Neutral Citation Number: [2010] EWHC 705 (Admin)

Case No: CO/8660/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2010

Before :

MR JUSTICE CRANSTON

- -

Between :

The Queen on the application of Saeedi	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
-and-	
Amnesty International Limited	**First Interveners**
The Aire Centre (Advice On Individual Rights In Europe)	
- and -	
United Nations High Commissioner For Refugees	**Second Intervener**

Mark Henderson and Alison Pickup (instructed by **Refugee and Migrant Justice**) for the **Claimant**
Elisabeth Laing QC and Alan Payne (instructed by **Treasury Solicitor**) for the **Defendant**
Simon Cox and Shahram Taghavi (instructed by **Simons Muirhead and Burton)** for the **First Interveners**
Raza Husain QC and Samantha Knights (instructed by **Baker and McKenzie LLP**) for the **Second Intervener**

Hearing dates: 24-26 February 2010

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr Justice Cranston:

I: INTRODUCTION

1. This is the lead case on return to Greece under the so called Dublin Regulation, Council Regulation (EC) No 343/2003. The claimant challenges the decisions of the Secretary of State for the Home Department ("the Secretary of State") to return him to Greece under the Dublin Regulation. He contends that as a result he risks facing ill treatment. That, in his contention, makes his return in breach of Article 3 of the European Convention on Human Rights and in breach of European Union law. Before the hearing I gave permission both to Amnesty International/The Aire Centre and to the United Nations High Commissioner for Refugees (UNHCR) to make written and oral submissions as interveners.

II: BACKGROUND

The claimant's account

2. On 12 January 2009 the claimant claimed asylum in the United Kingdom, having entered illegally hidden in a lorry. During his screening interview he claimed to have left Afghanistan on 23 November 2008 and arrived in Iran 7 days later. After that he travelled to Turkey, arriving on 5 December 2008. From Turkey he travelled through Bulgaria, Romania, Hungary, Austria and Germany before arriving in Belgium. Then he travelled to the United Kingdom. He claimed to have used an agent, to whom his uncle paid between $11,000 and $12,000, to arrange his trip to the United Kingdom. He asserted that he had been unable to claim asylum in any of the countries through which he travelled because he was, at all material times, under the control of an agent.

3. Subsequently, in a statement served under cover of a letter from the Refugee Legal Centre dated 26 February 2009, the claimant repeated a similar account of his journey to the United Kingdom. In addition, he explained that he had fled from Afghanistan in November 2008 after the Afghan authorities had discovered that he had converted to Christianity. In neither the interview nor the statement did the claimant make any reference to having passed through Greece or to having been imprisoned and ill-treated for two months in Turkey.

4. In his witness statement dated 13th November 2009 the claimant now describes arriving in Greece by boat from Turkey and travelling at night time in a small motorboat in dangerous conditions. After arriving in Greece, he says that he and the others with whom he travelled were arrested by Greek police. At no time during his detention was he ever provided with an interpreter or any information in his own language. In his account there were no posters or leaflets in the detention centre. Neither was he offered any legal advice, or given the opportunity to claim asylum. All of the information he obtained about the asylum procedure, his detention and the situation in Greece for asylum seekers was given to him by other migrants. After being fingerprinted by the police, on his account the claimant was examined in a clinic by medical staff, but with no interpreter. He was then detained in what he describes as a "big hall", together with 70 - 80 people. The detention centre was overcrowded and some detainees had to sleep outside in a courtyard. There were only three showers and two or three toilets for all the detainees, and there was never enough food.

5. After about four days, the claimant says that he was released from detention and given a paper telling him to leave Greece within a month. He and others were given tickets to travel by ferry to Athens. He intended to claim asylum but he was told by others that he would have no chance of being recognised as a refugee. He says he observed that even those who managed to claim asylum were destitute. He slept in a park in Athens with other Afghans. On the first night he explains that he was threatened by men with knives. When he tried to report this to the police with the help of another Afghan who spoke some Greek, they were not interested. He moved to another park after this incident but was unable to sleep because he was afraid of being attacked. He managed to obtain some food and drinking water from a church, although he states that usually there would not be enough food for those queuing. In the parks where he slept, there was only one small toilet, and there were no washing facilities. He saw the police stopping people in the park and some were taken away. Other Afghans told him that they had been beaten by the police.

6. Because he felt unsafe in Greece the claimant explains in his witness statement that he contacted the agent who had brought him from Afghanistan and arrangements were made for him to leave through the Bulgarian border. On the journey to the border, the lorry on which the claimant was travelling was intercepted, and he and other migrants were arrested by armed police. They were taken in a van to a remote area, where they were ordered at gunpoint to walk along a path. After walking for some time, the claimant and the other migrants were arrested by armed Turkish police. On his account he then spent two months in detention in Turkey. He was told to tell his family in Afghanistan to lodge money at the Turkish Embassy to pay for his return flight to Afghanistan. The conditions in which he was detained in Turkey involved over 100 people sleeping in one room, with only two toilets and two showers for all the detainees. There was very little food and there were regular fights between the detainees because of the stress. Many people fell ill due to the lack of food and dehydration, but there was no medical care. He says that the Turkish police were violent and aggressive towards the detainees, and he was beaten on his back and legs when he tried to intervene to stop another fight. After two months, he managed to escape from the detention centre with other detainees. He contacted the agent again, and was subsequently brought to the United Kingdom by lorry.

