THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

[2008 No. 1342 J.R.]

RAMAZAN HUSSEIN MIRZA

AND

[2008 No. 1243 J.R.]

TIGIST (A.K.A. EDEN) MAMO

AND

[2008 No. 1278 J.R.]

BRYALAY ABRAHIMI

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 21st day of October, 2009.

1. This is a substantive application for judicial review of three determinations of the Refugee Applications Commissioner ("the Commissioner"), dated October, 2008 that Greece is responsible for determining the applicants' asylum applications and that they should be transferred to Greece, pursuant to the terms of *Council Regulation (EC) No. 343/2003* ("the Dublin II Regulation").

2. The three cases were listed for hearing together as similar issues arise in each case. They are also representative of some thirteen other cases in which the same or

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similar issues arise. Leave was granted on consent by Finlay Geoghegan J. on the 8th December, 2008. The substantive hearing took place at the Kings Inns, Court No. 1, over seven days on the 26th, 27th, 28th May, 2009 and the 28th, 29th, 30th and 31st July, 2009. Mr. Feichín McDonagh S.C. and Mr. Conor Power B.L. appeared for the applicants and Ms. Sara Moorhead S.C. and Ms. Siobhán Stack B.L. appeared for the respondents.

1. Background

3. The three applicants in these cases are in a similar situation insofar as they have each applied for asylum in Ireland and in each case a Eurodac "hit" revealed that the applicant had previously entered Greece where his / her fingerprints were taken. The Commissioner determined that Greece is responsible for examining their asylum applications in all three cases pursuant to the Dublin II Regulation and that they should be transferred to Greece. A further common feature of the three cases is that the applicants were represented by the Refugee Legal Service (RLS) who made submissions to the Commissioner on behalf on each applicant, requesting that the Commissioner exercise his discretion under Article 3(2) of the Dublin II Regulation to derogate from the normal application of that instrument and to accept responsibility for determining the applicants' asylum cases in Ireland.

4. Naturally, there are of distinguishing features in each case in that Mr. Mirza claims to be from Iraq, Ms. Mamo from Eritrea and Mr. Abrahimi from Afghanistan. Mr. Mirza and Mr. Abrahimi did not apply for asylum in Greece while Ms. Mamo made an application which appears to have been refused. The determinations that are challenged in these proceedings were based on a common Memorandum ("the Memo") prepared by the Commissioner's agents. The applicants challenge the process by which the Memo was prepared and the conclusions contained therein.

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2. The RLS Submissions

5. Although the RLS made applicant-specific submissions to the Commissioner in each case, the substance of the submissions made and indeed the language used in each case was very similar. In each case, the RLS made the following points in respect of asylum procedures in Greece:-

(a) A report of the *Committee on Civil Liberties, Justice and Home Affairs* (LIBE) of the European Parliament (July, 2007) details the deplorable reception and detention conditions for asylum seekers and noted that refugee recognition rate in 2004 was 0.3% and in 2006 was 0.7% and total protection stood at 1.2%;

(b) A Press Release from the Director of European Affairs for the PROASYL network (October, 2007) noted that Greece is engaged in a systematic violation of the human rights of asylum seekers;

(c) In January, 2008 the European Commission had started infringement proceedings against Greece in the European Court of Justice (ECJ) for not complying with the Dublin II Regulation;

(d) Various other EU Member States had recently decided not to transfer asylum applicants to Greece. In the various submissions, reference was made to Norway, Germany, Sweden and Iceland. A Schedule was submitted indicating the countries which had ceased to transfer persons to Greece or whose Courts had intervened to restrain such transfers, and the dates on which they had ceased such transfers – the source for much of the information being the *European Council on Refugees and Exiles* (ECRE)'s weekly electronic update (Ecran);

(e) Representatives of the Commissioner and the Attorney General's Office were present at an ELENA Conference in Athens in February, 2008 where the treatment of asylum seekers in Greece was discussed and where Member States were urged not to return applicants to Greece under the Dublin II Regulation, and where the following issues were raised:-

- First instance decisions are taken by Greek police officers, with 0.04% chance of success;
- 2.07% chance of success on appeal;
- No legal aid is provided;
- Domestic legislation allows cases to be closed where an asylum seeker leaves the territory for a period of more than three months ("interrupted claims"); and
- Once a case has been closed for the above reason, it can only be reopened for reasons of *force majeure.*

(f) The UNHCR addressed the issue of interrupted claims in its paper of July, 2007 and in a covering letter to that paper, the Assistant Regional Representative with UNHCR called on governments to make generous use

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of Article 3(2) of the Dublin II Regulation and, in the case of interrupted claims, to confirm with Greece that persons would be able to re-enter the asylum process before transferring them to that Member State;

(g) For the Commissioner to determine that the applicant should be transferred to Greece would be in direct contravention of the UNHCR's advices to governments in its Position Paper of April, 2008. The UNHCR called on Member States to stop returning asylum seekers to Greece and make use of Article 3(2) of the Dublin II Regulation, and pointed out *"many obstacles faced by "Dublin returnees" to having their asylum claim registered and examined, leading to exclusion from the procedures or to their refoulement. The UNHCR called on Greece to promptly review their asylum procedure at first and second instances, so that asylum seekers are not left in limbo, unable to exercise their rights.*"

(h) The European Court of Human Rights issued an Order of prohibition under Rule 39 of the Rules of Court as an interim measure, restraining the transfer of an Iraqi applicant from Finland to Greece until further notice. Subsequently, successful Rule 39 applications were made by lawyers in Finland in seven other cases involving males from Somalia, Iraq and Afghanistan.

(i) Given the seriousness of the information widely available in relation to Greece, it was *incumbent on the Irish authorities to investigate the status of the applicant's case in Greece* and the likely conditions or risk of refoulement that he / she would face if returned there, in advance of taking a decision as to his / her return.

6. Between the three cases, the RLS forwarded some 17 country of origin information reports to the Commissioner. Further and more extensive submissions of a similar nature were made in each case. Those submissions related primarily, though not exclusively, to refoulement and the "interrupted claims" procedure. Of special significance in the context of these proceedings is that the RLS made additional submissions in July, 2008 in the case of Ms. Mamo where it was put to the Commissioner that this was a case in which he was "*obliged*" to derogate under Article 3(2) of the Dublin II Regulation. The RLS submitted that Ms. Mamo "*never could have obtained access to a fair and effective asylum process in Greece*" and remained at risk of refoulement if returned to that country, in breach of her fundamental right to claim asylum and her rights under the Geneva Convention

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relating to the Status of Refugees and the European Convention on Human Rights (ECHR). It was further submitted:-

> "The Dublin Regulation is premised upon the need for objective, fair criteria to rapidly identify the Member State responsible to determine an asylum claim "so as to guarantee effective access to the procedures for determining refugee status" (Council Regulation 343/2002, the "Dublin II" Regulation, Recital 4). Recital 15 states as follows:-
>
> > *The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.*
>
> Article 18 of the Charter provides a right to asylum as follows:
>
> > *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*
>
> The Dublin II Regulation, therefore, cannot be read or applied in a manner that would put an asylum applicant in jeopardy of not having his asylum claim properly determined. Given the information on file it is submitted that this Applicant will not have a proper asylum application in Greece and cannot be returned there under the Dublin Regulation."

7. The RLS concluded as follows:-

> "In this context and given the specific and compelling information available regarding Greece, it is submitted that it is wholly inappropriate for the deeming provisions of the Dublin II Regulation to be used to deem Greece responsible. For all of the above reasons we call on you to exercise your discretion and allow our client admission to a fair and effective asylum system in Ireland."

8. The applicants' arguments in these proceedings have their origins primarily in those submissions.

3. The ORAC Memorandum

9. The Memo which forms the basis of the decision in each case was in Mr. Mirza's application and Ms. Mamo's application signed by the same Authorised Officer of the Dublin Unit on the 22nd and 23rd October, 2008, respectively. In Mr. Abrahimi's case the Memo was signed by a different Authorised Officer, on the 22nd October, 2008. The three Memos follow the same structure. They first set out the

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details of the application, highlighting discrepancies in the evidence given by each applicant and noting that the applicants were less than forthcoming during the initial phase of their asylum applications in Ireland about their experiences in Greece. The Memos then refer to specific elements of the RLS submissions in each case. From that point on, the Memos are identical. In each case the Officer summarises the RLS submissions as raising the following six issues:-

(a) The "interrupted claims" procedure;
(b) The question of access to and the quality of the Greek asylum process;
(c) The nature of the reception conditions;
(d) Whether Greece meets its international obligations in relation to non-refoulement,
(e) The infringement proceedings taken by the European Commission against Greece in relation to the Dublin II Regulation;
(f) The position of other EU Member States in relation to returns to Greece under the Dublin II Regulation.

10. In each case the Officer states that he / she will deal with those issues having regard to research prepared including contacts with other EU Member States. The Memo then in paragraphs numbered 1 – 58 sets out an analysis of the issues raised. Each Memo summarises the information set out in the preceding paragraphs and reaches an identical conclusion.

