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Upper Tribunal
(Immigration and Asylum Chamber)

VT (Dublin Regulation: post-removal appeal) Sri Lanka [2012] UKUT 00308 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 2 July 2012**	**Determination Promulgated** ……

Before

UPPER TRIBUNAL JUDGE PETER LANE
UPPER TRIBUNAL JUDGE MCGEACHY

Between

VT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Jegarajah, instructed by Messrs Patricks Solicitors
For the Respondent: Mr J. Auburn, instructed by the Treasury Solicitor

(1) An out of country appeal may be made to the First-tier Tribunal by a person who has been removed to an EU member State pursuant to the Dublin Regulation (Council Regulation 343/2003/EEC). However, paragraph 6 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 precludes the appellant from bringing the appeal on any grounds that

relate to the Refugee Convention, including human rights grounds which effectively "overlap" with Refugee Convention issues. If the substance of a ground involves persecution for a Refugee Convention reason, paragraph 6 excludes that ground, whether or not the ground makes actual reference to the Refugee Convention.

(2) The effect of NS v Secretary of State for the Home Department [2011] EUECJ C-411/10 (21 December 2011) is to require paragraph 6 of Schedule 3 to be "read down", where the EU State to which the appellant has been sent pursuant the Dublin Regulation is shown to be one whose asylum processes are experiencing major operational problems, involving systemic flaws in the asylum procedure and reception conditions for asylum applicants, resulting in inhuman or degrading treatment of asylum seekers transferred to that State. In order to establish such a state of affairs, there needs to be material of the kind referred to at [90] of NS, such as regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the receiving State, UNHCR high-level pronouncements and EU Commission reports.

(3) Where such a "systemic deficiency" in the asylum processes of the receiving State is found to exist, paragraph 6 of Schedule 3 is to be read down, so as to be compatible with EU law. In such circumstances, the Tribunal would, accordingly, allow the appeal, to the extent that the removal decision is held to be not in accordance with the law. It would then be for the respondent to secure the appellant's return to the United Kingdom, where his or her claim to be in need of international protection would be substantively considered by the respondent and, if necessary, determined on appeal.

(4) Unless such a systemic deficiency can be shown, paragraph 6 of Schedule 3 applies, without qualification. It is not permissible to read down that provision on the basis only of evidence concerning the individual appellant.

(5) The effect of (2) to (4) above means that the same area of enquiry applies in appeals governed by Schedule 3, where a systemic deficiency is being asserted, as it does in a judicial review of the respondent's decision to certify under paragraph 5 of Schedule 3, prior to a person's removal from the United Kingdom. Where the Administrative Court has specifically addressed the issue in such proceedings, prior to the person's removal, the Tribunal, in considering the out of country appeal brought by that person, should regard the Court's findings as a starting point and as likely to be authoritative on the issue of systemic deficiency in the receiving State, insofar as those findings were based on the same or similar evidence as that before the Tribunal.

DETERMINATION AND REASONS

Introduction

1. This case involves the nature of an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent to remove a person from the United Kingdom to a "safe country" listed in Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, where the country concerned is a Member State of the European Union. In particular, this case concerns the relationship between Schedule 3 and Council Regulation 343/2003/EC,

Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (the so-called "Dublin Regulation"; sometimes called Dublin 2).

2. The relevant United Kingdom legislation is set out in the Schedule to this determination.

The appellant

3. The appellant is a citizen of Sri Lanka who was born on 11 October 1978. He is at present in Romania where, at the date of the hearing in the Upper Tribunal, he was detained in a prison in Bucharest. As will be seen, the circumstances which have led the appellant to be in this position are, in many respects, the subject of disagreement between the parties to the present appeal. According to the appellant, he was experiencing persecution in Sri Lanka and, as a result, in 2010 the services of an agent were enlisted in order to remove the appellant from that country. In August 2010, the appellant found himself in Romania, for the first time. He says that this arose as a result of his agent handing him over to a gang of human traffickers, who decided to take him to Romania. It is common ground that the appellant was arrested by the Romanian authorities in August 2010 and that he claimed asylum in that country, following his arrest.

4. The appellant says that he was detained in Romania, where due to the weather, poor food and insanitary conditions, he became unwell. He was abused by fellow inmates. Prior to that, the police who arrested the appellant had attacked him and stolen his money. The appellant asserted that he was not given any opportunity to explain to the Romanian authorities why he feared persecution in Sri Lanka. This was notwithstanding the fact that, according to the appellant, he had scars on his body as a result of his ill-treatment in his home country.

5. It is also common ground that, at some point, the appellant left Romania. According to the appellant's first witness statement, this is what happened:-

> "14. Having felt unwell, been left without any money in my pocket, having no way to tell my difficulties to anyone in my language, due to the hard time given [me] by the inmates, having no-one to listen to my complaints I felt that I was going to die.
>
> 15. The agent who pushed me in to Romania thought I may report him to the police about his human trafficking business. He therefore without my consent or knowledge smuggled me into Sri Lanka."

6. On return to Sri Lanka, the appellant asserts that the authorities arrested, detained and tortured him. The appellant's uncle, however, was able to strike "a deal with an officer and secured my release by an inside deal" (paragraph 17). Once again fearing

for his life in Sri Lanka, the appellant secured the assistance of another agent, which resulted in the appellant's arrival in the United Kingdom on 17 January 2011.

Events in the United Kingdom

7. According to the respondent, when the appellant was asked at his asylum screening interview on 31 January 2011 about the circumstances leading to his arrival in the United Kingdom, the appellant said that he had flown from Sri Lanka, via Dubai. He also said that he had not claimed asylum or been fingerprinted in any other country outside Sri Lanka. The appellant told the interviewer that he was living in the United Kingdom with an uncle and elder brother (the latter having been granted leave to remain under the immigration rules in November 2010).