Outline of proceedings

7. On 1 April 2009 the Secretary of State notified the claimant that consideration was being given to applying the Dublin Regulation to his case and sent a request to the Greek authorities, that they accept responsibility for taking the claimant back with a view to determining his outstanding asylum claim. This request was made on the basis of a Eurodac fingerprint match which demonstrated that the claimant had been in Greece on 24 September 2008. Greece was deemed to have accepted responsibility by default, having failed to reply to the Secretary of State's request within the prescribed time limits. In parallel the Secretary of State also certified the claimant's claim under Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 with a view to returning him to Greece under the Dublin Regulation. On 31 July 2009 the Secretary of State notified Refugee and Migrant Justice (as it had become) that the claimant was to be returned to Greece under the Dublin Regulation and, having considered the claimant's statement of 26 February 2009, certified his human rights claim as being clearly unfounded under paragraph 5 (4) of Schedule 3 of

the 2004 Act. Ultimately the claimant issued judicial review proceedings in early August. Removal directions were cancelled when the proceedings were served on the Secretary of State.

8. Meanwhile, Nasseri No 2 CO/7602/2009 had been designated as the test case for the Court to determine whether, in light of any additional evidence since R (Nasseri) v Secretary of State for the Home Department [2009] UKHL 23; [2010] 1 AC 1, asylum seekers could still be lawfully returned to Greece under the Dublin Regulation. Proceedings in the present case were then stayed pending the determination of Nasseri No 2. Nasseri No 2 was withdrawn because Mr Nasseri was no longer eligible for public funding. In mid October 2009 Collins J ordered that the claimant's case should become the new test case in relation to Dublin returns to Greece. Collins J also ordered a stay on removal of similar third country cases.

Structure of the judgment

9. While the hearing for this case was relatively short, two and a half days, the written submissions were voluminous. Thus the claimant's skeleton argument consisted of 468 paragraphs over 121 pages. The Secretary of State responded with a modest 51 page skeleton argument. There were also the skeleton arguments of the interveners. The claimant's case centres on his rights under Article 3 of the European Convention on Human Rights and on European Union law. The judgment considers the cases under these heads. Consideration is not, however, straightforward because of how Article 3 matters are dealt with in domestic law and because of the innovative manner in which the European law arguments have been advanced.

10. The Article 3 aspects of the claimant's case arise because the claimant contends, first, that the Secretary of State cannot return the claimant to Greece under the Dublin Regulation because he should not have certified under paragraph 5(4) of Schedule 3 of the 2004 Act that the claimant's Article 3 claim relating to return there is clearly unfounded. Alternatively, paragraph 3(2)(b) of Schedule 4 to the 2004 Act, under which Greece is a state which is treated as one from which the claimant will not be onwardly refouled in contravention of his Article 3 rights, is incompatible with those rights.

11. The European Union law aspect of the claimant's case is that the Secretary of State has a discretion not to return the claimant to Greece under the Dublin Regulation. In this case the Secretary of State should not do so because, if the claimant is returned to Greece, Greece will not abide by its obligations towards him under European Union law in terms of both how it will treat him and how it will process his asylum claim. This involves a consideration of a wide ambit of European law, as background to the so-called sovereignty clause in the Dublin Regulation, Article 3(2).

12. Both aspects of the claimant's case – under Article 3 of the European Convention on Human Rights and the European law aspects – necessitate a consideration of the evidence of how Dublin returnees are treated in Greece. Under the Article 3 head the claimant contends that he is at risk of suffering ill treatment on return to Greece because of potential detention; the failure of the Greek government to provide adequate procedures, accommodation and subsistence for asylum seekers; and the possibility of onward refoulement from Greece. The European law contentions draw on evidence about these same matters as they relate to the fundamental rights of

Dublin returnees. The evidence in the case was especially voluminous, which is another explanation for the length of the judgment. The evidence derives from a variety of sources.

13. After outlining the relevant legal principles (Parts III and IV), the judgment canvasses the evidence (Part V). It is then a matter of considering the parties' contentions in the light of the legal principles and evidence (Parts VI and VII).

III ARTICLE 3 ECHR: LEGAL PRINCIPLES

14. Article 3 of the European Convention on Human Rights provides that no one shall be subjected, inter alia, to inhuman or degrading treatment or punishment. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity or arousing feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and fall within the prohibition of Article 3: Pretty v United Kingdom (2002) 35 EHRR 1, [52].

Article 3 and removal

15. The European Court of Human Rights has held that Article 3 places an obligation on a Contracting State to the Convention not to remove someone from its territory where substantial grounds are shown for believing that, as a result, the person will face a real risk in the receiving country of being exposed to treatment contrary to Article 3: Chahal v United Kingdom (1996) 23 EHRR 54. The principle applies in the case of Dublin returnees: KRS v United Kingdom, Application No 32733/08.

16. The general principle was reaffirmed by the Grand Chamber of the European Court of Human Rights in Saadi v Italy (2008) 49 EHRR 730. In determining whether treatment to which a person would be exposed reaches the threshold for the engagement of Article 3, the Strasbourg Court in that case held that there is no distinction to be drawn between treatment which is inflicted directly by a sending state and that which might be inflicted by the authorities of the receiving state: [138]. Nothing said in R (Wellington) v Secretary of State for the Home Department [2008] UKHL 72; [2009] AC 335 is, in my view, inconsistent with this. That was an extradition case. It is clear that the legal policy behind extradition drove the House of Lords to regard Article 3 in that removal context as having an attended form.