11. Paragraphs 1 – 58 of the Memo are divided into the following headings:-

- On Interrupted Claims (para. 1);
- On ECRE and the infringement procedures (paras. 2-4);
- On the LIBE Committee Delegation (paras. 5-8);
- The UNHCR Position Paper of 15th April, 2008 on the return of asylum seekers to Greece under the Dublin Regulation (paras. 9- 25);
- The Position in other Dublin Regulation States – *Sweden, Norway, The Netherlands, Germany, the U.K. and Greece* (paras. 26-31);
- Information Obtained from other Member States re Greece;
- Refoulement Matters (paras. 54-55);

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12. In its concluding paragraphs (56-58), the Memo notes that Greece is a party to and thus bound by international human rights instruments which prohibit refoulement and that "*The current development of a common EU asylum policy by Member States (including Greece) is predicated on the full and inclusive application of the 1951 Geneva Convention relating to the status of refugees and its 1967 New York Protocol, which maintain the principle of non-refoulement"*. The Memo draws 12 conclusions on the situation in Greece:

(i)– (iii) There is no risk of refoulement

(iv) As outlined by the UNHCR in 2007 there would appear to be substantial efforts to provide support to asylum applicants;

(v) Applicants transferred from Ireland to Greece have been accepted into the asylum system;

(vi) There is no general application by other Member States of the sovereignty clause of the Dublin II Regulation. Any derogation is in relation to specific and unique cases.

(vii) Any Member State which suspended transfers to Greece did so on a temporary basis until they were satisfied that there was no risk to the applicant on transfer.

(viii) An accurate description of procedures can be taken from information provided directly from Greece, and also from visits by other Member States to Greece. Greece has accepted responsibility for examining the asylum applications of Dublin II returnees.

(ix) Each Member State has responsibility for the operation of its own asylum procedure. Any concerns about the operation of such procedures in relation to the requirements of EU law are a matter for complaint to the European Commission. The Authorised Officer who prepared the Memo states: "*I am satisfied (on the basis of the evidence available both directly from the Greek authorities and from other Member States) that Greece meets its obligations to admit persons to its asylum procedure, to process their application and to avoid the risk of refoulement.*"

(x) – (xi) At a meeting of the *Dublin Regulation Contact Committee* (held every six months in Brussels and attended by all Dublin Regulation liaison officers and UNHCR representatives), no concerns were raised in respect of refoulement from or ill-treatment in Greece.

(xii) No report of any actual instance of unlawful refoulement or of any question in relation to the Greek practices and procedures has been circulated to Member States by the European Commission, which is responsible for monitoring the operation of the Dublin II Regulation.

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13. The Memo concludes that if the applicant is returned to Greece, he / she will be admitted to the Greek asylum procedures, will have his / her claim determined in that procedure, will have access to reception conditions such as accommodation and will not face the risk of refoulement. A recommendation was therefore made that a notice of determination issue to each applicant pursuant to the *Refugee Act 1996 (Section 22) Order 2003* (S.I. No. 423 of 2003).

4. THE APPLICANTS' SUBMISSIONS

14. The applicants are seeking *inter alia* an order of *certiorari* quashing the Commissioner's determination that they should be transferred to Greece. Leave was conceded by the respondents on the following grounds:-

(a) The Commissioner failed to take into account all relevant considerations and / or took into account irrelevant considerations in deciding to transfer the Applicant's application for asylum to Greece and as such the Commissioner has failed to act in accordance with fair procedures and natural and Constitutional justice.

Without prejudice, the Minister failed to consider the details regarding compliance by Greece with the Geneva Convention relating to the Status of Refugees and the provisions of the Dublin II Regulation, and / or considered that the Greek authorities were in compliance with their obligations in circumstances where they were not, and without prejudice, the Minister wrongly considered that the Greek authorities would properly apply the provisions of the 1951 Geneva Convention, as amended, and maintain the principles of non-refoulement.

(b) The Commissioner failed to put information regarding the compliance of Greece with the provision of the Geneva Convention and / or the Dublin II Regulation to the Applicant prior to making its decision herein. This said information was not publicly available to the Applicant.

(c) The Commissioner erred in law in not properly investigating the compliance of Greece with relevant obligations under the Geneva Convention Relating to the Status of Refugees and the provisions of Council Regulation (EC) No. 343 of 2003.

(d) The Commissioner failed to give adequate reasons for preferring one set of country of origin information to others and / or the Commissioner failed to draw the correct inferences and / or drew wholly incorrect inferences from the information provided.

(e) The Commissioner erred in law and in fact in not exercising its discretion to admit the application for asylum for consideration within the State.

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(f) The decisions of the first and second-named Respondents were vitiated by irrationality and / or disproportionality in all the circumstances.

(g) In the circumstances, a transfer to Greece would amount to a disproportionate interference with the rights of the Applicant under the Constitution, EC law and the European Convention on Human Rights and, without prejudice, would be a breach of Council Regulation (EC) No. 343 of 2003.

15. Although reference is made to the European Convention on Human Rights (ECHR), that ground was officially abandoned at the hearing of the substantive application. It was repeatedly emphasised that this is *not* a case about Ireland's compliance with the ECHR. The applicants also clarified that they are only challenging the Commissioner's determinations and not the subsequent decisions of the Minister to make transfer orders.

16. Having heard the applicants' arguments over the course of some five days, it seems to this Court that their claim has two separate limbs:

A. That the Commissioner **acted unfairly, irrationally and in breach of natural and constitutional justice** in the manner in which it assessed the information and materials before it and

B. That the Commissioner **erred in law** in refusing to exercise its discretion under Article 3(2) of the Dublin II Regulation

17. The Court will examine each of those arguments in turn.

A. UNFAIRNESS AND IRRATIONALITY

18. The applicants complain that when considering their requests for derogation, the Commissioner acted in breach of fair procedures and natural and constitutional justice as follows:

- Failing to take into account all relevant considerations and / or taking into account irrelevant considerations, in breach *inter alia* of Regulation 4 of the *Refugee Act 1996 (section 22) Order* S.I. No. 423 of 2003;
- Failing to draw the correct inferences and / or drawing wholly incorrect inferences from the COI;

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- Failing to give adequate reasons for preferring one set of COI to others;
- Failing to deal with the materials in any meaningful way;
- Approaching the material in a less than objective way;
- Enthusiastically seizing upon and repeating any comment or phrase which could support the idea that it was reasonable to transfer to Greece
- Ignoring any material criticism of the Greek authorities;
- Misrepresenting the contents of the COI on certain limited occasions;
- Drawing benign and optimistic conclusions which have no bearing in reality; and
- Dealing with the formal aspects of the asylum procedure in Greece as they appear on paper, but ignoring the well-documented reality of the position on the ground in Greece.

19. Mr McDonagh S.C. made lengthy submissions on behalf of the applicants critically addressing each of the findings drawn by the Commissioner's agents in the Memo. He argued that the author of the Memo failed to adequately consider that the European Commission has taken infringement proceedings against Greece. He submitted that in considering the letter written by the European Commission to ECRE (an umbrella organisation of NGOs working in the area of asylum) on the question of those proceedings, the Memo extracted a sentence which reflects the trite legal observation that it is only the ECJ that can establish a breach of the EC Treaty. The author of the Memo omitted the subsequent relevant observation that Member States were entitled to exercise the sovereignty clause in Article 3(2) of the Dublin II Regulation which, counsel submitted, affirms the existence of a substantive decision making-power on the part of Member States. This omission of the second sentence is indicative of a slant towards a negative decision.

20. Counsel further argued that the Memo seriously misreads the report of the European Parliament's LIBE Committee delegation to Greece which, he submitted, was highly critical of asylum determination procedures in Greece. He argued that the conclusions drawn in the LIBE report were damning and that the Commissioner was wholly incorrect in interpreting the report as being supportive of the transfer of

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applicants to Greece under the Dublin II Regulation. He submitted that the Commissioner characterised the LIBE report in a misleading and incomplete way and that the analysis carried out by the Commissioner was anodyne, simplistic and an air-brushing exercise which simply did not reflect the criticisms made by the LIBE.

21. The applicants also criticised the Commissioner's finding that it would not be appropriate to draw conclusions on the outcomes of refugee status in Greece as those outcomes are influenced by a wide variety of complex factors which are not necessarily the same in each Member State. It was submitted that the statistics cited by the UNHCR were a relevant matter and by failing to consider the statistics, the Commissioner sought to emasculate the criticisms of Greece made by the UNHCR.

22. Mr. McDonagh's primary submissions were directed to the treatment given by Commissioner to the UNHCR Position Paper of April, 2008. He argued that this report was one worthy of significant consideration as it was an exceptional publication on the part of the UNHCR. He submitted that it was the most relevant evidence put before Commissioner which demonstrated the ineffectiveness or the "shambles" of the asylum determination procedure in Greece. The Commissioner consciously chose to ignore the most damning provisions of the UNHCR paper and failed to deal with the concerns raised by the UNHCR.

23. Particular issue was taken with the Commissioner's finding at paragraph 24 of the Memo that there was a "*considerable body of evidence supplied by Greece and elicited by other members states that would question the contents of the UNHCR position paper in relation to the issue of access to the Greek asylum procedure, the quality of the Greek determination procedure and on the issue of the reception conditions*." It was submitted that this conclusion is not supported by an analysis of the information supplied by Sweden, Norway, The Netherlands, Germany, Denmark,

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the U.K. and Greece and that the Commissioner's analysis of that information was selective, unfair and irrational. Counsel submitted that none of the information provided to the Commissioner by other Member States cast doubts of the significance on any of the criticisms made by the UNHCR of Greece, unless one was to take at face value what was asserted by the Greek Ministry. The information provided by those Member States was corroborative of the major concerns raised by the UNHCR and painted a picture consistent with that painted by the UNHCR and other NGOs.

