refugee status there would fall under Dublin II, the reasoning of the CJEU in *NS* plainly calls for a uniform approach to the present cases.

The situation in Italy

49. Ms Carss-Frisk QC, for the four claimants, has seen this problem coming and done her excellent best to meet it. She has submitted that the presumption of state compliance can be rebutted by adequate evidence of personal risk, predicated typically but not necessarily on that person's own experience. There is no magic, she submits, in a UNHCR report. It is simply part of a body of evidence, which may legitimately go beyond what the High Commissioner reports. Given the apparent prevalence of the inhuman and degrading conditions described by her clients, it is perfectly reasonable to infer that the Italian system, like the Greek, is not merely functioning erratically but is truly dysfunctional.

50. In July 2012 the UNHCR published *Recommendations on Important Aspects of Refugee Protection in Italy*. It sets out some recent figures for inward migration to a country which until the 1960s was a source of net emigration: between 4 and 5 million in a population of 60 million are migrants, 61,000 of them refugees. But its report, in contrast to the reports on Greece, does not suggest that the asylum system is systemically deficient. In fact it asks Italy to use article 3(2) to avoid returning asylum seekers to Greece. It notes improvements in legal and procedural protection, while calling for further improvements. It also notes a recognition rate of the order of 30%.

51. The report goes on to describe the reception system which is outlined earlier in this judgment. It records that in 2011 the system was deemed insufficient, and that in consequence central and local government reached an agreement for the relocation of up to 50,000 persons within Italy. Having expressed "appreciation for the improvements to the reception system", the UNHCR sets out a number of concerns about Italy's inability to cope with sudden influxes, the uneven quality of provision and the care offered to the vulnerable. The report also records that the 6-month time limit in reception centres (something that does not quite correspond with the government guidance referred to earlier in this judgment) is being dropped. It goes on to make a series of recommendations, none of which is suggestive of repairing a systemic dysfunction rather than improving a functioning one.

52. It may be said that such a report is an essay in diplomacy rather than a critical or objective appraisal; but it means inexorably that the kind of support which was available to the claimant in *MSS* is lacking here. Can the gap then be filled by a combination of individual testimony and NGO reports? While we have sought to explain why the UNHCR's view has in the recent past proved critical in this kind of inquiry, we accept that it cannot be said to be a legal necessity. The question is whether Ms Carss-Frisk's further material can fill the gap.

53. Its high point may be the report of Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, issued in September 2011 following a formal visit to Italy the previous May. The report pays a good deal of attention to the situation of refugees and asylum-seekers. Its opening summary reads:

> "The sharp increase in arrivals from the coasts of Northern Africa has put the Italian system of reception of migrants, including asylum-seekers, under strain. The Italian authorities are encouraged to ensure that that their reception arrangements can respond effectively to fluctuating trends in arrivals and asylum applications, notably by extending the capacity of the housing schemes administered by SPRAR, a publicly-funded network of local authorities and non-profit organisations. Progress is also needed to ensure that in all centres where they are accommodated, asylum seekers have adequate access to legal aid and psycho-social assistance. Special measures to identify and cater for the needs of vulnerable individuals should be effectively implemented. Lack of clarity concerning the nature of the centres where migrants are kept and the regime applicable to them (including detention or not) have contributed to jeopardising the rights of migrants.
>
> ….
>
> There is a need to make progress on the front of establishing a reliable system to support the integration of refugees and other beneficiaries of international protection in Italian society. Noting that these persons sometimes become destitute or homeless, the Commissioner calls for a strengthening of local authorities' capacity to provide accommodation and services, notably through the channelling of more funds and the

> involvement of more regions and municipalities. Further useful measures include a comprehensive review of laws and regulations that impact on refugee integration and the introduction of positive action measures, for instance on the labour market, that support integration at the initial stages following status recognition…."

54. The report goes on (paragraph 44) to stress that the unexpected migration caused by unrest in Tunisia and Libya does not relieve Italy of its human rights obligations – "a responsibility which in the Commissioner's view has not been met fully". It gives chapter and verse for the recommendations summarised in the passage we have quoted, and notes (paragraph 69) that "the lack of a reliable system to support the integration of refugees" is "[a] longstanding concern voiced by organisations dealing with the rights of asylum seekers and refugees in Italy". It attributes the problem in part to obstacles created by Italian law and administrative practice, and points out that:

> "As a result, several hundred refugees are reported to live in destitute conditions or squat illegally around the country, with some becoming homeless" (paragraph 70).