17. The threshold, however, is high and ill-treatment must attain a minimum level of severity. In Saadi the Grand Chamber said:

> "[142] The court has always been very cautious examining carefully the material placed before it in the light of the requisite standard of proof [before] finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting Chahal v United Kingdom (1996) 1 BHRC 405 it has only rarely reached such a conclusion."

18. In the removal context the well-known case of N v Secretary of State for the Home Department, [2005] UKHL 31 [2005] 2 AC 296, is illustrative. That concerned

medical treatment. The claimant's life expectancy would be drastically shortened if returned to Uganda because of the disparity between the medical facilities available in the United Kingdom and in Uganda. Lord Nicholls summed up the Strasbourg cases as deciding that "aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to benefit from medical, social, or other forms of assistance provided by the expelling state": para. [15]. See also [48] per Lord Hope; [80] per Lord Brown.

19. In assessing whether the evidence establishes a real risk that persons will be subject to ill treatment contrary to Article 3 in the receiving country the focus is on the foreseeable consequences of removal in the light of the circumstances of the country to which removal will take place, and of the applicant's personal circumstances: Vilvarajah v the United Kingdom (1991) 14 EHRR 248, 289, [108]. The Court of Appeal has held that the test is whether there is "a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does": AA (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 149, [14], and [21]. There is no need to show a certainty or a probability that all returnees will face serious ill-treatment upon return.

20. In R (Yogathas) v Secretary of State for the Home Department [2002] UKHL 36; [2003] 1 AC 920, Lord Hutton said that the onus rests on persons alleging that their removal would constitute a breach of Article 3 by the United Kingdom to show substantial grounds for believing that they would face a real risk of being subjected to treatment contrary to Article 3: para [61]. This, with respect, is not the whole story in as much as it suggests a process akin to ordinary civil litigation. In MT (Algeria) v Secretary of State for the Home Department [2007] EWCA Civ 808; [2008] QB 533, the Court of Appeal confirmed that the approach in Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449, 469-70 should be applied to the assessment of factual issues in Article 3 cases. Sir Anthony Clark MR said:

> "[162] We would accept that the correct approach to the application of the Chahal test is that described in Karanakaran. The decision-maker should take a holistic approach; it should take account of all the relevant evidence and risk factors, giving to each matter such weight as it warrants, bearing in mind its importance in the context of the case and the extent to which it has been satisfactorily proved. It will be proper to exclude from consideration those matters which it can safely discard because it has no real doubt that they did not occur. The decision-maker should also take account of the absence of satisfactory information relating to matters of importance. If no evidence or information can be discovered on a matter of importance, its absence will be relevant to the assessment of future risk."

In Saadi the court said that the assessment of this minimum level of severity is relative, depending on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim: [134].

21. The concept of exposing a person to "treatment" contrary to Article 3 was recently considered by Hickinbottom J in R (EW) v Secretary of State for the Home Department [2009] EWHC 2957 (Admin). The claimant there resisted his return to Italy under the Dublin Regulation on the basis that a consistent failure to implement in Italy the Common European Asylum System meant that, if he were to be returned, he faced a risk of destitution and homelessness. That rendered the Italian authorities, and thus the United Kingdom government, in breach of Article 3. Hickinbottom J reasoned that there is no right to accommodation or to a minimum standard of living which can be drawn from the European Convention on Human Rights. That is a matter for social legislation. Hickinbottom J then referred to R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396. In his view this established that there is no right under the Convention to a minimum level of social support. A State may stand passively by and allow individuals' living standards to fall to an inhuman or degrading level. In his judgment treatment contrary to Article 3 required positive action by the State: paras. [81], [92]-[95].

22. (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66; [2006] 1 AC 396 deserves closer attention because it was advanced before me as the crucial case in this area. There the House of Lords concluded that placing late application asylum seekers in a state of destitution by denying them welfare benefits, the right to work and access to other forms of social support was liable to engage Article 3. The legislation prohibited the Secretary of State from providing accommodation and the necessities of life for asylum applicants who did not lodge early claims. Applicants could not work to support themselves. Lord Bingham said that treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. The treatment, to be proscribed, had to achieve a minimum standard of severity. Where that treatment does not involve the deliberate infliction of pain or suffering the threshold was a high one. A general public duty to house the homeless or provide for the destitute could not be spelled out of Article 3. The threshold may be crossed if a person with no means and no alternative sources of support, unable to support himself, was, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.

> "[9] It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed. I do not regard O'Rourke v United Kingdom (Application No 39022/97) (unreported) 26 June 2001 as authority to the contrary [he did not apply for housing]: had his predicament been the result of state action rather than his own volition, and had he been ineligible for public support (which he was not), the court's conclusion that his suffering did not attain the requisite level of severity to engage Article 3 would be very hard to accept."

23. Lord Hope said while the prohibition in Article 3 was negative, it might also require the state to do something to prevent its deliberate acts, which would otherwise be

lawful, from amounting to ill treatment: [46]. He agreed with Lord Brown that the real issue was whether the state was properly to be regarded as responsible for the conduct prohibited by the article: [53]. Lord Scott said that just as there was no Convention right to be provided by the state with a home, so too there was no Convention right to be provided by the state with a minimum standard of living. "Treatment" required something more than mere failure: [66]. Baroness Hale said that it was well known that a high threshold was set but it would vary with the context and the particular facts of the case. It was necessary to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age: [78]. Lord Brown said that it was generally unhelpful to attempt to analyse obligations arising under Article 3 as negative or positive, and the state's conduct as active or passive. Time and again these were shown to be false dichotomies. The real issue in all these cases was whether the state is properly to be regarded as responsible for the harm inflicted, or threatened upon the victim: [92].