24. Counsel took particular issue with the reliance placed by the Commissioner on the report of the Swedish Federal Agency for Migration on its visit to Greece between the 21st and 23rd April, 2008 – i.e. one week after the UNHCR paper. It was argued that the Commissioner misinterpreted or misread the Swedish report by implying that it indicates that the UNHCR's concerns were misplaced and unsubstantiated and that the Memo extracts the positive from the Swedish report and ignores the negative. Mr McDonagh also argued that the Memo misrepresented the views expressed by Mr. Dan Eliasson (Director General of the Swedish Migration Board) in his covering letter to the Swedish delegation report as being the views of the delegation itself. Counsel stated that Mr. Eliasson did not go to Greece and put an interpretation on the report which does not in fact reflect its contents.

25. Counsel further submitted that the Memo failed to correctly interpret the information provided by Norway to the Commissioner and that the information provided relating to the U.K. relates primarily to the risk of refoulement and therefore would not question the contents of the UNHCR position paper on the asylum procedures in Greece. He argued that the decisions of the House of Lords in *Nasseri v. Secretary of State for the Home Department* [2009] 2 W.L.R. 1190, the Court of Appeal in *A.H. (Iran), Zego (Eritrea) and Kadir (Iraq) v. Secretary of State for the*

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Home Department [2008] EWCA Civ 985 (6th August, 2008) and the European Court of Human Rights ("ECtHR") in *K.R.S. v. United Kingdom* (Application No. 32733/08, 2nd December, 2008) have no bearing on the issues raised in these proceedings as the claims made in those cases related to Article 3 of the ECHR and not to the effectiveness of the asylum determination system in Greece.

26. Counsel further criticised the Commissioner's assessment that the information provided by Greece to the Dutch authorities was relevant as he argued that it was self-serving, political and aspirational in nature and failed to address the complaints made by the UNHCR. He objected to what he described as an extraordinary respect for the views of Greece and warned that the Greek reiteration of its official position could not be regarded as contributing to a "considerable body of evidence" questioning the contents of the UNHCR position paper.

27. Mr McDonagh further argued that the Commissioner acted in breach of fair procedures by omitting to refer to documents submitted by the RLS to the Commissioner and in particular failed to refer to a U.S. Department of State country report on Greece for 2007 (8th March, 2008), a *Athens News* article by Kathy Tzilivakis (February, 2008) and a series of documents from the ECRE umbrella organisation which reiterate many of the concerns raised by the UNHCR.

Failure to disclose documents

28. A subsidiary argument advanced by the applicants was that the Commissioner acted in breach of fair procedures by failing to put the applicants on notice that he intended to rely on materials other than those furnished by the RLS. The applicants argued that the information furnished to the Commissioner by Sweden, Norway, Denmark, Germany and the Netherlands was not generally or publicly available and even if it had been publicly available, the applicants had no way of knowing that the

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Commissioner was intending to rely on it and they were given no opportunity to comment or make submissions on those materials.

29. Mr. Richard Godfrey, an Assistant Principal with ORAC, filed a replying affidavit in which he avers that the Swedish report relied on by the Commissioner was located from the ECRAN weekly updates which is a website known to the RLS. He stated that the Norwegian press release was circulated to Norwegian newspapers and was therefore freely available and that the information submitted by Greece to the Dutch Dublin Unit was freely available on the internet. Mr. Godfrey stated on affidavit that the information set out in replies to specific queries from the Commissioner to the Dublin Units of Germany, Denmark and Greece (Annexes 8, 9 and 10 to the Memo) was available through the ECRE website and ECRAN weekly updates. Mr. Godfrey noted that there was extensive co-operation throughout Europe between bodies such as the RLS and NGOs in general and stated that he believed that all of the information relied on by the Commissioner was available to the RLS prior to the date on which the Memo was prepared and the determinations issued.

B. ERROR OF LAW

30. The applicants argue that the Commissioner was entitled to determine that the applicants should be transferred to Greece pursuant to the Dublin II Regulation *only if* Greece was applying the Geneva Convention relating to the Status of Refugees ("the Refugee Convention") in a manner consistent with the terms of the Dublin II Regulation. The applicants rely on Article 3(1) of the Regulation which provides:-

> "Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."

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31. The applicants argue that the obligation to examine the asylum application of a third country national under Article 3(1) must be read as an obligation to examine the application in accordance with the Refugee Convention and in accordance with EC law. They point to recital 4 to the Dublin II Regulation which states that the method for determining the Member State responsible for the examination of an asylum application "should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, *so as to guarantee effective access to the procedures for determining refugee status* and not to compromise the objective of the rapid processing of asylum applications" (*the applicants' emphasis*).

32. The applicants argue that these provisions indicate that each Member State must have in place a fair and effective system for the determination of asylum applications. They accept that there is a presumption that Member States apply the same standard of protection and determine applications in accordance with the Refugee Convention but they argue that such a presumption is not conclusive and that in cases where the presumption is rebutted by clear and cogent evidence, ORAC is *obliged* to exercise its discretion under Article 3(2) of the Regulation – the so-called "sovereignty" clause – and accept responsibility for determining the asylum application in Ireland.

33. The applicants argue that the presumption of compliance has long since been rebutted in the case of Greece. The information before the Commissioner demonstrates that the asylum process in Greece is a "shambles" and that there is no guarantee that the Refugee Convention is being applied or that asylum applications will be determined fairly and effectively. In those circumstances the Commissioner erred in law by failing to exercise his discretion to derogate from the Dublin II Regulation.

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5. THE RESPONDENTS' SUBMISSIONS

A. UNFAIRNESS AND IRRATIONALITY

34. With respect to the applicants' arguments on the Commissioner's failure to act in accordance with natural and constitutional justice Ms. Moorhead pointed out that while the key recommendation made by the UNHCR was to advise Member States to suspend transfers to Greece under the Dublin II Regulation, the information provided by other Member States was that they were generally continuing to transfer applicants to Greece. Those two scenarios are inconsistent and it then fell to the Commissioner to analyse all of the evidence before him in the round so as to decide the appropriate approach for this country to adopt. Ms Moorhead posited that it would be fundamentally incorrect to suggest that each Member State should operate as an island, isolated from the practices of other Member States and in that context it was entirely reasonable and eminently sensible for the Commissioner to have regard to the views expressed by other Member States subsequent to the issue of the UNHCR recommendations.

35. Ms. Moorhead argued that the reality is that while the applicants may have wished for the Commissioner to rely on the UNHCR paper and not return the applicants to Greece under the Dublin II Regulation, there was in existence a body of other evidence that the Commissioner could rely on. The evidence that was before the Commissioner was not all "one way traffic" and the issue was not quite as clear-cut as the applicants would wish. It was not appropriate for the Commissioner to take the UNHCR position paper in isolation; it was appropriate for him to instead examine the information in the round. All relevant material, including the highly relevant information obtained from other Member States, was considered and overall, the Memo demonstrates that an impressive amount of research was carried out, nothing

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was glossed over and serious consideration was given to the applications for derogation.

36. Ms Moorhead responded to each of the specific submissions made by the applicants. She placed great reliance on the report compiled by Sweden, noting that it was prepared after the UNHCR position paper was published and made reference to other NGOs' reports and was material to which the Commissioner was clearly entitled to have regard. She submitted that there was no distinction to be made between the views expressed by Mr. Eliasson and those expressed in the delegation's report.

37. Ms Moorhead also argued that the comments contained in the Memo as to the statistics cited by the UNHCR were entirely reasonable given that neither the Commissioner nor the RLS are party to the refugee determination system in Greece which is a Member State of the EU and a Contracting State to the ECHR. She also argued that it would be disrespectful for the Commissioner to disregard the information provided by Greece.

38. Finally Ms. Moorhead asked the Court to bear in mind that the Commissioner's assessment was undertaken in the light of allegations of refoulement and interrupted claims, which had the potential to constitute treatment contrary to Article 3 of the ECHR. Those allegations now form no part of these proceedings.

Failure to Disclose Documents

39. Ms. Moorhead argued that the Commissioner addressed the question of how other Member States were dealing with transfers to Greece because this was a matter raised by the RLS. She argued that a distinction was drawn by Cooke J. in *R.J.A. (Ajoke) v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 216 (30th April, 2009) between, on the one hand, information of a generalised nature which might be included in a s. 13 report and furnished to an asylum applicant for the

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first time with that report, and on the other hand information which was of relevance to the individual asylum seeker and which natural justice would require to be put to an applicant for comment before a decision could be made. The information at issue in this case is, she argued, generalised information upon which the applicants could not be expected to comment, and did not require to be put to them for comment and explanation. She also relied in this regard on the decision of the Supreme Court in *Baby O v. The Minister for Justice Equality and Law Reform* [2002] 2 I.R. 169.