8. The respondent took the appellant's fingerprints. It was established that these matched those of a person fingerprinted in Romania on 1 September 2010, who was recorded as having claimed asylum in Romania the following day.

9. On 9 February 2011, the appellant was further interviewed by the respondent. The appellant said that he had been in Romania for about two weeks before he had been fingerprinted but that he had then flown back to Sri Lanka about a week later with the help of an agent, arriving in that country on 15 September 2010.

10. On 15 February 2011 the respondent sent a formal request to the Romanian authorities, pursuant to the Dublin Regulation, requesting those authorities to accept responsibility for considering the appellant's asylum application. Also on 15 February, the respondent received information from the appellant's representative, indicating that the appellant claimed to have been tortured by the Sri Lankan army. The respondent considered the appropriateness of the appellant's detention and concluded that it was still appropriate, as he was being removed to Romania, not Sri Lanka. It was also noted that the appellant failed to mention in his asylum screening interview that he had been tortured.

11. On 28 February 2011, the Romanian authorities formally accepted responsibility for the appellant's asylum application.

The respondent's decisions

12. On 1 March 2011, the respondent informed the appellant by letter that the Romanian authorities had accepted that Romania was the State responsible for examining the appellant's application for asylum. The respondent's letter stated that, by virtue of paragraph 3(2) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Romania was to be treated as a place:-

> "(a) where your life and liberty will not be threatened by reason of your race, religion, nationality, membership of a particular social group, or political opinion; and

(b) a place from which you will not be sent to another State in contravention of your Convention rights; and

(c) from where you will not be sent to another State otherwise than in accordance with the Refugee Convention."

13. The letter continued by stating that the respondent "will normally decline to examine the asylum application substantively if there is a safe third country to which the applicant can be sent. There are no grounds for departing from this practice in your case". The letter then certified "that the conditions mentioned in paragraphs 4 and 5 of Part 2 of Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 are satisfied, namely that:-

"(a) it is proposed to remove you to Romania, and

(b) in the Secretary of State's opinion you are not a national citizen of Romania."

14. Under the heading "Right of appeal", the letter concluded by telling the appellant that he should refer to the attached notice of decision, appeal form and accompanying leaflet given to him with the certification "for details of how and when to appeal".

15. The immigration decision in question was to remove the appellant as an illegal entrant. The notice of decision said this:-

"You are entitled to appeal this decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002, after you have left the United Kingdom. A **notice of appeal** is enclosed which explains what to do **and** an Asylum and Immigration Tribunal leaflet which explains how to get help. The appeal must be made on one or more of the following grounds:

- That the decision is not in accordance with the immigration rules;
- That the decision is unlawful because it racially discriminates against you;
- That the decision is unlawful because it is incompatible with your rights under the European Convention on Human Rights;
- That the decision breaches rights which you have as an EEA national or member of such a person's family under community treaties relating to entry or residence in the United Kingdom;
- That the decision is otherwise not in accordance with the law;
- That a discretion under the Immigration Rules should have been exercised differently.

You should not appeal on grounds which do not apply to you. You must also give arguments and any supporting evidence which justifies your grounds" (original emphases).

The judicial review

16. Although the immigration decision, to which we have just referred, and which gave rise to the proceedings in the First-tier Tribunal and this Tribunal, was made on 26 April 2011, it was not the first such decision made in respect of the appellant. Following certification under Schedule 3, the respondent had, in fact, made a decision on 2 March 2011 to remove the appellant to Romania, setting directions for that removal to be carried out in 10 March. The appellant sought permission of the Administrative Court to judicially review that decision.

17. In his JR application grounds, the appellant asserted that "I have family members in the UK and that I had arrived in January 2011. I had informed [the respondent] that I had a brother and family in the UK as well as other relatives and friends." He then went on to assert that he was suffering from post-traumatic stress disorder, as he had been tortured by the Sri Lankan army and that he had scars on his body. He was "mentally much stressed and cannot tolerate being in detention nor being sent to Romania". Whilst in Romania, the appellant "was racially attacked and told to go back to [my] country. Romania is not safe country." The appellant asserted that the respondent had not applied the five-step "Razgar" test and contended that, under that test, the appellant's removal would be a disproportionate interference with his family life in the United Kingdom.

18. The respondent filed an Acknowledgement of Service in respect of the appellant's judicial review application. The information we have set out above regarding the appellant's asylum application and subsequent interviews is largely taken from the summary grounds of defence attached to the AOS. In this regard, we note that the appellant disputes the assertion that, during his interview, he said that he had claimed asylum in Romania.

19. Both in her summary grounds of defence and in her letter to the appellant of 30 March 2011, responding to the appellant's JR application, the respondent set out her reasons for concluding that the appellant's Article 8 rights would not be violated by removing him to Romania. The AOS also relied upon case law, including KRS v United Kingdom [2008] ECHR 1781 and Nasseri [2009] UKHL 23 in support of the proposition that "signatories to the Dublin Regulation are also signatories to the ECHR and the 1951 Convention relating to the status of refugees…and can be relied upon to honour their international obligations".

20. On 4 April 2011, HH Judge Shaun Spencer QC, sitting as a Deputy Judge of the High Court, refused the appellant's application for judicial review. Further removal

directions were then set, pursuant to the making of the fresh decision to remove the appellant as an illegal entrant.

Removal to Romania

21. On 10 May 2011 the appellant was removed from the United Kingdom to Romania. Once outside the United Kingdom, the appellant appealed to the First-tier Tribunal against the decision of 26 April to remove him. The grounds of appeal are dated 18 July 2011. They complain that the Romanian authorities have not fairly processed the appellant's asylum claim and that his asylum claim was refused because it was alleged he had failed to attend his interview. "But he was in detention, so the allegation made by the Romanian authorities suggesting that [the appellant] had failed to attend is not true." The appellant further submitted that he had had no access to any interpreter in Romania.