24. Limbuela establishes that what in this jurisdiction is sometimes called street homelessness can meet the threshold necessary to be caught by Article 3. It would seem that the test applicable is that in Pretty v United Kingdom, whether this condition humiliates or degrades, diminishing human dignity. However, the risk of such ill treatment must be, at the least, the responsibility of the state. Destitution, as such, does not fall within the Article 3 net. There must be a close and direct link between the destitution and the actions of the state. That, in my opinion, can hardly ever occur in this type of case: the link between the decision of the Secretary of State to return a person under the Dublin Regulation, and any destitution which occurs in the receiving state, in this case Greece, will simply be too attenuated a link.

"Safe" third countries and human rights

25. Under the scheme established by Parliament certain countries are deemed to be safe as regards human rights issues. Greece is one of them. The legislative scheme begins with section 33 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") which gives effect to Schedule 3. That concerns the removal of persons claiming asylum to countries known to protect refugees and to respect human rights. Schedule 3 is headed 'Removal of Asylum Seeker to Safe Country' and provides for the removal of asylum seekers to third countries without substantive consideration of their asylum claims. In part it gives effect to the Dublin Regulation. Part 2 of the Schedule then has the 'First List of Safe Countries', to which the deeming provision applies. The list is set out at paragraph 2 and includes Greece as one of 28 States: para. 2(j).

26. Paragraph 3 of Part 2 of Schedule 3 then explains in what respects a country in this list like Greece is deemed to be safe: first, it is safe as regards Refugee Convention persecution in that country. Secondly, it is also safe in that the person will not be sent (or refouled) to another country in Convention of his human rights (the so-called deeming provision) or otherwise in violation of the Refugee Contravention.

> "(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, and

(b) from which a person will not be sent to another State in contravention of his Convention [ECHR] rights, and

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

27. The upshot is that where the Secretary of State certifies that a person is not a citizen of a State in the list, and he is to be removed to a State on the list, that person may not bring an in-country appeal to the Tribunal under section 92(2) or (3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Nor may he bring an in-country appeal under section 92(4)(a) in so far as it relies on onward removal from that State (paragraphs 5(1), (2) and (3)).

28. The so-called deeming provision, paragraph 3(2)(b), applies to human rights claims arising from being removed to another country from a first list country like Greece. It does not apply to Article 8 human rights claims arising from removal interfering with family or private life in the United Kingdom or to Article 3 human rights claims relating to ill-treatment within the first list Country. However, Part 2 of Schedule 3 imposes a duty on the Secretary of State to certify human rights claims in relation to first list countries as clearly unfounded unless satisfied that they are not clearly unfounded. If certified the effect is that there can be no appeal by the person from within the United Kingdom against removal. Paragraph 5(4) of Schedule 3, Part 2, to the 2004 Act provides:

"The person may not bring an immigration appeal by virtue of section 92(4)(a) of the 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."

29. Authoritative guidance on the role of the Secretary of State in making, and of the court in reviewing, a certificate under paragraph 5(4) of Part 2 of Schedule 3 of the 2004 Act derives from two House of Lords decisions. The first is R (Yogathas) v Secretary of State for the Home Department [2002] UKHL 36; [2003] 1AC 920. That concerned the removal of asylum seekers to Germany under the Dublin Convention. The certificate at issue was under section 72(2)(a) of the Immigration and Asylum Act 1999, that an applicant's human rights claim was manifestly unfounded. The House

of Lords held that the Secretary of State had to give careful consideration to the allegation, the grounds on which it was made, and any material relied on to support it. The question for the Secretary of State was whether the allegation was so clearly without substance that it must clearly, or was bound to, fail. This was a screening process rather than a full merits review, and its extent depended on the nature and detail of the case presented by the applicant. The court's role on a challenge to such a certificate was to subject the Secretary of State's decision to the most anxious scrutiny by way of a rigorous examination of whether he had adequately considered and resolved the issue of whether the allegation was manifestly unfounded.

30. The second authority is ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6, [2009] 1WLR 348. That concerned a certificate under section 94(2)(a) of the 2002 Act, that the claimant's asylum and human rights claims were 'clearly unfounded'. The House of Lords was clear that in considering whether the claimant's asylum and human rights claims were clearly unfounded, the court's function was one of review. It had to consider how the claim would be likely to fare on appeal and assess what judgment would be made by the court on appeal in relation to such legal questions as would arise. The court was not required to make the decision in relation to the certificate for itself and to substitute its own decision for that of the Secretary of State.

31. However it was not as clear from ZT (Kosovo) what test the House of Lords held should be applied. Lord Phillips adopted the approach of the Court of Appeal in R (L) v Secretary of State for the Home Department [2003] EWCA Civ 25, [2003] 1 WLR 1230 and concluded that where there was no dispute of primary fact, only one rational answer could come as the conclusion of that review. Lord Brown agreed. Lords Hope and Carswell took the view that there may be cases, although they would be rare, where the review could result in more than one rational answer. Lord Neuberger agreed with Lord Phillips, although he said that he would be reluctant to suggest that there is a hard and fast rule to that effect: [83].