40. In reply, Mr. Power B.L. on behalf of the applicants sought to distinguish *Ajoke* on the basis that the application in that case was for asylum whereas in this case the application was for derogation. He accepted that in most cases, there is an interest in ensuring that a quick decision is taken as to the transfer of an asylum applicant and that there is no general requirement to put information to an applicant for comment and explanation but in this case there was deep controversy about the material sourced and in the circumstances the material relied on by the Commissioner should have been put to the applicants.

B. Error of Law

41. The respondents dispute the applicants' interpretation of the Dublin II Regulation. Both parties agree that the Regulation operates on the presumption and the premise that every EU Member State will observe the provisions of the Refugee Convention. The respondents argue that absent cogent evidence that the applicant will be at risk of treatment contrary to Article 3 of the ECHR, the Commissioner is entitled to transfer an applicant in accordance with the Dublin II Regulation and that there is otherwise no obligation to derogate.

42. The respondents argued that the ECtHR in *K.R.S.* (cited at para. 25 above) made a clear distinction between Member States' obligations under the Dublin II Regulation

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where there is a real or substantial risk of an Article 3 violation and the situation that arises where an applicant complains about the adequacy of the asylum determination process. The same distinction was made by the Court of Appeal in *Zego,* the House of Lords in *Nasseri* (both cited at para. 25 above) and this Court in *Mantay (M.M.) v. The Refugee Applications Commissioner & Anor* (Unreported, High Court, Clark J., 8th June, 2009).

43. The respondents argue that as the applicants have abandoned their initial claim that their transfer to Greece would put them at risk of ill-treatment contrary to Article 3 of the ECHR, there is no legal impediment to their transfer to Greece. They argue that the default position under the Dublin II Regulation is that applicants should be transferred in accordance with the scheme of the Regulation, save for exceptional circumstances. They argue that it is for the European Commission to take infringement proceedings against a Member State before the European Court of Justice if there are issues about that State's compliance with EC law and it is not appropriate for Ireland to parse or analyse the asylum determination system of another Member State. In addition, the decisions in *K.R.S.* and *Nasseri* make clear that the first port of call if there is a complaint in respect of the asylum system in Greece is with the Greek courts and then before the ECtHR and not the domestic courts of the transferring state.

6. THE COURT'S ASSESSMENT

44. The Court believes that notwithstanding the outraged criticisms made by the applicants arising from the determination that all three applicants should be returned to Greece under the terms of the Dublin II Regulation, sometimes the basic import of the Dublin II Regulation has been lost. When performing his functions under the *Refugee Act 1996 (Section 22) Order 2003* to determine whether an asylum

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application should be examined in Ireland, the Commissioner is not obliged in any case to deal with the merits of the asylum application or to accede to an applicant's request for derogation. However, because of the nature of the Regulation which is an EU-wide agreement and which sets out a "Hierarchy of Criteria" for determining which Member State is responsible for examining a particular asylum application, the Commissioner must take into consideration all relevant matters known to him, including any representations made by or on behalf of the applicant. In these cases the Commissioner's decision must be viewed in the context of the applicants' specific representations.

45. When each of the applicants applied for asylum in Ireland they told blatant untruths. None of the applicants revealed that they had come to Ireland via Greece until faced with the fact that the Eurodac system revealed that each applicant had previously been in Greece. This information confirmed that Ms. Mamo had her fingerprints taken in Greece on the 9th September, 2003 and subsequently applied unsuccessfully to be considered a refugee in Greece. A Category 2 Eurodac "hit" in respect of Mr. Abrahimi and Mr. Mirza revealed that they were apprehended in connection with the illegal crossing of an external border and had their fingerprints taken in Kos on the 30th September, 2007 and Mytilini on the 8th January, 2008, respectively.

46. It is common case that according to the criteria set out in Chapter III of the Dublin II Regulation, Greece would be the Member State responsible for examining the applicants' asylum applications and that if the normal scheme were followed, the applicants would be transferred to Greece. The applicants requested that the Commissioner exercise his discretion to derogate from the normal application of the Regulation pursuant to Article 3(2) of that instrument which is commonly known as

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the "sovereignty clause" and to accept responsibility for determining their asylum applications in Ireland. Article 3 of the Regulation provides:-

> "**1**. *Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.*
>
> **2**. *By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility*. […]"

47. The primary basis on which the applicants sought this derogation under Article 3(2) of the Dublin II Regulation was that if the applicants were transferred to Greece, Ireland would be in breach of its obligations under the European Convention on Human Rights (ECHR) because there was a risk that they would be subjected to ill-treatment in or refoulement from Greece contrary to Article 3 of the ECHR. The Commissioner assessed that argument and found that on the evidence, there was no risk of the applicants being exposed to treatment which would be contrary to Article 3 of the ECHR. The applicants do not challenge that conclusion. In addition, the applicants clarify the nature of their challenge by stating that the "interrupted claims" procedure plays no role in these cases. In any event, the Court observes that Greece gave a standard assurance in reply to the Commissioner's "take back" requests in the cases of Mr Mirza and Mr Abrahimi that those applicants would be entitled to submit an asylum application upon their return to Greece if they wished to do so. The

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question does not appear to be live in Ms Mamo's case as she appears to accept that her asylum application was already determined by Greece. It is stated that she was refused refugee status but she appears to have lived in Greece for some four or five years thereafter before coming to Ireland.

48. The second basis for the request for derogation was essentially that Greece does not have in place an effective asylum determination system and Ireland is therefore *obliged* to derogate under Article 3(2). While this was undoubtedly the main plank of the applicants' submissions to the Court, it was very much a subsidiary aspect of their requests for derogation to the Commissioner. The obligation to derogate by reason of the absence of an effective asylum system in Greece was an argument formulated in Ms. Mamo's case. As was noted at paragraph 6 above, in her case the RLS submitted that the recitals to the Dublin II Regulation are premised on the need to guarantee effective access to asylum determination procedures and to ensure full observance of the right to asylum guaranteed with due respect for the rules set out in the Geneva Convention and the right to asylum as guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union. It was submitted on her behalf that:-

> "*The Dublin II Regulation, therefore, cannot be read or applied in a manner that would put an asylum applicant in jeopardy of not having his asylum claim properly determined. Given the information on file it is submitted that this Applicant will not have a proper asylum application in Greece and cannot be returned there under the Dublin Regulation*."

49. Although such submissions were not so clearly identified in the cases of Mr. Mirza and Mr. Abrahimi the Commissioner nevertheless assessed this argument and the evidence advanced in support of the application for derogation and concluded that each Member State has responsibility for the operation of its own asylum procedure

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and any concerns about the operation of such procedures in relation to the requirements of EC law are a matter for complaint to the European Commission. The Commissioner also concluded that the evidence indicates that if the applicants are returned to Greece, they will be admitted to the Greek asylum procedures and will have their claims determined in that procedure and they will also have access to reception conditions such as accommodation.

50. The applicants challenge the validity of those conclusions and argue that they were reached both in error of law and in breach of fair procedures and natural and constitutional justice.

A. UNFAIRNESS AND IRRATIONALITY

51. The applicants argue that the assessment of the extensive submissions made on their behalf by the RLS regarding the inadequate asylum determination processes in Greece was conducted in breach of fair procedures and of natural and constitutional justice. Primarily they argue that the Commissioner took account of irrelevant considerations, failed to take account of relevant considerations and drew incorrect conclusions from the material.

52. The applicants approached the challenge to the assessment of their submissions by forensically deconstructing the Commissioner's Memo and taking each individual assertion made by the RLS and laying it beside the Commissioner's response. In that way the applicants sought to demonstrate that the information contained in the Memo does not correspond to the information on which it is said to be based. This is an exercise frequently disapproved of, especially by Peart J. in *G.T. (Tabi) v. Refugee Appeals Tribunal* [2007] I.E.H.C. 287 (27th July, 2007), where he held that "*It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used*".

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53. The lengthy Memo which grounded the impugned decisions should ideally have been approached as a complete document to establish whether, read as a whole, it failed to address the arguments made by the applicants or whether it arrived at conclusions on those arguments and supporting documents that were unfair, wrong in law or based on serious factual errors. Having read the Memo in that way there is little doubt that the issues raised by the RLS on behalf of the applicants were considered thoroughly and carefully. Each submission made was examined and attached country of origin information and other material furnished was considered. The applicant did not during the lengthy hearing point to any relevant matter which the Commissioner failed to consider. The Court is not satisfied that the Commissioner breached his obligations under Regulation 4 of the *Refugee Act 1996 (Section 22) Order* (S.I. No. 423 of 2003) to take account of all relevant information known to him.

54. Perhaps the most vehement of the applicants' criticism was directed to the Commissioner's conclusion that there was a "considerable body of evidence" which would question the contents of the UNHCR position paper of April, 2008 which calls on Member States to derogate from the normal application of Dublin II. It is perhaps unfortunate that by concentrating on single aspects of the Commissioner's Memo and by attributing a perhaps unintended interpretation to the phrase set out in paragraph 24 of the Memo that there was a "considerable body of evidence which called into question the contents of the UNHCR position paper" the applicants have distorted the real meaning of the Commissioner's analysis. Although the somewhat infelicitous use of the phrase set out at paragraph 24 could, if taken out of context, appear to be unsupported by the evidence, the Court is satisfied that this is not a fair interpretation of what was intended. When the Memo is read as a whole and paragraph 24 is taken

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in the context of the preceding paragraphs and the analysis that follows, the finding is in fact supported by the evidence. It was not suggested that the factual correctness of difficulties in the asylum system in Greece was questioned but rather that the need to derogate from Dublin II as a result of those difficulties was disputed by a considerable number of sources. Before arriving at that conclusion the Commissioner considered each of the three issues of concern outlined in the UNHCR position paper of April, 2008. Each issue had been considered in the light of the covering letter written by Mr. Eliasson, Director General of the Federal Agency for Migration and Refugees dated the 7th May, 2008 which accompanied the report of the Swedish delegation.