22. Paragraph 6(iv) of the grounds gives a somewhat different story to the one we have described earlier, concerning the circumstances in which the appellant left Romania for Sri Lanka in 2010:-

> "I thought unless I leave the camp, I was going to die in the camp. I got out from the camp and contacted my agent who was outside the camp. When the agent heard my story, my agent said that he could not do anything other than returning me to Sri Lanka. He took me to Sri Lanka…"

23. In order to understand the appellant's complaint that the Romanian authorities had not substantively determined his asylum claim, following his enforced return to that country in 2011, it is necessary to refer to the English translation of a document contained in the appellant's bundle of documents for the hearing on 2 July 2012. This concerns the official transcript of proceedings in the Court of Appeal in Bucharest, relating to a legal action, "initiated by petitioner" [the appellant] "against the Romanian Immigration Authority". The complaint concerned the decision to detain the appellant. The document asserts that an interpreter in the English language "Mrs Mihaela Istrati" was in attendance "in order to translate all submissions to [the appellant]". It is also recorded that "another person attends on behalf of the Romanian immigration office, Sri Lankan citizen and English speaker, to ensure that the submissions are indeed translated to [the appellant]". The record went on to describe how the proceedings had been put back in order for the appellant to be made aware of various documents filed by the immigration authority. The appellant was recorded as stating that he suffered from "mental problems, namely that he always thinks someone wants to kill him. When prompted by the court to explain how the release from the reception centre can assist him given the circumstances, [the appellant] explains that if released from the centre, he could care for his health. Furthermore, he requests the asylum in Romania to be granted." The appellant then explained "that his older brother lives in London and could help him. Therefore he asked the court to allow his petition to be granted for freedom in Romania."

24. Counsel for the immigration authority, however, told the Court of Appeal that "There was a previous decision to remove the Sri Lankan under escort for crossing the Romanian border illegally. He had the chance to make submissions about his status on 02.09.2010 when he applied for the status of refugee, an application dismissed by RIO, a decision uncontested by [the appellant]." The appellant then submitted "that he does not know the Rules in Romania and he did not get any help. He does not want (sic) to go to London." The court found that continued detention of the appellant was lawful. In doing so it recorded that on 2 September 2010 the appellant had "applied for the status of refugee on Romanian territory to be granted, and his application was rejected by the RIO by administrative decision, made final and binding as it was not challenged".

25. At the Upper Tribunal hearing on 2 July, we allowed Ms Jegarajah to call oral evidence from the appellant's brother regarding the interpreter issue, as set out in the document we have just summarised. During a break in proceedings, we were informed that the brother had telephoned the appellant on his mobile telephone in Romania (where it was said he remained in detention). The brother told us in evidence that the appellant had said that the Sri Lankan speaker referred to by the Court of Appeal was not a proper interpreter but a fellow detainee in the same prison. The Romanian authorities had asked this person to interpret (we assume, between Tamil and English), as they had not got a suitable interpreter of their own. This person was a fellow asylum seeker and three weeks later, according to the oral evidence, he was deported from Romania.

26. The appellant's bundle contains a number of other documents, relating to periodic challenges by the appellant of his continued detention in Romania. The last of these, dating from 30 January 2012, post-dates the proceedings and determination in the First-tier Tribunal, to which we must turn in due course. It is, however, convenient to refer to the Court of Appeal proceedings at this point in our determination.

27. The document at pages 15 to 17 of the appellant's bundle is an English translation of an application by the Chief Detective Inspector of the Romanian Immigration Service to the Court of Appeal, for permission to grant an extension of the public custody time limit relating to the appellant.

28. The application describes the appellant as having entered Romania illegally on 26 August 2011 and as having applied for asylum on 2 September 2010. It would seem that the reference to 26 August 2011 must be a reference to 2010. It is stated that the asylum application was considered and rejected by a decision dated 23 September 2010 which was "deemed definitive and binding".

29. After describing the appellant's leaving Romania illegally, being encountered by the United Kingdom authorities and return to Romania, the application makes reference to a request of the appellant on 11 May 2011 for "access to a new asylum seeking procedure". That request was rejected on 25 January 2012 "made final and binding". Efforts were then made to secure the return of the appellant to Sri Lanka, with the

involvement of the Sri Lankan Embassy in Warsaw. The appellant, however, failed to cooperate. At page 16, we observe that "on 26.01.2012 [the appellant] filed again a new request for access to asylum procedure, which is now under consideration".

The proceedings in the First-tier Tribunal

30. On 7 December 2011 the appellant's appeal came before First-tier Tribunal Judge Clayton, sitting at Taylor House. The appellant was represented on that occasion by Mr C Yeo of Counsel; but that fact is not recorded in the judge's determination. Although the judge's handwritten record of proceedings records Mr Yeo's making extensive legal submissions, none of these feature in the determination. Ms Jegarajah informed us that the appellant had taken his case to the European Court of Human Rights ("ECtHR"), where proceedings were currently stayed.

31. The operative paragraphs of the First-tier Tribunal judge's determination are as follows:-

> "5. Romania is a member of the European Union and a sovereign state. The Appellant is complaining of ill-treatment by the Romanian authorities, but it is not for the UK to comment on whether an EU sovereign state did or did not comply with the minimum standards agreed by EU signatories. The Appellant was properly returned to Romania under the provisions of the Dublin 2 Regulations. The Appellant's removal from the UK was delayed by his application for Judicial Review which was not successful.
>
> 6. A person fleeing from persecution would be expected to claim asylum at the first available opportunity. It would appear the appellant did not intend to terminate his first visit to Europe in Hungary and then travelled to Romania, but both of these countries are sovereign states and members of the European Union.
>
> 7. When the found [sic] Romania not to be to his liking, the Appellant then returned to Sri Lanka and travelled to the UK, which was doubtless his destination of choice. Upon arrival in the UK he denied having made any asylum claim in any other country until confronted with the evidence from the EURODAC European fingerprint database, which confirmed a match with those taken from him in Romania on 10 September 2010.
>
> 8. The Appellant has claimed asylum in Romania but has also been charged and convicted with a criminal offence there. I conclude he is now complaining about prosecution, not persecution. He was properly returned to Romania after his application for Judicial Review in the UK failed. I therefore find there is no valid appeal before me."