KRS v United Kingdom

32. KRS v the United Kingdom App. No. 32733/08, 2 December 2008 is a key decision of the Strasbourg Court, because it very much addresses the issue before me. The applicant was from Iran. He applied to the Strasbourg Court for a rule 39 indication preventing his transfer by the United Kingdom to Greece under the Dublin Regulation on the basis that, in making that return, the United Kingdom would be in breach of its own obligations under Article 3. That was because, if returned, there was a risk that he would be refouled from Greece to Iran and that as an asylum seeker in Greece, he would suffer inhuman and degrading treatment while waiting for his application to be determined. The rule 39 indication was granted. The United Kingdom told the court that, according to the Greek Government, no asylum claimants were being removed to Iran, or Afghanistan, even if their asylum application had been rejected. It applied for the indication to be lifted on the grounds that the application was manifestly unfounded. The applicant's legal representatives were not involved in this process and there was no oral hearing. The court's fourth section lifted the rule 39 indication and declared the application clearly unfounded.

33. In its reasons the court reaffirmed TI v United Kingdom, Application no 43844/98, [2000] INLR 211. That case decided that removal to an intermediary country, which

is also a Contracting State to the European Convention on Human Rights, in that case, Germany, did not affect the responsibility of the United Kingdom to ensure that the applicant was not, as a result of the decision to remove, exposed to an Article 3 risk. That ruling applied with equal force, said the court in KRS, to the Dublin Regulation. The court observed, however, that the asylum regime under the Dublin Regulation protected fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance. In KRS the court noted that the UNHCR and other organisations had expressed concerns that asylum seekers in Greece might not have access to an effective remedy. That evidence is canvassed later in this judgment.

34. As a matter of evidence the court in KRS found that Greece was not currently removing people to, inter alia, Afghanistan, so that it could not be said that there was a risk that the applicant would be removed there. The court noted that the Dublin Regulation was one of a number of measures agreed in the field of European Union asylum policy. It had to be considered alongside the obligations of Member States under the relevant European Union Directives to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. (Those directives are outlined in the next part of this judgment). It said:

> "The presumption must be that Greece will abide by its obligations under those Directives. In this connection, note must also be taken of the new legislative framework for asylum applicants introduced in Greece … Quite apart from that, there was nothing to suggest that an asylum seeker faced with unlawful refoulement to a country where he faced treatment contrary to Article 3 could not apply, in Greece, for a rule 39 indication against the Greek Government, even though the Greek Government had not specifically addressed this question in its recent letter": (p.17).

35. The court recalled that Greece, as a Contracting State, had undertaken to abide by the European Convention on Human Rights. In the absence of any proof to the contrary, it must be presumed that Greece would abide by its obligations. Any complaint about onward removal should be taken up not with the United Kingdom but with the Greek authorities, and if unsuccessful, by an application to the Strasbourg Court. In relation to conditions for asylum seekers in Greece, the court went on to say:

> "… [I]n the Court's view, the objective information before it on conditions of detention in Greece is of some concern, not least given Greece's obligations under [the Reception Directive] and Article 3 of [the EHCR]. However, for substantially the same reasons, the Court finds that were any claim under the Convention to arise from those conditions, it should also be pursued first with the Greek domestic authorities and thereafter in an application to this Court": (p.18)

36. Before me the claimant seeks to undermine the authority of this decision by suggesting that it was, effectively, ex parte, and that the claimant there was denied the opportunity of making any submissions to contradict the case advanced by the United Kingdom government. There was nothing unusual about the procedure adopted by the

Strasbourg Court in an admissibility decision. It is also said that the authority of KRS is weakened since, following it, the Strasbourg Court has given rule 39 indications and communicated matters in comparable cases involving Greece. None of these, however, have yet led to decisions. In my view it is impossible for me to impugn the Strasbourg Court's decision in KRS. Until the Stasbourg Court speaks again I must accept it as authoritative acknowledging, of course, that it was an admissibility decision.

Nasseri

37. As explained earlier, the present litigation is the progeny of R (Nasseri) v Secretary of State for the Home Department [2009] UKHL 23; [2010] 1 AC 1. In brief the facts were that Mr Nasseri, a national of Afghanistan, claimed asylum in the United Kingdom after being discovered hidden in a lorry. His fingerprints were matched, via the Eurodac fingerprint database, with a person who had previously claimed asylum in Greece. The Secretary of State sent a request to the Greek authorities asking them to take him back under the Dublin Regulation to determine his outstanding application for asylum. Once the time limits for a response had expired, the Secretary of State certified Mr Nasseri's claim under Schedule 3 of the 2004 Act with a view to returning him to Greece under the Dublin Regulation. The Greek authorities formally accepted responsibility. His legal representatives then challenged his removal, alleging that if removed to Greece he faced a risk of refoulement and referring to evidence concerning the conditions facing asylum seekers in Greece. That evidence is referred to later in this judgment.

38. McCombe J held that the deeming provision prevented both the Secretary of State and the court from considering the law and practice of refoulement of safe countries listed in Part 2 of Schedule 3 to the 2004 Act. Accordingly, he refused to consider the material concerning the situation in Greece and declared that the deeming provision was incompatible with Article 3 of the European Convention on Human Rights: [2010] 1 AC 1. The Court of Appeal allowed the Secretary of State's appeal, concluding that there was no statutory bar on considering material relating to conditions in safe third countries. Having decided the issue of principle, the Court of Appeal went on to conclude that, in the light of the material referred to below, return to Greece did not give rise to a real risk of refoulement: [2010] 1 AC 1 [35]-[39].