55. Ms Carss-Frisk has also shown us reports from Juss-Buss (deriving from a joint Swiss and Norwegian NGO visit to Italy in October 2010); from NOAS (a Norwegian NGO, based on the same visit in October 2010); from Pro-Asyl (a German NGO which visited Italy at about the same time); from Caritas (in a report entitled *Metropolitan Mediations*, sponsored by the EU and the Italian Ministry of the Interior, undated in origin but updated – evidently as to its statistics - to May 2012); from a specialist lawyer, Gianluca Vitale (June 2011); and from two other specialist lawyers, Salvatore Fachile and Loredana Leo (*Critical Aspects of the International Protection System in Italy*, June 2012).

56. The Juss-Buss report records:

> "Italian stakeholders agree that the system does not work, due to a lack of capacities … [T]here is a lack of political will to upgrade the system in order to meet the actual demands … [N]o budgetary changes are planned until 2013. The already insufficient capacities will remain the same".

57. The NOAS report concludes:

> "During the last decade, Italian authorities have responded to the measures towards a common European asylum system by introducing initiatives and reforms to improve the asylum mechanism in Italy. However, the basic well-being of asylum seekers and refugees is far from properly secured.
>
> The most striking characteristic of the Italian asylum system is the lack of support, in terms of accommodation and integration, for the majority of the granted a permit. The situation leaves

> thousands of refugees – including many considered vulnerable – without proper means for taking care of themselves."

58. Pro-Asyl reports that fewer than half of those leaving SPRAR accommodation succeed in finding work and accommodation.

59. Caritas judges the Italian reception system to be "insufficient in terms of numbers and, in particular, to be widely inconsistent inasmuch as various parallel systems can be identified with little coordination between them." It goes on to record that, pursuant to a prime ministerial decree of February 2011, the Department of Civil Protection had implemented a special reception system for migrants which was currently assisting over 21,000 individuals. But it judges that because of "chronic insufficiency" the Italian reception system still "does not provide adequate reception facilities to all those who are entitled to it" because it is "too fragmented and incomplete".

60. Of the two lawyers' reports, Mr Vitale's draws explicitly on personal experience in concluding that the system's shortcomings represent "a pathology of the Italian reception system rather than an exception to the norm". That of Mr Fachile and Ms Leo speaks of a "systematic lack of places available" and cites in support the suggestion in Amnesty International's 2011 report that this lack, with the influx of refugees from North Africa, had led to "summary expulsions, violations of the ban on refoulement and illegal detentions". The report goes on to speak of "a veritable reception gap", both for initial arrivals and for "Dubliners" – those returned from other EU states because their first landfall was made in Italy. It suggests that something like two thirds of asylum seekers who are accorded refugee status fall into this gap.

Discussion

61. This material gives a great deal of support to the accounts given by three of the claimants of their own experiences of seeking asylum in Italy. If the question were, as Ms Carss-Frisk submits it is, whether each of the four claimants faces a real risk of inhuman or degrading treatment if returned to Italy, their claims would plainly be arguable and unable to be certified. But we are unable to accept that this is now the law. The decision of the CJEU in *NS v United Kingdom* has set a threshold in Dublin II and cognate return cases which exists nowhere else in refugee law. It requires the claimant to establish that there are in the country of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment…".

62. In other words, the sole ground on which a second state is required to exercise its power under article 3(2) Regulation 343/2003 to entertain a re-application for asylum or humanitarian protection, and to refrain from returning the applicant to the state of first arrival, is that the source of risk to the applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures. Short of this, even powerful evidence of individual risk is of no avail.