32. We were not addressed regarding any issue relating to Hungary. There does not appear to have been any suggestion from either the United Kingdom or Romanian authorities that Hungary should be the country to which the appellant would be returned, pursuant to the Dublin Regulation. We say no more about this matter.

33. Permission to appeal the determination of the First-tier Tribunal was granted on the grounds submitted by the appellant. In summary, these were that the judge had erred in finding that there was no valid appeal; that she had failed to engage with Mr Yeo's submissions, which were to the effect that the Romanian authorities had failed properly to determine the appellant's claim for asylum; that the Romanian authorities do not comply with the minimum standards agreed by the EU with regard to reception conditions for asylum seekers; and that an irrebutable presumption, such as that set out in paragraph 6 of Schedule 3 to the 2004 Act, that Romania would not act in the ways there described, was contrary to EU law as clarified in NS v Secretary of State for the Home Department [2011] EUECJ C-411/10 (21 December 2011).

Was there an appeal to the First-tier Tribunal?

34. In both his written and oral submissions on behalf of the respondent, Mr Auburn was careful not to suggest that the appellant did not have any right of appeal at all, once outside the United Kingdom. Instead, Mr Auburn submitted that the appellant cannot bring the form of challenge he is, in fact, making, by means of statutory appeal out of country. For the appellant, Ms Jegarajah submitted that the appellant plainly had a right of appeal. The notice of immigration decision given to the appellant had informed him as much.

35. There can be no doubt that the First-tier Tribunal Judge erred in law in holding that there was no valid appeal before her. The manifest purpose of section 33 and Schedule 3 is not to preclude a person in the position of the appellant from appealing, once outside the United Kingdom, an immigration decision to remove that person from this country. The purpose of those provisions is, rather, severely to circumscribe the grounds in section 84 of the 2002 Act which might otherwise be used by an appellant. The judge ought, therefore, to have engaged with the basis on which the appellant had sought to challenge the immigration decision and to have explained why (if she thought it to be the case) the appellant's grounds could not be advanced. Accordingly, not only was the judge's final conclusion wrong; the peremptory nature of her determination deprived the appellant of any proper understanding of why (despite Mr Yeo's submissions) he had lost in the First-tier Tribunal.

36. We accordingly find that the determination of the First-tier Tribunal contains an error of law. We have decided to set that determination aside. The result is that the decision in the appellant's appeal falls to be re-made by the Upper Tribunal.

37. The effect of certification under paragraph 5 of Schedule 3 was to preclude the appellant from bringing an in-country appeal under the 2002 Act against the removal decision in reliance on:-

"(a) an asylum claim which asserts that to remove the person to a specified State to which this Part applies would breach the United Kingdom's obligations under the Refugee Convention, or

(b) the human rights claim insofar as it asserts that to remove the person to a specified State to which this Part applies would be unlawful under section 6 of the Human Rights Act 1998 because of the possibility of removal from that State to another State."

The effect of paragraph 6 of Schedule 3 to the 2004 Act

38. In the present case, the battleground of the parties is paragraph 6 of Schedule 3:-

"**6.** A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies as a place –

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
(b) from which a person will not be sent to another State in contravention of his Convention rights, and
(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention."

39. Notwithstanding the drafter's use of double negatives in paragraph 6, its intended ambit is sufficiently clear. Paragraph 6 does not preclude a person outside the United Kingdom from bringing an immigration appeal in respect of matters unrelated to the Refugee Convention. Thus, for example, an appeal may be brought on the ground that the immigration decision in question was not in accordance with the law, for reasons of formal invalidity. An appeal may be brought on the ground that the immigration decision racially discriminates against the appellant. More significantly, perhaps, paragraph 6 does not preclude an appellant from appealing on the ground that the immigration decision violated his or her right to respect for private and/or family life under Article 8 of the ECHR; for example, by severing the appellant from family members in the United Kingdom.

40. On the other hand, it is clear that paragraph 6 has been deliberately drafted so as to exclude asylum-related grounds based on the ECHR, which effectively "overlap" with Refugee Convention issues. The same is true of overlap between the Refugee Convention and humanitarian protection under the Qualification Directive. This is the effect of the words "any ground which is inconsistent with treating a State…"

41. Accordingly, a purported ground of appeal which involves, for example, alleged racial or social group persecution cannot be brought, either specifically as regards the Refugee Convention or as regards an alleged violation of Article 3 of the ECHR. Indeed, if the substance of an appellant's complaint is actual or threatened

persecution, then the ground may not be advanced, whether or not it makes actual reference to the Refugee Convention.

42. The reason why paragraph 6 is the key provision in this appeal was acknowledged by Ms Jegarajah in oral submissions. She acknowledged that the appellant would not be able to succeed in his appeal on the basis that paragraph 6 has the effect we have just described, since the substance of his appeal was entirely covered by sub-paragraphs (a) to (c). That is indeed so, when one considers the written grounds of appeal to the First-tier Tribunal. Although the appellant had raised Article 8 issues in his judicial review, these did not feature in his grounds of appeal. The appellant's case is that he is experiencing ill-treatment at the hands of the Romanian authorities and non-State agents in the shape of fellow detainees; and that this treatment has a racial motivation. It is also plain that the appellant's account involves allegations of mistreatment of asylum seekers in Romania, in circumstances where such persons constitute a particular social group. The rest of the appellant's case involves an assertion that, as a result of the inadequate way with which his case has been dealt with in Romania, the authorities in that country are likely to return him to Sri Lanka in contravention of his ECHR rights and of his rights under the Refugee Convention.