39. Mr Nasseri appealed to the House of Lords on the grounds that the Court of Appeal had erred in principle and in their treatment of the evidence concerning Greece. The House of Lords dismissed Mr Nasseri's appeal and held that it was not incompatible with the claimant's rights under Article 3 of the Convention for the Secretary of State to order his removal to Greece pursuant to the deeming provisions in paragraph 3 of Schedule 3 to the 2004 Act. Lord Hoffmann gave the leading speech, with which the other law lords agreed. He reviewed the claimant's case, the law relating to Article 3 of the Convention, its impact on the Secretary of State's power to remove, the proceedings below and the material about Greece from, amongst others, UNHCR. Lord Hoffmann held that the Secretary of State was not under a legal duty to keep the situation in Greece under review so as to decide whether or not to take Greece off the list in Part 2 of Schedule 3. No-one was under a justiciable duty to promote primary legislation: [2010] 1 AC 1[21].

40. Turning to KRS v United Kingdom Lord Hoffmann noted the Strasbourg Court's view that, if the complaint was not about refoulement, but about the conditions under which a returned asylum seeker would be held in Greece, "that should be taken up with the Greek authorities and, if unsuccessful, before the European Court by way of a complaint against Greece. It was not a basis for proceedings against the United Kingdom": [39]. He also drew from KRS the conclusion that Member States should not be expected to police the asylum policy of another, this being a task for the European Commission. "Other Member States are entitled to assume - not conclusively presume, but to start with the presumption - that other Member States will adhere to their treaty obligations. And this includes their obligations under the European Convention to apply Article 3 and give effect to rule 39 indications": [41].

41. None of this is undermined by what all parties before me identified as a misunderstanding Lord Hoffmann made at paragraph [40] of his speech, when he recorded a submission by Mr Rabinder Singh QC for the appellant, that KRS should be given little weight. One reason for the submission which is recorded is that the Strasbourg Court did not invite submissions from "his client". It is clear from the appellant's printed case that the submission was that argument was not invited from KRS, rather than Nasseri. But this is no basis for doubting the authority of the reasoning of the House of Lords in Nasseri. The point does not go to the substantive merits of the decision.

42. Lord Hoffman concluded that there was no evidence that any Dublin returnee was in practice removed from Greece to another country in breach of their Article 3 rights, which to him was of critical importance: [43]. The Secretary of State was not concerned with Greek law. The operation of the Greek system for processing asylum applications, and the conditions under which asylum seekers are kept, was a problem for the Greek authorities or, if necessary the European Commission. The Secretary of State was concerned only with whether in practice there is a real risk that a migrant returned to Greece will be at real risk of a breach of Article 3: [44].

Detention in Greece: Strasbourg decisions

43. Reference should be made to two of the decisions of the European Court of Human Rights which have held that conditions inside Greece for detained asylum seekers are in breach of Article 3. SD v Greece Application no 8256/07, 26 November 2009 involved a Turkish journalist who crossed the border illegally from Turkey. He was detained for nearly two months at the border post at Soufli, and then for 6 days at Petrou Ralli in Athens. When he was prosecuted for illegal entry a Greek court held that he was a political prisoner and had fled because of threats. He submitted a written claim for asylum but it was initially rejected for vagueness. The application was then adjourned pending the provision of further evidence. Meanwhile the police had detained him with a view to deportation. On 16 July 2007 the Administrative Tribunal of Athens held that that was unlawful. On 17 July 2007 he attended at the asylum department at Petrou Ralli and was given a red card, valid for six months. This was subsequently renewed twice and entitled him to work and to medical assistance.

44. The Strasbourg Court referred to conditions in Soufli, drawing on reports by the Greek Ombudsman, the UNHCR, the Committee for the Prevention of Torture, Human Rights Watch and the Commissioner for Human Rights of the Council of

Europe. These showed that those conditions were dismal, contrary to the claims of the Greek government. Even if the applicant shared a relatively clean cell with hot water, the court said that he spent two months confined in a pre-fabricated hut, with no chance of going outside, no access to a telephone, and without blankets, clean sheets or enough cleaning materials: para [51]. At Petrou Ralli, he was confined in his cell for 6 days and was unable to exercise in the open air. In the court's view the conditions were unacceptable. In the light of the applicant's personal circumstances, in particular his torture in Turkey, the court held that his detention in such conditions, as an asylum seeker, combined with its excessive duration, amounted to degrading treatment and a violation of Article 3: paras [53] and [54].

45. In Tabesh v Greece, Application No 8256/07, 26 November 2009 Tabesh had been arrested for possession of a false document, apparently a pink/red card, to which he was not entitled. He was sentenced to 40 days' imprisonment and consequently his expulsion from Greece was ordered. He was detained in a police station on 28 December 2006, pending expulsion, by the immigration police. The legal maximum period of detention was three months. His challenge to detention was rejected by the Thessalonika Administrative Tribunal. He was released on the expiry of the three-month period, as he could not be expelled to Afghanistan absent the provision of travel documents. He then applied for asylum. He complained that his cell did not have sufficient access to fresh air or daylight, and that the air was damp and stale, because of the proximity of smokers. He had no exercise space. The surroundings were unhealthy, and there were insufficient toilet and washing facilities. Food was not provided but instead prisoners had an allowance of 5.87 euros a day to order food from outside. He could not get newspapers or magazines, and was cut off from the outside world as he had no radio or television in his cell. The Strasbourg Court held that quite apart from problems of hygiene and overcrowding, the failure to provide meals and a space for regular exercise amounted to degrading treatment.