63. The totality of the evidence about Italy, although it is extremely troubling and far from uncritical, does not in our judgment come up to this mark. While undoubtedly at a number of points it either overtly alleges or powerfully suggests systemic failure, it is neither unanimously nor compellingly directed to such a conclusion. At least equal, if not greater, weight has to be accorded to the far more sanguine – and more recent - UNHCR report, echoed as it is, albeit more faintly, by the Hammarberg report. While what amounts to a systemic deficiency must to a considerable degree be a matter of judgment, perhaps even of vocabulary, the evidence does not demonstrate that Italy's system for the reception of asylum seekers and refugees, despite its many shortcomings and casualties, is itself dysfunctional or deficient. This is so whether one focuses on the body of available reports on Italy or the comparative findings in *MSS* about Greece.

64. It has to follow that the four claims before the court, despite their supporting testimony of individual risk, are incapable of succeeding under article 3 on the present evidence, and that the Home Secretary is therefore justified in that respect in certifying them. The same necessarily applies to any distinct argument raised by AE and EH under article 8 by reference to the effect of conditions in Italy on their mental health.

MA's claim

65. Ms Carss-Frisk bases her fallback case for MA on the two children who are still with her and are doing well in secondary and tertiary education here. Their best interests, she submits, plainly consist in remaining in the United Kingdom with their mother, giving all three tenable article 8 grounds for resisting removal.

66. No attempt has been made to separate Marta's interests, now that she is an adult, from her mother's and brother's. This may help them, but it does not help her. We approach the mother's claim, accordingly, on the assumption which we have been invited to make that removing her will mean also removing both Daniel and his older sister. It follows that the material interference will be with their private rather than their family life.

67. We accept for present purposes the favourable account we have been given of the children's response to education and their unwillingness to be parted from it: indeed, we would have assumed it to be so. We also accept as real their fear of returning to the state of street homelessness in which the family previously found itself in Italy.

68. It is uncontentious that, in gauging for the purposes of article 8(2) the proportionality of an interference with private life, the interests of children are a paramount consideration, though not a trump card: *ZH (Tanzania) v Home Secretary* [2011] UKSC 4, *HH v Deputy Prosecutor, Genoa* [2012] UKSC 25. More specifically, we have the guidance of Baroness Hale in the first of these cases at paragraph 29:

> "… what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo)*, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence

> from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

69. Langstaff J at first instance concluded (at paragraph 67):

> "An immigration judge would be bound to hold that the essential interests of the children and the claimant would be preserved and not adversely affected by any move to Italy."

His reasons for so holding, set out in his previous paragraph, are an amalgam of the admittedly disruptive effect of removal on the children's education and social support and what the judge regarded as "the very great difficulties in regarding the claimant herself as giving credible or reliable evidence", together with the unlikelihood that any repetition of abuse or hardship in Italy would go unremedied.

70. Ms Carss-Frisk suggests with some cogency that the judge has rolled too many disparate factors into that paragraph and may have lost sight of the case-specific elements which alone go to determine the best interests of the children. She is able in this regard to point to his acceptance (in paragraph 61) of Mr Payne's submission that "it can confidently be said that an immigration judge would be most unlikely to regard the claimant's account as trustworthy unless corroborated…" – a test which both sets the threshold of certification too low and bases it on matter not obviously related to the children's best interests. But Ms Carss-Frisk has still to face the formidable fact that the children's position in this country, albeit through no fault of theirs, is both fortuitous and highly precarious, with no element whatever of entitlement.

Conclusions

71. Making every allowance for her counsel's critique of Langstaff J's decision, we still have to consider whether there is any real possibility of MA's article 8 claim being upheld on an in-country appeal to an immigration judge. We are satisfied that there is none. Her daughter is now an adult and cannot legitimately have her interests aggregated with MA's. Her son, now 14, is settled in school; but he is here only because his mother has been able for four years to resist removal. As Ms Carss-Frisk's submissions implicitly recognise, if her case has reached this point it is because we are required to deem conditions for refugees in Italy (so far as they can enter at all into the article 8(2) exercise) to be compliant with the state's international obligations, whatever the evidence to the contrary. This being so, the case against removal of MA, albeit with her son, is too exiguous to stand up in any legal forum when set against the history of her entry and stay here and the legal and policy imperatives for returning her to Italy.

72. For the reasons set out earlier in this judgment, the appeals of EM and MA against the refusal of judicial review, and the applications of EH and AE for judicial review, will therefore be dismissed.