43. As advanced by Ms Jegarajah, the appellant's case is that, regardless of the effect paragraph 6 of Schedule 3 would have on the appellant that provision has to be "read down" in order to be compatible with EU law. This is despite the fact that section 33 and Schedule 3 were intended to give effect to the Dublin Regulation (No 343/2003) whereby, as a general matter, asylum applications of third-country nationals are to be dealt with by the Member State in which the applicant first arrived. For the respondent, Mr Auburn accepted that, in the light of the relevant case law, paragraph 6 cannot be read as an irrebutable proposition of law. Counsel were, accordingly, agreed that paragraph 6 does not always have the effect its words suggest, and that in certain circumstances it has to be read down so as to be compatible with EU law. However, they disagreed as to the circumstances in which the obligation to read down arises.

The case of NS

44. In advancing their respective cases, Counsel agreed that the case of NS was of particular significance. It is, accordingly, necessary to deal with this case in some detail. NS arose as a result of references for a preliminary ruling made to the Court of Justice of the European Union ("CJEU") by the Court of Appeal. In particular, the third question posed by the Court of Appeal was "in essence, whether the obligation on the Member State which would transfer the asylum seeker to observe fundamental rights, precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European law and/or the minimum standards imposed by the … directives" [71].

45. At [75] to [80] the Court set out the following basic propositions:-

"75. The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter [of Fundamental Rights] and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76. As stated in paragraph 15 above, the various regulations and directives relevant to the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77. According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78. Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79. It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the Conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80. In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR."

46. This basic proposition was, however, subject to the following qualifications:-

"81. It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a

substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82. Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83. At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84. In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims - on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application - to establish, as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85. If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86. By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision."

47. In R (on the application of Efrem Medhanye) v Secretary of State for the Home Department [2012] EWHC 1799 (Admin), Kenneth Parker J has recently had occasion to examine the effect of NS in the context of a judicial review to remove a claimant to Italy under the provisions of the Dublin Regulation.

48. At [7] of his judgment, the Judge held that the finding at [81] of NS, that it was "not inconceivable" that the system in a Member State may experience operational problems such that there is a substantial risk of asylum seekers transferred there facing treatment incompatible with their fundamental rights, was "entirely consistent with the test to be applied under the ECHR, for the purposes of which there is a '*significant evidential presumption*' that Italy would comply with its international obligations: R (Elayathamby) v SSHD [2011] EWHC 2182 (Admin), paragraph 42(1) applying MSS v Belgium and Greece [2011] ECHR 108 (GC)".

49. At [8] the Judge, likewise, held that the findings of the CJEU at [86] of NS, regarding there being "substantial grounds for believing that there are systematic flaws in the asylum procedure and reception conditions for asylum applicants" was "also entirely consistent with the test under the ECHR. It was the systemic flaws in the asylum procedure and reception conditions in Greece that led the court in *MSS* concluding that Belgium had acted in breach of the ECHR by returning the applicant to Greece."

50. At [90] and [91] of NS, the CJEU addressed the issue of what sort of evidence might be required in order to demonstrate the "major operational problems" or "systematic deficiency" [89] required to displace the general proposition identified at [75] to [80]:-

> "90. In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).
>
> 91. Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks."

51. In Medhanye, Kenneth Parker J at [11] observed that, in the passages we have just cited, the CJEU had "adopted essentially the same position as that adopted by the ECtHR in regard to the nature and extent of the evidence required to rebut the assumption (or in ECHR terms the presumption) of compliance with international obligations".

52. In rejecting the submission (not made in our case) that NS had not, in effect, dealt with Article 1 of the Charter and that there might, accordingly, be circumstances in which the CJEU would find there had been a violation of Article 1 (right to dignity) without necessarily finding a breach of Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Kenneth Parker J made the following findings, which we respectfully consider distil the essence and general effect of NS:-

> "14. In my judgment, this submission rests upon a fundamental misreading of what *NS* has decided. In *NS* the constitutional issue was novel and, I would respectfully suggest, controversial. The European Union aspires to be a close union, if not a federal system: it is far more, especially at this stage of its development, than a collection of nation states bound together by treaty (as is the case under the ECHR, which of course does not purport to represent any system of political union). The central principle of such a union is that member states of the union have mutual trust and confidence in each other, particularly mutual trust and confidence that each state will faithfully comply with binding provisions of union law, including, most importantly, provisions of union law protecting fundamental human rights. In that context, it might be thought that it would be inconsistent with the principle of mutual trust and confidence to impose a legal duty on one member state in effect to monitor whether another member state was complying with its obligations under union law, including its obligation to respect fundamental human rights. The United States is often presented as the paradigm of a mature federal union: although I have not researched the question, I would be surprised indeed if constitutional or federal law in the United States does, or could legitimately, require one state of the Union, before, for example, extraditing a citizen to another State of the Union, to satisfy itself that the sister State would not treat the citizen inconsistently with his or her rights under the Constitution. It might be assumed that the public authorities, including the judicial branch, of the sister State would, compliant with a solemn and binding obligation under the Constitution, ensure that the fundamental rights of the citizen were respected in their territory, and that it would run counter to the principle of mutual trust and confidence if other States were under any obligation, or even had a discretion, to investigate whether there was a systemic failure to discharge that duty.
>
> 15. The CJEU expressly recognises the principle of mutual trust and confidence as the "*raison d'être*" of the European Union. It might have been thought, therefore, that, under that principle, one Member State could not properly be obliged to determine whether another Member State was complying with its legal duties under EU law. However, the CJEU, having recognised both the importance of asylum law and practice and of respect for fundamental human rights, decided that in this context Member States did have such an obligation. Nonetheless, with due regard to the "*raison d'être*" of the EU, the CJEU very carefully and with great precision delineated precisely the nature and scope of the legal duty of the transferring Member State. The nature and scope of the duty is set out in paragraph 86 of the judgment of the CJEU. In my view, given in particular this important constitutional issue at stake in *NS*, that duty simply excludes the independent operation of Article 1 of the Charter. When read in the correct context, that is what the Court is saying at paragraphs 114-5 when it states that Articles 1, 18 and 47 of the Charter do not lead to a different answer, namely, that

the only question that the transferring State need address and answer is the one identified at paragraph 86 of the judgment of the CJEU, which makes no allusion to Article 1 of the Charter."