55. The covering letter of Mr Eliasson is of particular relevance because it was written as an overview of the report of the delegation compiled after an on-site visit which took place just one week after the UNHCR position paper issued on the 15th April, 2008. The Swedish report makes no reference to the UNHCR position but does not underplay the difficulties experienced by asylum seekers in Greece and corroborates the UNHCR report in that regard. Mr. Eliasson's letter establishes that notwithstanding those findings, his analysis of the delegation's report was that the relevant Swedish authorities would not derogate generally from the Regulation. He noted that Sweden's attitude is that derogations will be granted only in exceptional circumstances so as not to contravene to general aim of the Dublin II Regulation. He noted that the delegation report indicates that the asylum determination system and reception conditions in Greece "generally meet acceptable standards" save in the case of children. On the basis of that and other information relating to Greece he concluded that *"not enough reasons, be they humanitarian or other, were detected"* whereby a derogation could be made to the general scheme of the Regulation. In those circumstances, the Commissioner's Memo accurately reflects the contents and

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tenor of the Swedish delegation report and the position of Mr. Eliasson. The authors who considered this information were entitled to have regard to the effect of the Swedish delegation's report on Swedish government policy and the advice to the Swedish government given by their responsible officer on that particular policy.

56. The Court considers it important that immediately before reaching the conclusion set out at paragraph 24, the Commissioner had regard to the decision in *Zego* where the Court of Appeal made the crucial distinction between cases involving a risk of a breach of Article 3 of the ECHR and all cases falling short of that threshold. The Commissioner also went on to point out that "*in relation to the UNHCR position paper, it is only appropriate that this matter should be considered in the context of a more holistic examination of matters arising including the position of other EU States, non-governmental organisations and, of course, the Greek authorities themselves.*"

57. The Commissioner then considered the position in other Dublin II Regulation Member States being Sweden, Norway, Germany, Denmark, the Netherlands and the U.K. As noted above those Member States indicated that they are continuing in general to transfer applicants to Greece. The documents appended to the Memo indicate that other Member States were generally aware of the difficulties for Greek authorities and for asylum seekers as outlined by the UNHCR in its position paper and by many reports prepared by other NGOs and humanitarian organisations. A careful examination on the position of the other Member States consulted by the Commissioner's officers indicates that, notwithstanding the UNHCR position and advice that transfers to Greece be halted, the policy of those Member States consulted by the Commissioner in the preparation of the Memo was that they had either resumed or continued to operate in accordance with the Dublin II Regulation. For

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instance, in December 2007 Norway decided to temporarily stop transfers of families with minor children to Greece, "*based primarily on concerns about the reception conditions for such a vulnerable group of asylum seekers*". In February 2008, the decision was taken to temporarily stop the transfer of all asylum seekers to Greece, "*on the basis of information about possible violations of the rights of asylum seekers in Greece.*" Norway did not resort to the sovereignty clause in those cases. It simply put transfers on hold temporarily and did not examine those cases for the time being. In July 2008, the Norwegian Ministry of Labour and Social Inclusion determined that the examination of asylum applications involving transfer to Greece under Dublin II should resume, with the exception of application from families with children. That decision was notified to other Member States on the 21st July, 2008.

58. As was previously noted, Sweden decided in April, 2008 that no grounds had been identified by the delegation that visited Greece which would merit the general suspension of the Dublin II Regulation although it decided not to transfer unaccompanied minors.

59. The German authorities indicated on the 17th July, 2008 that Germany was still actively processing cases that would result in a transfer to Greece and was still proceeding to transfer applicants to Greece, irrespective of their nationality. From January to May, 2008 it had transferred 143 applicants to Greece. Germany indicated its position as follows:-

> "*In principle, transfers to Greece are continuing to take place from Germany to Greece. The sovereignty clause in the Dublin [Regulation] is being closely examined with Greece. In case of doubt, use is made of the sovereignty clause for people in particular need of protection. From the German point of view, persons following under "particular need of protection" include*

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unaccompanied minors, pregnant women, women with newborn babies or infants, persons over the age of 65 [and] persons with a serious disease or handicap."

60. Denmark indicated by letter dated the 9th July, 2008 that it was a strong supporter of the Dublin system and as a result it was of the view that a generally-applied suspension of the Dublin II Regulation would work against the purpose of the Regulation. It indicated that Denmark would continue to follow the procedure where the Greek authorities would be asked in each case to confirm in writing that the returned applicant would have their application considered upon return. Denmark indicated that it would transfer adult asylum applicants to Greece unless special considerations of a humanitarian nature arose. It confirmed that it had been decided for the time being to suspend transfers of unaccompanied minors. That decision was made on the basis of the Swedish delegation report.

61. Thus the Commissioner was aware that the other Member States consulted were continuing to transfer asylum applicants to Greece although they did not transfer vulnerable applicants. As the respondents pointed out, none of the applicants in this case were in any particular vulnerable category. The information received by the Commissioner from other Member States indicates that those countries did not follow the UNHCR's recommendation that they should derogate from the Regulation in relation to transfers to Greece. In that way the UNHCR position is not consistent with the position taken by those Member States. The Commissioner's view that these sources bring into question the UNHCR's views on the need for derogation from the Regulation is therefore well supported by evidence.

62. Another of the applicants' criticisms of the Commissioner's Memo was that it appeared to minimise negative findings made in various reports on the asylum

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determination process in Greece and engaged in a selective assessment of that information which it was argued was unequivocally that the asylum process in Greece was a “shambles”. The Court has viewed the many reports where this criticism was made. If a report is to be of any utility in establishing facts it must first be informed. In determining the value of the information contained in a report it is not of any great benefit to identify each piece of information contained in that report and then to assess each portion separately. A more useful exercise is to read the report as a whole to establish the source of the information, the expertise and objectivity of the author and whether the contents show consistency with other reports on the same subject. When the report as a whole is deemed reliable and useful and information deemed of value is extracted and relied upon, such evaluation is not neutralised by the failure to list the other findings and comments made in the report under consideration. Once the extraction of key information follows a fair and reasonable examination of the whole report and the extracts are quoted in context, the extracts cannot be seriously impugned. I believe that this is the case here.

63. The Memo does not distinguish between the matters set out in the Swedish delegation report itself and the views expressed in the covering letter from the Director General of the Swedish Migration Board, Mr. Eliasson. That omission cannot, as was asserted, amount to a breach of fair procedures. The letter and the report are inextricably linked and to ignore that link would be to distort the purpose and effect on the actions of those who directed the investigation of conditions in Greece, i.e. to advise on future policy. All parties in this proceeding agree on the importance of the Swedish delegation report as it post-dated the dissemination of the UNHCR position paper and the advice to governments to halt Dublin II transfers to Greece. Its importance is the very reason why the Commissioner considered the

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Swedish report in detail when seeking to establish the reactions of other Member States to the UNHCR advice. The Swedish government's intention to continue returning asylum seekers to Greece under the Dublin II Regulation (with the exception of children) was therefore highly relevant particularly as it informed the Norwegian Ministry of Labour's decision of July, 2008 to direct that the transfers of adult asylum seekers to Greece under Dublin II should recommence.

64. That brings the Court to the applicants' argument that little or no regard should have been had to the information provided by Greece. There is a fundamental principle that in any situation where allegations are made against one party, the other side should be afforded an opportunity to provide its side of the argument before any decision is arrived at – *audi alteram partem*. Greece is a Member State of the EU and a Contracting State to the European Convention on Human Rights and as such, there must be a presumption that it will comply with its international obligations. Here it was incumbent on the Commissioner to hear what Greece had to say regarding the very extensive criticisms made regarding its asylum assessment system. The Commissioner was aware of the concerns relating to the practice in Greece of interrupted claims. The Commissioner was also aware of proceedings taken by the European Commission against Greece on this very point and for Greece's failure to implement the Reception Conditions Directive in full. The views of Greece on the suspension of transfers under Dublin II had therefore to be given due weight. Had the Commissioner not sought information from Greece, the applicants may well with some justification have argued that he conducted an incomplete investigation. Contrary to what was argued, there is no question that the Commissioner relied either solely or disproportionately on the information provided by Greece in coming to his determination that the applicants should be transferred there. The Commissioner's

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discussion in the Memo of the information provided by Greece came after the actions taken by various other Member States in a geographically similar position to Ireland were identified. The applicants' arguments relating to the undue deference by the Commissioner to Greece's position and response to the UNHCR paper and the criticism of humanitarian organisations and NGOs are not warranted.