IV THE DUBLIN REGULATION AND ITS CONTEXT

46. In broad terms the policies behind European Union measures in the area of asylum and international protection are three-fold: the reinforcement of the right of freedom of movement in the internal market, by reducing secondary movements of third country nationals; the safeguarding of their rights; and securing minimum and uniform standards in the procedures and reception conditions which apply to asylum seekers: H. Battjes, European Asylum Law and its Relation to International Law, 2006, para 2.

47. The first policy is evident in the Dublin Regulation itself. The policies of safeguarding rights and of securing minimum and uniform standards are most obviously displayed in the other legal instruments of the Common European Asylum System, primarily Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ("the Reception Conditions Directive"); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive"); and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). The Common European Asylum System is applicable to the United Kingdom in its

entirety. In each of the system's constituent instruments reference is made to the European Union Treaties and to the Charter of Fundamental Rights. These were thus a logical starting point for the submissions before me.

The Treaties

48. Article 2 of the Treaty on European Union provides that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article 6 "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights … which shall have the same legal value as the Treaties". However, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Article 6(3) continues:

> "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

49. Under Article 78 of the Treaty on the Functioning of the European Union, the European Union shall develop a common policy on asylum, subsidiary protection and temporary protection, with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. That policy must be in accordance with the 1951 Convention and its 1967 Protocol: Art. 78(1). Article 78(2) provides that the European Parliament and the Council shall adopt measures for a common European asylum system which includes a uniform status of asylum, valid throughout the Union, and a uniform status of subsidiary protection for nationals of third countries. In addition, Article 80 provides that "the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility ... between the Member States".

Fundamental rights

50. Before turning to the Charter on Fundamental Rights it is important to recall that the settled case law of the Court of Justice of the European Union ("the Court of Justice") is that fundamental rights form a part of the general principles of law it applies. The court has said it draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international instruments for the protection of human rights involving Member States. In that regard, the European Convention on Human Rights has special significance. Respect for human rights is a condition of the lawfulness of Community acts. All European Union legislation must respect fundamental rights, that respect constituting a condition of their lawfulness:

> "[335] Effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the member states, which has been enshrined in Articles 6 and 13 of the Human Rights Convention , this principle having furthermore been reaffirmed by Article 47 of the Charter of Fundamental Rights": Joined cases C-402/05

and C-415/05P, Kadi v Council of the European Union [2008] ECR I-6351; [2009] 1 AC 1225, [381], [283]-[285], [332], [335].

51. As a result of the Lisbon Treaty the Charter of Fundamental Rights now has equal status to the other European Union treaties. Its relevant rights constitute general principles of European Union law. Even before the Lisbon Treaty came into force, the Charter was relied upon in a number of cases by the European Court of Justice. In case C-540/03, European Parliament v Council of the European Union [2006] ECR I-05769 the Court of Justice stated:

> "[35] Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the member states have collaborated or to which they are signatories. The ECHR has special significance in that respect ... "

The court then referred to Article 6(2) of the Treaty on European Union and to the Charter. While the Charter was not (then) a legally binding instrument, the Community legislature acknowledged its importance by referring to it in the recitals to the Directive at issue in that case. The court added that the principal aim of the Charter was as stated in its preamble.

52. In Title I of the Charter Article 1 provides: "Human dignity is inviolable. It must be respected and protected". Explanations to the Charter were originally prepared under the authority of the praesidium of the convention which drafted the Charter. They have been updated and although they do not have the status of law, they are a tool of interpretation intended to clarify the provisions of the Charter: [2007] OJ C 303/02. The Explanation of Article 1 states that in its judgment of 9 October 2001, in Case C-377/98 Netherlands v European Parliament and Council [2001] ECR I-7079, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law. The Explanation adds that "the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."

53. Article 18 of the Charter provides that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention and in accordance with the Treaties. The Explanation on Article 18 is to the effect that its text is based on what is now Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. The Explanation continues that reference should be made to the Protocols relating to Denmark, and to the United Kingdom and Ireland to determine the extent to which they are bound. The right of asylum guaranteed under Article 18, is in addition to the prohibition on refoulement, which is addressed by Article 19 of the Charter. Under the heading "Protection in the Event of Removal, Expulsion or Extradition", Article 19(2) provides:

> "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected

> to the death penalty, torture or other inhuman or degrading treatment or punishment."

54. In Title II of the Charter Article 47 is entitled "Right to an effective remedy and to a fair trial". It reads:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

The Explanation on Article 47 states that the first paragraph is based on Article 13 of the European Convention on Human Rights, the effective remedy Article. However in European Union law, it continues, the protection is more extensive since it guarantees the right to an effective remedy before a court. Article 47 applies to the institutions of the European Union and "of Member States when they are implementing Union law and does so for all rights guaranteed by Union law." The Explanation then says that the second paragraph corresponds to Article 6(1) of the European Convention on Human Rights. In European Union law, however, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.