Submissions

53. In her oral submissions, Ms Jegarajah conceded that she was not seeking on behalf of the appellant to demonstrate that there is in Romania any "systemic deficiency" of the kind required in NS. Although there were a number of materials in the appellant's bundles containing criticisms of the behaviour of the Romanian authorities, Ms Jegarajah did not submit that these amounted to "regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System" in Romania. Even if she had done so, we would not have found that those materials came anywhere near meeting the NS test.

54. Instead, Ms Jegarajah based the appellant's case on the specific evidence of what had happened to him in Romania, both as regards his alleged ill-treatment there and as regards deficiencies in the application of asylum law and procedures by the authorities in the actual circumstances of the appellant. Ms Jegarajah submitted that the respondent had not raised any credibility issues in relation to the appellant's allegations, as set out in the various written materials, including his witness statements, and those of his brother. The case was a very disturbing one and the appellant needed to be brought back to the United Kingdom from Romania so that he could have his claim substantively determined. Although, in her earlier written submissions, Ms Jegarajah had suggested that the issue in the present case might be suitable for a preliminary reference to the CJEU, she did not pursue this on 2 July.

55. In response to Ms Jegarajah's submissions on 2 July, Mr Auburn submitted that to accept what Ms Jegarajah had proposed would cause the collapse of the Dublin Regulation approach, which was based on mutual trust and confidence between Member States.

Discussion

56. On this issue, we accept Mr Auburn's submissions and reject those of Ms Jegarajah. Even if the suggestion of a reference had been pursued, we consider the matter to be *acte clair.*

57. There is nothing that has been brought to our attention in the case law to support the submissions made on behalf of the appellant. Ms Jegarajah provided us with a synopsis in English of an ECtHR case, IM v France (9152/09 – February 2012), where the full judgment is not available in English. That case involved a Sudanese asylum seeker in France who, but for the Strasbourg Court's application of its procedural rule 39, precluding his deportation from France while the ECtHR proceedings were

ongoing, would have been exposed to real risk of Article 3 ill-treatment. In IM's case, the application of French fast-track asylum procedures had not given him the opportunity of having his claim properly considered and adjudicated.

58. Ms Jegarajah drew attention to IM as instancing individual failures in a Member State's asylum procedures, notwithstanding the absence of the sort of systemic deficiencies recently identified in the case of Greece. We do not, however, find that IM takes the present appellant's case any further forward. No-one doubts that, even in States not experiencing "major operational problems", an individual applicant may experience less than satisfactory treatment in the processing of his or her asylum claim. That *may* be the case with the present appellant. But it would, in our view, undermine the Dublin Regulation and the legislation which underpins it if an individual who had been returned to the State tasked with processing his or her asylum claim were able to have the returning State adjudicate upon (a) the receiving State's treatment of that person, as an asylum seeker; and (b) whether that person has a well-founded fear of persecution in and, hence, *refoulement* to, a non-Member State.

59. Since in this scenario, the receiving State is, *ex hypothesi,* one whose adherence to the Conventions and Charter has not been successfully called into question on a general basis, it cannot be right for the tribunals and courts of the United Kingdom to adjudicate, at a distance, upon the individual facts of the case. The proper course, as Mr Auburn submitted, is for the individual in the receiving State to pursue redress in that State and, if that is not forthcoming, in Strasbourg. Indeed, that is precisely what the appellant in the present case has done. We were told that proceedings in Strasbourg are currently stayed, pending the outcome of the present proceedings in this Tribunal. That, in itself, demonstrates the dysfunctionality that will arise if Ms Jegarajah's submissions are correct. Not only will the proper process of seeking appropriate redress in the ECtHR be subverted: the prospect arises of the judicial authorities of two Member States being simultaneously engaged in determining the same individual's asylum claim.

60. It may be argued that, on the facts of the present case, no further judicial or other proceedings in respect of the appellant's asylum claim are likely in Romania. If, as we were informed, the ECtHR has become seized of the matter, this would suggest domestic remedies have been exhausted. On looking more closely, however, that is far from certain. We have already noted the reference in one of the Court of Appeal documents to a third asylum claim being made by the appellant and being (in January 2012 at least) ongoing. We do not know whether anything has come of that. But, in any event, we have not been told (and do not know) if any appeal against an adverse decision is possible. Quite apart from this, we know from the processes which obtain in the United Kingdom that, even when an asylum applicant has become "appeal rights exhausted", legal challenges based on an asserted fear of persecution may still be possible. In short, if we were to accept the appellant's submissions on this issue, United Kingdom courts and tribunals would risk expending time and effort on resolving cases that could be properly resolved in the receiving State.

61. In such a scenario, judicial fact-finders in the United Kingdom would face the obvious problem that, unlike their counterparts in the receiving State, they will be unable to receive oral evidence from the appellant who is present in their courtroom. They would, therefore, be highly likely to be in a worse position to make sustainable findings of fact, compared with the court or tribunal in the receiving State. Ms Jegarajah's response to this was that the effect of our allowing the appellant's appeal could be limited to ensuring that he was returned to the United Kingdom, where his asylum claim could then be substantively considered by the respondent. That solution, however, would do nothing to prevent major damage occurring to the "principle of mutual trust" identified in NS.