65. The next issue is the statistics relating to levels of successful asylum outcomes cited in the UNHCR report which are undoubtedly alarmingly low. The approach taken by the Commissioner to those statistics was to indicate that neither the RLS nor Ireland is a party to the determination process in Greece and that it would not be appropriate to draw conclusions on the figures. It was stated that the outcome of applications is influenced by a wide variety of complex factors which are not necessarily the same in each Member State. The Court observes that in the report of the Swedish delegation in April, 2008 it was noted as follows:-

> "We were told that many asylum seekers mention economic reasons as confirmed by [A.V.], who works as [a] lawyer for the Greek Council for Refugees. She said that this concerns in particular asylum seekers from Pakistan, Bangladesh and Sri Lanka. They often give this as a reason and since the proceedings in Greece are very long they rely on it and receive a "pink card" and they can work and receive health care during their stay. These people often have accommodation also. However, many people from Iraq do not want their application to be controlled in Greece but they apply to other EU countries so they do not ask for asylum."

66. Two of the three applicants in this case give some small credence to those assertions as they did not themselves apply for asylum until they came to Ireland. While the manner in which asylum determinations were carried out in Greece is and

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has been subject to much criticism on humanitarian grounds, the fact remains that the Commissioner had nothing before him which would allow him to conclude that like was being compared with like in the background to the very low success rates for such applicants. I am not satisfied that in taking this approach the Commissioner breached fair procedures. The Commissioner was not furnished with any explanatory memorandum on how those statistics were compiled. Without such explanation statistics can be meaningless. The nationality of applicants and their stated reasons for applying for asylum will differ greatly from one Member State to the next and this will influence the statistics of asylum determination. A low rate of recognition may be reflective of a state of affairs where the applicants are economic migrants fleeing poverty rather than persecution in its many forms and will not necessarily be indicative of an unfair or defective asylum determination system.

67. By way of illustration, German statistics, for example, reflect a low rate of refugee status; this is because non-state persecution does not qualify an applicant for refugee status but may qualify such applicant for subsidiary protection or the equivalent of humanitarian leave to remain. The statistics for Ireland indicate a dramatic fluctuation in the number of positive recommendations made by ORAC in the past four years:[1]

	Total Cases Processed	Positive Recommendations	Percentage
2006	4,784	397	8.3 %
2007	4,152	376	9 %
2008	4,581	295	6.4 %
2009 (to August)	2, 743	74	2.7 %

68. If other Member States were to survey the asylum recognition statistics of this State in the absence of some awareness of the general profile of the applicants, the

[1] *Cases processed to completed for 2002 to 2009*, ORAC Monthly Statistics – August 2009 issue.

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rate of recognition on appeal, and the number of failed asylum seekers who are subsequently granted leave to remain or subsidiary protection, it is possible that unsound and inappropriate conclusions could be drawn. A similar unsound assessment might arise from an uninformed perusal of the statistics in relation to asylum in the U.K., which demonstrates the following fluctuations:[2]

	Total Number of Decisions	Total Granted Asylum	Percentage
2005	29,885	2,225	7.5 %
2006	21,745	2,285	10.5 %
2007	22,890	3,800	16.6 %
2008	19,855	3,935	19.8 %

69. A close examination of a further sample of U.K. figures[3] shows that of the initial decisions on applications for asylum received by the U.K. all applicants from Macedonia, Moldova and Russia were refused. Of 345 applications from the Americas, 325 were refused. Of 4,375 applications from the Middle East, only 495 were recognised as refugees. Those figures may appear stark without consulting the reasons for the refusal and without considering whether the applicants were instead granted humanitarian protection or discretionary leave to remain, or whether they came from a third safe country or failed to comply with the process.

70. The applicants submit that the Commissioner's Memo extracts the positive and ignores the negative from the LIBE delegation report of the European Parliament, and from the European Commission's letter to ECRE. I do not believe that this is established by any fair reading of the Memo. In the case of each negative report furnished by the RLS, the Memo has noted the key aspects of the material and set it against more recent developments and balanced the two in the background of general

[2] U.K. Home Office Statistical Bulletin *Control of Immigration: Statistics U.K. 2008.*
[3] See U.K. Home Office *Asylum Statistics 4th Quarter of 2007 (October to December).*

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principles relating to Ireland's obligations under the Dublin II Regulation. That was an appropriate evaluation which arrived at conclusions that were neither unreasonable nor irrational. For instance, taking the LIBE report, the Commissioner noted that the report expressed "a number of important concerns" about the quality and standard of the Greek refugee determination and reception process. While the Commissioner did not list those concerns he noted that the LIBE report provided clarity on a number of important issues in that it addressed the issue of refoulement and recognised that Greece had abandoned the interrupted claims procedure. In that context it is difficult to see that the Commissioner's summation was either selective or unfair. It was not incumbent on the Commissioner to list each and every concern raised by the European Parliament delegation in 2007.

71. Finally, the applicants argued that the failure on the part of the Commissioner to disclose to them the information obtained regarding the position of other Member States *vis-à-vis* transfers to Greece and to afford them an opportunity to comment upon that information was in breach of natural justice. It is difficult to discern what exactly the applicants wished to do with such an opportunity. The question of whether an asylum application should be determined in Ireland is a matter for the Commissioner, pursuant to section 4 of the *Refugee Act 1996 (Section 22) Order 2003* (S.I. No. 423 of 2003). Section 4(2) provides:-

> "The Commissioner shall, before making a determination under this Article, take into consideration all relevant matters known to him or her, including any representations made by or on behalf of the applicant."

72. Unless special circumstances exist this determination is intended to be a rapid process and not one which deals with the merits of the applicant's claim or a development of the applicant's arguments as to why Ireland should exercise its

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discretion to derogate from the Regulation. In this case the RLS made very extensive submissions and observations on behalf of each applicant. Those submissions and observations were considered and investigated and conclusions were reached. In the absence of extraordinary changed circumstances relating either to Greece or to the applicants' personal circumstances, it is difficult to envisage that a right of rebuttal was anticipated by the obligation to consider "all relevant matters" set out in section 4(2). The RLS expressly requested that the Commissioner should have regard to the position taken by other Member States in relation to the UNHCR position paper. It must be assumed that the RLS kept itself up to date on information generally available through websites specialising in asylum issues and had made all its necessary relevant points in the very extensive submissions made on behalf of the three applicants. The applicants have not indicated what submissions they were prevented from making nor have they demonstrated any prejudice by the failure of the Commissioner to engage with them in commenting on the information obtained from the other countries consulted. The Dublin II process is not an assessment of asylum status but rather a determination of which Member State is responsible for examining an asylum application according to an agreed hierarchy of criteria. The Court is satisfied that the Commissioner acted rationally and in accordance with fair procedures and natural and constitutional justice once he had considered all relevant information known to him and the representations made on behalf of the applicants.

B. Error of Law

73. The applicants have advanced the argument that Ireland is *obliged* to derogate from the general application of the Dublin II Regulation once cogent evidence that Greece does not comply with its obligations under EC law is established. I do not believe that is a correct interpretation of the law.

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74. The Dublin II Regulation, which came into force in 2003, replaced the *Dublin Convention on the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities* of 1990. The Regulation is an instrument achieved by discussion, compromise and agreement following close cooperation between Member States. It is one of the many legislative acts adopted under Title IV of Part Three of the amended EC Treaty which sets out and regulates Community policies on *Visas, Asylum, Immigration and other Policies related to Free Movement of Persons*. Although Ireland has opted not to take an automatic part in measures adopted under Title IV,[4] the State has made explicit its intention to exercise its right to take part in the adoption of such measures to the maximum extent compatible with the maintenance of its Common Travel Area with the UK,[5] and the State took the necessary steps to fully adopt and apply the Dublin II Regulation.

75. The objective of the Dublin II Regulation is to identify as quickly as possible which Member State is responsible for examining an asylum application, to establish reasonable time limits for each of the phases of determining the Member State responsible and to prevent abuse of asylum procedures in the form of multiple applications. The "Dublin system", which comprises the Dublin II and Eurodac Regulations and their implementing Regulations, is a common process designed to prevent "asylum shopping" and to ensure that each case is processed by only one Member State.

76. The Dublin II Regulation is a keystone of the first stage of the as yet embryonic Common European Asylum System (C.E.A.S.) which has been in progress for the past decade, since the entry into force of the Treaty of Amsterdam in 1999. Its

[4] See *Protocol on the position of the U.K. and Ireland, and Protocol on the application of certain aspects of Article 15 of the Treaty establishing the European Community to the U.K. and to Ireland, annexed by the Treaty of Amsterdam to the TEU and the TEC.*

[5] See *Declaration (No. 4) by Ireland on Article 3 of the Position of the U.K. and Ireland*, attached to the Treaty of Amsterdam.

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objectives were defined by the Tampere Conclusions and confirmed by the Hague Programme and its development will be further advanced under the proposed Stockholm Programme which is currently under negotiation. The first stage of the C.E.A.S. saw four building blocks being put in place: the Dublin II Regulation, the Reception Conditions Directive (2003/9/EC), the Qualification Directive (2004/83/EC) and the Asylum Procedures Directive (2005/85/EC). Those instruments are intended to harmonise Member States' legal frameworks for the granting of asylum on the basis of common minimum standards. The move towards the C.E.A.S. is now in its second phase and the four first stage instruments are being expanded. As part of the second stage the EU Institutions have reviewed the first stage instruments and are working to resolve the shortcomings identified in their operation. The European Commission is considering proposals to establish a common asylum procedure and to strengthen practical cooperation between Member States and the external dimension of asylum.[6] While this work is under way, the European Commission continues to monitor the implementation of the first stage instruments.