62. We do not rule out the possibility of evidence concerning an individual's position in the receiving State playing a part in supporting a case based on "systemic deficiency" evidenced by "the regular and unanimous reports of international non-governmental organisations". Indeed, it is hardly likely that a case would be advanced on such a basis, which did not involve an appellant in an out of country appeal under Schedule 3 asserting that he or she had been personally subjected to improper treatment in the receiving State (but see paragraphs 63 and 64 below). Nevertheless, the consequence of our conclusion that paragraph 6 of Schedule 3 falls to be read down only where such a systemic deficiency is established is that it will be unnecessary for the appellant to show he or she has been subjected to such treatment in the receiving State. The Tribunal will find that the immigration decision appealed is not in accordance with the law, with the consequence that it will be for the respondent to secure the appellant's return to the United Kingdom, where his or her claim to be in need of international protection will then be substantively considered by the respondent and, if necessary, determined on appeal. In short, the result will be as described by Ms Jegarajah (paragraph 61 above); but only where a systemic deficiency in the receiving State has been established.

63. We should say that, had the appellant's case been advanced on the basis that there is currently a relevant systemic deficiency in Romania and if (contrary to our conclusion in the preceding paragraph), we had been required to make findings regarding the appellant's situation, we would have had considerable difficulty establishing the appellant's individual circumstances in that country. Notwithstanding Ms Jegarajah's submission that the respondent had not taken issue with the appellant's credibility, there are manifest problems in accepting the appellant's allegations regarding his treatment, which the Tribunal could not properly ignore, and which the respondent could not properly be said to be debarred from raising (subject to procedural fairness). As we have seen, he has given two significantly different accounts of how he left Romania for Sri Lanka. His description of the attitude and behaviour of the Romanian authorities does not fit well with the material which he has seen fit to adduce from those authorities; in particular, in relation to his alleged inability to make himself understood through an interpreter. At pages 44 and 45 of the larger of the appellant's bundles, there is a "To whom it may concern" letter dated 28 November 2011 from Manuela Josan, who states that he

is a "solicitor in Romania". Whether or not this letter has been translated from Romanian into English is unclear. At any event, it bears no letter heading. It repeats the appellant's allegation that the Romanian immigration authorities "will not properly consider his asylum claim as there is no interpreter facility". Mr Josan, however, sets out in some detail what the appellant "told me", as regards his treatment in detention, his trip to the United Kingdom and return to Romania and his need for medical treatment and support. How Mr Josan was able to converse with the appellant is unexplained.

64. These problems seem to us to underscore the correctness of the approach based on systemic deficiency. In an out of country appeal of the present kind, the Tribunal does not need to make findings about the credibility of the individual appellant in relation to his experiences in the receiving State or in the "home" State; and it will usually be sensible for the Tribunal to decline to do so.

65. Thus, to reiterate, we find that paragraph 6 of Schedule 3 to the 2004 Act falls to be qualified or read down only where there is shown, on the basis of the kinds of evidence identified in NS, to be in the receiving State a "systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers" in that State. Where such evidence is lacking, the Tribunal must apply paragraph 6, without any qualification. It is not permissible to read down that provision on the basis only of evidence concerning the individual appellant.

66. The effect of our finding is that the same area of enquiry applies to appeals governed by Schedule 3 as it does in judicial review of a respondent's decision to certify under paragraph 5 of Schedule 3, prior to a person's removal from the United Kingdom. Ms Jegarajah submitted that it was not appropriate to assess the ambit of paragraph 6, which concerns an appeal, by reference to such a judicial review. We have not done so. Rather, the principles of EU law that drive the conclusion we have reached in relation to paragraph 6 are, on analysis, the same as inform the Administrative Court's approach to pre-removal judicial review.

67. The consequence of the two approaches being the same means that, in an appeal where a "systemic deficiency" is being asserted, the Tribunal should have regard to any relevant findings made in the course of any judicial review proceedings that may have been brought by the person in question against the removal decision, prior to removal. Where the Administrative Court has specifically addressed this issue, the individual is subsequently removed and then brings an out of country appeal subject to Schedule 3, the Tribunal should regard the findings of the Court as a starting point and as likely to be authoritative on the issue of systemic deficiency in the receiving State, insofar as those findings were based on the same or similar evidence as that which is now before the Tribunal.

68. Mr Auburn submitted that there is no obligation on a Tribunal to consider evidence based on "events alleged to have taken place after [the removal decision] was made and acted upon". We do not agree. Insofar as evidence emerges post-removal, in the

context of an appeal, which demonstrates that there are now (or can now be seen to be) systemic deficiencies of the kind with which we are concerned, the Tribunal must engage with that evidence (section 82(4) of the 2002 Act; LS (Gambia) [2005] UKAIT 00085).

69. Applying these legal principles to the circumstances of the appellant's case, although there is a valid appeal before us (as there was before the First-tier Tribunal), the grounds sought to be advanced by the appellant are grounds which he is precluded from bringing by reason of paragraph 6 of Schedule 3 to the 2004 Act. It follows that the appellant's appeal must be dismissed.

Decision

70. The determination of the First-tier Tribunal having been set aside, we re-make the decision by dismissing the appellant's appeal.

71. With the agreement of the parties, we make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant.

Signed

Date

Upper Tribunal Judge Peter Lane

SCHEDULE

Nationality, Immigration and Asylum Act 2002

82. Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal].

(2) In this Part 'immigration decision' means –

(a) refusal of leave to enter the United Kingdom,
(b) refusal of entry clearance,
(c) refusal of a certificate of entitlement under section 10 of this Act,
(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,
(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,
(g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b), (ba) or (c)] of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in United Kingdom),
(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c.77) (control of entry: removal),
[(ha) a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),]
(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),
[(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c.77) (seamen and aircrews),]
[(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),]
(j) a decision to make a deportation order under section 5(1) of that Act, and
(k) refusal to revoke a deportation order under section 5(2) of that Act.

(3) …

[**(3A)** Subsection (2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but –

(a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and
(b) a reference in this Part to an appeal against an automatic deportation order is a reference to an appeal against a decision of the Secretary of State that section 32(5) applies.]

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

…

84. Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds-

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c.74) (discrimination by public authorities);

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) 'EEA national' means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 (as it has effect from time to time).

(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

(4) An appeal under section 83A must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.]

…

86. Determination of appeal

(1) This section applies on an appeal under section 82(1) [, 83 or 83A.]

(2) [the Tribunal] must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and

(b) any matter which section 85 requires [it] to consider.

(3) [the Tribunal] must allow the appeal in so far as [it] thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.

(5) In so far as subsection (3) does not apply, [the Tribunal] shall dismiss the appeal.

(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b).

…

92. Appeal from within United Kingdom: general

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

(2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) [, (ha)] and (j).

[**(3)** This section also applies to an appeal against refusal of leave to enter the United Kingdom if –
(a) at the time of the refusal the appellant is in the United Kingdom, and
(b) on his arrival in the United Kingdom the appellant had entry clearance.

(3A) This subsection applies to a refusal of leave to enter which is a deemed refusal under paragraph 2A(9) of Schedule 2 to the Immigration Act 1971 (c.77) resulting from cancellation of leave to enter by an immigration officer –
(a) under paragraph 2A(8) of that Schedule, and
(b) on the grounds specified in paragraph 2A(2A) of that Schedule.

(3C) This subsection applies to a refusal of leave to enter which specifies that the grounds for refusal are that the leave is sought for a purpose other than that specified in the entry clearance.

(3D) This section also applies to an appeal against refusal of leave to enter the United Kingdom if at the time of the refusal the appellant –
(a) is in the United Kingdom,
(b) has a work permit, and
(c) is any of the following (within the meaning of the British Nationality Act 1981 (c.61)) –
(i) a British overseas territories citizen,
(ii) a British Overseas citizen,
(iii) a British National (Overseas),
(iv) a British protected person, or
(v) a British subject.]

(4) This section also applies to an appeal against an immigration decision if the appellant –

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or

(b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom.

…

Asylum and Immigration (Treatment of Claimants, etc) Act 2004

…

33. Removing asylum seeker to safe country

(1) Schedule 3 (which concerns the removal of persons claiming asylum to countries known to protect refugees and to respect human rights) shall have effect.

(2) …

(3) …

…

SCHEDULE 3

PART I

INTRODUCTORY

1.- (1) In this Schedule –

'asylum claim' means a claim by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,
'Convention rights' means the rights identified as Convention rights by section 1 of the Human Rights Act 1998 (c.42) (whether or not in relation to a State that is a party to the Convention),
'human rights claim' means a claim by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with his Convention rights,
'immigration appeal' means an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (c.41) (appeal against immigration decision), and
'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and its Protocol.

(2) In this Schedule a reference to anything being done in accordance with the Refugee Convention is a reference to the thing being done in accordance with the principles of the Convention, whether or not be a signatory to it.

PART 2

FIRST LIST OF SAFE COUNTRIES (REFUGEE CONVENTION AND HUMAN RIGHTS (I))

2. This Part applies to –

(a) Austria,
(b) Belgium,
[(ba) Bulgaria]
(c) Republic of Cyprus,
(d) Czech Republic,
(e) Denmark,
(f) Estonia,
(g) Finland,
(h) France,
(i) Germany,
(j) Greece,
(k) Hungary,
(l) Iceland,
(m) Ireland,
(n) Italy,
(o) Latvia,
(p) Lithuania,
(q) Luxembourg,
(r) Malta,
(s) Netherlands,
(t) Norway,
(u) Poland,
(v) Portugal,
[(va) Romania]
(w) Slovak Republic,
(x) Slovenia,
(y) Spain, and
(z) Sweden.

3. **(1)** This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed –

(a) from the United Kingdom, and
(b) to a State of which he is not a national or citizen.

(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place –

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
(b) from which a person will not be sent to another State in contravention of his Convention rights, and
(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

4. Section 77 of the Nationality, Immigration and Asylum Act 2002 (c.41) (no removal while claim for asylum pending) shall not prevent a person who has made a claim for asylum from being removed –

(a) from the United Kingdom, and
(b) to a State to which this Part applies;

provided that the Secretary of State certifies that in his opinion the person is not a national of citizen of the State.

5.- **(1)** This paragraph applies where the Secretary of State certifies that –

(a) it is proposed to remove a person to a State to which this Part applies, and
(b) in the Secretary of State's opinion the person is not a national or citizen of the State.

(2) The person may not bring an immigration appeal by virtue of section 92(2) or (3) of that Act (appeal from within United Kingdom: general).

(3) The person may not bring an immigration appeal by virtue of section 92(4)(a) of that Act (appeal from within United Kingdom: asylum or human rights) in reliance on –

(a) an asylum claim which asserts that to remove the person to a specified State to which this Part applies would breach the United Kingdom's obligations under the Refugee Convention, or
(b) a human rights claim in so far as it asserts that to remove the person to a specified State to which this Part applies would be unlawful under section 6 of the Human Rights Act 1998 because of the possibility of removal from that State to another State.

(4) The person may not bring an immigration appeal by virtue of section 92(4)(a) of that Act in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is not clearly unfounded.

(5) Sub-paragraph (4) applies to a human rights claim if, or in so far as, it asserts a matter other than that specified in sub-paragraph (3)(b).

6. A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies as a place –

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
(b) from which a person will not be sent to another State in contravention of his Convention rights, and
(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.