77. The formulation of the C.E.A.S. is based on a full and inclusive application of the Refugee Convention. This is clear from the language used in the Tampere Conclusions and the Hague Programme, language which is replicated in recital 2 of the Dublin II Regulation:-

> "The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New

[6] See *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU* (Communication from the Commission to the European Parliament, the Council, the EESC and the Committee of the Regions) COM(2008) 360 final.

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York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. […]"

78. Each Member State that has opted to take part in the adoption and application of the first stage instruments is obliged to comply with its obligations under those instruments as a matter of EC law. It follows that each Member State that is bound by the Dublin II Regulation is obliged to ensure that it has in place an asylum determination system that conforms to the requirements of the Qualification Directive and, by proxy, the Refugee Convention. This is clear from the *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System* of the 6th January, 2007[7] which stated that "*the notion of an "examination of an asylum application" as defined in the Dublin Regulation should be interpreted, without any exceptions, as implying the assessment whether the applicant in question qualifies as a refugee in accordance with the Qualification Directive.*" The requirements of the Qualification Directive (2004/83/EC of 29th April, 2004), which establishes minimum conditions for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, are broadly in line with the requirements of the Refugee Convention.

79. There can be no dispute as to these facts but what is contentious is the applicants' argument that Ireland is ***obliged*** to derogate and refuse to transfer Dublin II applicants where there is evidence that the responsible Member State is not complying with its obligations under domestic, EC or international law. If that argument were correct for Ireland then it would also be correct for every Member

[7] See COM(2007) 299 final.

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State of the EU and the Regulation would lose its cohesive effect. The Court does not accept that interpretation of the law.

80. Chapter III of the Dublin II Regulation sets out a "Hierarchy of Criteria" for determining the Member State responsible for examining an asylum application. The criteria are to be applied in the order in which they are presented in the Regulation and on the basis of the situation existing when the asylum seeker first lodged his or her asylum application with a Member State. The criteria relate to (i) family unity; (ii) the issuance of a residence permit or visa; (iii) illegal entry or stay in a Member State; (iv) legal entry to a Member State; and (v) applications in an international transit area of an airport. The 'default' rule, which applies where no Member State can be designated according to the "Hierarchy of Criteria", is that the first Member State with which the application was lodged will be responsible for examining it.

81. Guidance on the circumstances in which derogation from the Chapter III "Hierarchy of Criteria" is appropriate is provided by Article 15 of the Regulation, the "humanitarian clause", which allows Member States to derogate from the application of the hierarchy in order to bring family members or other dependent relatives together on "*humanitarian grounds based in particular on family or cultural considerations*" even though a different Member State would be responsible for examining their asylum application if the Hierarchy of Criteria was strictly applied. While the Regulation sets out that option it does not oblige derogation in such a situation.

82. The terms of the Dublin II Regulation do not in fact mandate derogation from the Chapter III "Hierarchy of Criteria" in any situation, leaving it to the designated officer in each Member State to exercise his or her discretion. The only identified situation where an ***obligation*** to derogate arises is where the proposed transfer would

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give rise to a breach of a Member State's obligations under Article 3 of the European Convention for Human Rights (ECHR). Article 3 provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" That is an absolute prohibition which includes the prohibition of refoulement.

83. In the relatively recent past it was believed that persons being returned to Greece under the Dublin II Regulation might face being returned by Greece to their native countries where there existed a real risk that they would face torture or worse. Such return would constitute a breach of the prohibition of refoulement, contrary to Article 3 of the ECHR. It has since been clarified however that Greece has not in fact returned any persons to countries where such a risk exists and refoulement is no longer considered a risk. It appears that the applicants accept that this is the case.

84. This perceived fear caused the relationship between Article 3 of the ECHR and the Dublin II Regulation to be ventilated and examined in a series of cases before the Court of Appeal and the House of Lords in *R (Nasseri) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 1386 (14th May, 2008); *A.H. (Iran), Zego (Eritrea) and Kadir (Iraq) v. Secretary of State for the Home Department* [2008] EWCA Civ 985 (6th August, 2008); and *R (Nasseri) v. Secretary of State for the Home Department* [2009] 2 W.L.R. 1190 (14th May, 2009); and that relationship was also the subject of a decision of the European Court for Human Rights in *K.R.S. v. United Kingdom* (Application No. 32733/08, 2nd December, 2008). Those cases, among others, establish that where substantial grounds have been shown for believing that the person concerned would if deported or transferred face a real risk of being subjected to treatment contrary to Article 3, then that person should not be deported or transferred.

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85. The Court is not aware of any other situation where there is an ***obligation*** to derogate from the Dublin II Regulation. In the circumstances, it follows that the Commissioner was correct when it was stated in the Memo accompanying the determination that each Member State is responsible for its own asylum process and that if a Member State has issues with another State's asylum process that is a matter for complaint to the European Commission. The European Commission is the "guardian" of the EC Treaty as set out in Article 211 EC and one of its roles is to ensure the proper application of Community law.

86. If a Member State is not complying with its obligations under Community law, it is the Commission that takes steps to put the situation right. As the Dublin II Regulation operates on the assumption that it is the Commission that should regulate standards, it cannot be appropriate for Member States to examine other countries' processes themselves. Although Member States may as an exceptional measure bring proceedings against other Member States under Article 227 (formerly 170) of the EC Treaty, the Member State must involve the Commission closely in such proceedings. In ordinary circumstances it is the Commission which must initiate infringement proceedings against a Member State before the European Court of Justice (ECJ) under Article 226 (formerly 169) of the EC Treaty. The Commission must when investigating infringement issues engage in a pre-litigation administrative procedure whereby the Member State is formally notified of the Commission's views and is given an opportunity to respond.

87. The Common European Asylum System is based on mutual trust, confidence and solidarity between Member States with the object of pursuing co-ordinated, strong and effective working relations between Member States and the European institutions. Those objectives would be undermined if the application of the Dublin II

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Regulation in Ireland was subject to the oversight by domestic courts of the effectiveness of asylum system of Greece or if there were an obligation on the part of the Commissioner to consider whether the responsible Member State operated an asylum system which accorded with an applicant's concept of an effective asylum evaluation system. The authorities in this State are entitled to assume that other Member States act in compliance with their obligations under Community law and that any issues of non-compliance are for the Commission to investigate. As was stated by Lord Hoffman in *R (Nasseri) v. Secretary of State for the Home Department* [2009] 2 W.L.R. 1190 (6th May, 2009) at p.1202:-

> "*I do not know whether the status of the Convention, the Regulation and the Directives in Greek domestic law would make staying there a breach of Greek law or not. It may be that the asylum seeker would be entitled to say that the refusal of his application is contrary to European and Convention law and that his failure to remove himself is not unlawful. But the Secretary of State is not concerned with Greek law. Like the operation of the Greek system for processing asylum applications and the conditions under which asylum seekers are kept, that is a Greek problem. The Secretary of State is not concerned with Greek law. Like the operation of the Greek system for processing asylum applications and the conditions under which asylum seekers are kept, that is a Greek problem. The Secretary of State is concerned only with whether in practice there is a real risk that a migrant returned to Greece will be sent to a country where he will suffer inhuman or degrading treatment*."

88. If an applicant has concerns about the responsible Member State's compliance with its obligations under EC or international law, he or she is perfectly entitled to raise those concerns with the authorities of that State or with the European

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Commission. This same reasoning must surely apply to the matters with which the Commissioner is normally concerned when determining which Member State is responsible for examining an asylum application pursuant to the Dublin II Regulation.

89. The Court does not seek to minimise the difficulties for migrants and asylum seekers in Greece as there is little doubt that its location as with other Mediterranean countries close to areas of conflict, discrimination, economic and political turmoil means that a greater number of people arrive at their external borders seeking entry to Europe. In recent times, these eastern and southern Mediterranean countries have experienced a vast wave of migrants originating in sub-Saharan Africa and the Middle East. This migration has not occurred in more northern or inland Member States, sparing those countries the same challenges to their administrative and humanitarian resources such as face countries like Greece, Malta, Cyprus and Southern Italy which bear an especially heavy burden. This relatively new phenomenon has at times threatened to overwhelm the resources of an ill equipped police and immigration service spread over hundreds of islands in Greece. There is no dispute that inadequate and sometimes appalling living conditions in holding areas on the Greek archipelago led to warranted concerns being voiced by various NGOs, interest groups and especially the UNHCR regarding the treatment of migrants and asylum seekers in Greece. In particular, the UNHCR voiced its concerns on several occasions about the risk of the so-called “interrupted claims” procedures, the fear of refoulement and the inadequacy of the asylum process.

90. Alert to such complaints, the European Commission acted to ensure compliance with the relevant EC instruments on the treatment and processing of asylum seekers. In April, 2007 the ECJ gave judgment in *Commission v. Greece* (Case C-72/06), finding that Greece had failed to implement the Reception Conditions Directive

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(Council Directive 2003/9/EC of 27th January, 2003). That Directive was transposed into Greek law in November, 2007. In January, 2008 the Commission instituted proceedings (Case C-130/08) against Greece in respect of its infringement of the Dublin II Regulation based on Greece's so-called "interrupted claims" procedure. A representative from the European Commission explained to ECRE in April, 2008 why the matter had been referred to the ECJ, as follows:-

> "*According to the Greek legislation, authorised departure of an asylum applicant from his/her place of residence amounts to a withdrawal of his/her asylum application and discontinuation of the asylum procedure. This appears to be against the provisions of the Dublin Regulation, namely of its Article 3(1), which places an obligation on the responsible Member State to effectively examine the applications concerned in the case of Dublin transfers.*
>
> *The Greek authorities acknowledged the fact that their legislation is incompatible with the Dublin Regulation and indicated a change in the practice of the administrative authorities, stating that, since April 2006, asylum applications from third-country nationals falling within the scope of the Dublin Regulation have been examined on their substance. However, in the absence of any clear indications allowing to conclude that Greece will correct the legal situation in the foreseeable future and based on the settled case-law of the Court of Justice, according to which, as long as changes in practice are not yet set in law, the infringement continues to persist, the Commission decided to refer the case to the Court of Justice."*

91. In other words, the intention to ensure that Dublin II returnees were received into the asylum system had to be followed up by legislation which was slow in coming. In May, 2008 the ECJ gave judgment in those proceedings (OJ C 128 of 24.05.2008, p.25), finding that Greece had failed to adopt the necessary measures to ensure that it examines the merits of applications for asylum of third country nationals in respect of whom a discontinuance decision had been issued on the ground of arbitrary departure and whom it had taken back in accordance with the Dublin II Regulation. The ECJ noted the following as part of its decision:-

> "5. The Hellenic Republic acknowledged that Greek legislation may create a problem in relation to Regulation No 343/2003 and displayed willingness to take measures in that regard. Thus, it proposed solving the problem by means of the adoption of a presidential decree which would transpose Council Directive

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> 2005/85/EC into national law and would specify that the provisions at issue would not apply in cases where Regulation No 343/2003 applied.
>
> 6. At the same time it gave assurances that it would examine the merits of every application for asylum of persons who are transferred for re-examination within the framework of Regulation No 343/2003 and that it would revoke any discontinuance decisions that had been adopted.
>
> 7. The Commission takes account of those assurances given by the Hellenic Republic. None the less, it considers that they are not sufficient to guarantee the required legal certainty regarding the correct implementation, in all cases of an application for asylum, of the regulation's provisions and in particular of the examination of the merits of every application for asylum, in such a way as to ensure actual and effective access for refugees to the procedures for making determinations."

92. In the meanwhile a number of Rule 39 orders were made by the European Court of Human Rights relating to transfer orders from EU Member States to Greece under the Dublin II Regulation. Between May and September, 2008, the ECtHR received 80 such Rule 39 applications from applicants in the U.K. alone.[8] For the main part those Rule 39 orders related to what has become known as Greece's "interrupted claims" procedures or to the then perceived risk that failed asylum seekers would be returned to their home countries where they could face persecution.

93. In the face of this barrage of criticism and in accordance with the assurances given to the ECJ in May, 2008, Greece enacted a new refugee law in July, 2008 which transposed the Asylum Procedures Directive and the Qualification Directive into domestic law and made provision for asylum seekers returned under the Dublin II Regulation to have their asylum applications reopened.

94. Between July and November, 2008 the Greek Dublin Unit also provided at least three letters of assurance to the U.K. authorities in the context of proceedings before the ECtHR, stating that asylum seekers would not be refouled and that the system of "interrupted claims" had been abandoned. Thus somewhat belatedly, Greece has

[8] See *K.R.S. v. United Kingdom* (Application No. 32733/08, Decision of 2nd December, 2008).

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demonstrated its intention to comply with its obligations under EC law, international law and the ECHR.

95. The Court is conscious from the very many documents sent to the Commissioner that the manner in which the Dublin system is designed at present creates a possible disparity in the distribution of asylum applications between Member States. Those countries located at the eastern and southern borders of the Union are very much more exposed to mass migration than those at the north-western borders causing an imbalance in the cost of complying with Community policies and laws on the treatment of asylum seekers. It is understandable that countries facing such exposure to large numbers of claimants would feel at times overwhelmed by the demands on their resources and their ability to ensure optimum asylum evaluation conditions.

96. Ireland, with its north-western neighbours may derogate from the normal application of the Dublin II Regulation for a variety of reasons including humanitarian or compassionate grounds as outlined at paragraph 81 above and there is certainly an argument that burden sharing should be distributed more fairly throughout the EU by less exposed countries accepting prospective Dublin II returnees into the asylum system. There is little doubt that burden sharing requires that solutions towards that end ought to be considered. It does not follow however that there is, as argued, any *obligation* on Ireland to derogate from the normal application of the Dublin II Regulation, absent substantial grounds for believing that there is a real and substantial risk of the transferee being subject to treatment contrary to Article 3 of the ECHR as a result of the transfer. In the decision of the Court of Appeal in *Zego* (cited at paragraph 84 above) (which was referenced in the Commissioner's Memo), Stanley Burnton L.J. at para. 21 identified a crucial distinction between the consequences of a

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risk of treatment contrary to Article 3 and the consequences of a risk of a defective examination of an asylum claim, as follows:-

> "*In my judgment it is right to distinguish between ill treatment in Greece and the risk of return to a country by Greece to another country in which an applicant will be mistreated. […] a defective examination of an asylum claim, in my judgement, only becomes relevant if there is a real risk of return contrary to Article 3: that is to say a return of an applicant without examination complying with international standards of his asylum claim to a state in which he is liable to be mistreated. If there is no risk of return, the fact that there is no proper examination of the asylum claim cannot of itself either constitute a breach of Article 3 or supplement what otherwise would not amount to a breach of Article 3 within what is alleged to be a safe third country, here Greece*."

97. This Court adopts the view endorsed by Stanley Burton L.J. in *Zego* and finds that it is important to distinguish between (i) cases where there is a real risk of a breach of the European Convention on Human Rights and (ii) cases where there are concerns about the asylum determination process and reception conditions which fall short of breaches of Article 3 of the Convention. In case (i), there may be an obligation to derogate from the Regulation but there can be no obligation to derogate in case (ii).

98. No evidence has been presented to the Court that any complaint is currently before the European Commission regarding Greece's asylum determination procedures. If such a complaint was before the Commission, the State would still not be under any ***obligation*** to derogate unless the complaint raised a risk of a breach of

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Article 3 of the ECHR. As one of the documents from the European Commission relied on by the applicants states:-

> *"The Commission would like […] to highlight that it is only the Court of Justice that can establish that a Member State has failed to fulfil an obligation under the European Community Treaty. Therefore, the mere fact of opening an infringement procedure cannot in itself provide a reason to justify the partial suspension of the application of a Community instrument. Member States may, however, upon their own initiative, decide to apply the sovereignty clause in Article 3(2) of the Dublin Regulation to examine an application for asylum lodged with them by a third-country national even if such examination is not their responsibility under the criteria laid down in the Regulation."*

99. In the circumstances, it cannot be said that the Refugee Applications Commissioner erred in law in refusing the applicants' request for derogation as alleged. In the circumstances the Commissioner's only obligation was to act in accordance with fair procedures and natural and constitutional justice, and to take account of all relevant matters known to him. The Court's assessment of the applicants' arguments in that regard is set out above at paragraphs 51 to 72.

7. Summary and Conclusion

100. As so much time was taken up on a paragraph by paragraph analysis of the Commissioner's Memo to establish that it was partisan, prejudiced, selective and unfair it was necessary to consider the various fragments of the Memo to evaluate the fairness of the whole. However, while the consideration afforded by the Commissioner to the extensive submissions made as to why Ireland should derogate from the application of the Dublin II Regulation was fulsome and extensive, I wonder if in future there will be the same necessity to engage in such analysis in

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circumstances where it is not claimed that there is a real risk of ill treatment contrary to Article 3 of the ECHR. The rigorous analysis undertaken in this case was, of course, wholly appropriate because concerns were raised in respect of Article 3 of the ECHR and of the applicants' fear of being refouled to their respective countries of origin. It is very strongly arguable that in the absence of such concerns, the expenditure of time and resources in making extensive observations and submissions would be misplaced. It has to be understood that the Refugee Applications Commissioner is under *no obligation* to exercise his discretion to derogate from the normal application of the Dublin II Regulation even if there is evidence that the responsible Member State is in breach of its obligations under the asylum provisions of EC law. The only situation where an *obligation* to derogate under Article 3(2) of the Regulation may arise is where there are substantial grounds for believing that the applicants would, if transferred to Greece, face a real risk of being subjected to treatment contrary to Article 3 of the ECHR. There was no evidence of such a risk in this case and in the circumstances the Commissioner's only obligation was to consider all relevant matters before him and to act in accordance with fair procedures and natural and constitutional justice. It was of course open to the Commissioner to exercise his discretion but it was certainly not for the applicants to demand that he do so nor is it for this Court to direct that he do so.

101. I am satisfied that the Commissioner's decision to issue notices of determination to these applicants pursuant to the *Refugee Act 1996 (Section 22) Order 2003* (S.I. No. 423 of 2003) ***was*** in accordance with law, fair procedures and natural and constitutional justice. The application ***fails***.

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