55. Title VII of the Charter contains general provisions governing its interpretation and application. Thus the scope of the Charter is laid down in Article 51.

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law ..."

As regards the Member States, the Explanation makes clear that the Charter is only binding when they act within the scope of Union law. Paragraph 2, together with the second sentence of paragraph 1, confirm that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. The Explanation also spells out that paragraph 2 confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. Thus the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be the 'implementation of Union law' within paragraph 1.

56. Article 52(3) provides:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The Explanation on Article 52(3) is that it is intended to ensure the necessary consistency between the Charter and the European Convention on Human Rights by establishing the rule that, in so far as the rights in the Charter also correspond to rights guaranteed by the European Court on Human Rights, their meaning and scope are the same as those laid down by the Convention. The meaning and the scope of the guaranteed rights is to be determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The level of protection afforded by the Charter may never be lower than that guaranteed by the Convention but it can be more extensive. The Explanation continues that the list of rights which may, at the present stage, be regarded as corresponding to rights in the Convention, as to meaning and scope, include Article 19(2), corresponding to Article 3 of the Convention as interpreted by the European Court of Human Rights. Articles where the meaning is the same as the corresponding Articles of the Convention, but where the scope is wider, include Article 47(2) and (3), corresponding to Article 6(1) of the Convention, but with the limitation to the determination of civil rights and obligations or criminal charges not applying as regards Union law and its implementation.

57. As indicated there is a Protocol on the application of the Charter to Poland and the United Kingdom: [2007] OJ C3 156. Recital 2 to the Protocol recalls that the Charter is to be applied in strict accordance with the provisions of Article 6 of the Treaty of European Union and Title VII of the Charter itself. Article 6 requires the Charter to be applied and interpreted by United Kingdom courts strictly in accordance with the explanations referred to in that Article. Recital 8 notes the wish of the United Kingdom to clarify certain aspects of the application of the Charter. Recital 12 reaffirms that the Protocol is without prejudice to other obligations devolving upon the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally. Article 1 of the Protocol then reads (in part):

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

Article 2 continues that to the extent that a provision of the Charter refers to national laws and practices, it applies to the United Kingdom only to the extent that the rights or principles it contains are recognised in United Kingdom law or practices.

58. In its report The Treaty of Lisbon: an impact assessment, HL Paper 62-I, 13 March 2008, the House of Lords European Union Committee observed that the Lord Chancellor and Secretary of State for Justice confirmed that the Protocol was intended

to reflect the terms of the Charter's horizontal Articles and put beyond doubt what should have been obvious from other provisions: para 5.96. The committee itself recorded that in reply to a question to the Lord Chancellor and Secretary of State for Justice, the government said that it was clear that the Charter only reaffirmed existing rights: para 5.4.2. The committee opined that the effect of declaring the Charter to have the same legal value as the Treaties was likely to preclude any argument that the rights and principles "reaffirmed" did not already exist as fundamental rights and principles in the area of European Union law. As to the Protocol the committee set out the view of Professor Dashwood, that it was not an opt-out but an interpretation instrument. It concluded that the Protocol should not lead to a different application of the Charter in the United Kingdom as compared with other Member States: para 5.103(d). Ultimately its interpretation was a matter for the courts: para 5.105.

The Dublin Regulation

59. The Dublin Regulation (EC) No 343/2003 is the cornerstone of the Common European Asylum System. It establishes a system of determining responsibility, according to specific criteria, for examining an asylum claim lodged in a Member State or in Iceland, Norway or Switzerland, which all participate in the Dublin system. The Regulation aims at ensuring that each claim is examined by one Member State as "on the one hand, to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum application and, on the other, to prevent abuse of asylum procedure in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his/her stay in the Member States": COM(2008) 820 final.

60. The first recital of the Dublin Regulation states:

> "A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community".

Recital (2) recalls that the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention to ensure that nobody was sent back to persecution "i.e. maintaining the principle of non-refoulement ... Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals". The European Council had also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application, a method based on objective, fair criteria both for the Member States and for the persons concerned. This method 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: recitals (3)-(4).

61. The recitals continue that family unity should be preserved if possible, and Member States should be able to derogate from the responsibility criteria so as to reunify families on humanitarian grounds (recitals (6) and (7)). Recital (8) reads as follows:

> "(8) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity."

Recitals (10) and (11) refer to the Eurodac fingerprint comparison system. Recital (12) reminds Member States that with respect to the persons falling within the scope of the Regulation they are bound by obligations under instruments of international law to which they are a party. Recital (15) explains that 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 full observance of the right to asylum guaranteed by Article 18 is sought.

62. The mechanism in the Dublin Regulation by which an asylum claim is considered by one, responsible Member State, is set out in Chapter II, General Principles. Article 3(1) provides that Member States shall examine the application of any third-country national who applies at the border or in their territory 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. Article 3(2) has become known as the sovereignty clause and this is central to this litigation. It enables Members States to consider an asylum application, despite not having responsibility under Chapter III.

> "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. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

63. Article 3(3) continues that any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention. Asylum seekers must be informed in writing, in a language that he or she may reasonably be expected to understand, regarding the application of the Regulation, its time limits and its effects: Article 3(4).

64. Among the criteria in Part III of the Regulation, "Hierarchy of Criteria", responsibility may be attributed to a Member State to deal with an asylum claim "where it is established, on the basis of proof or circumstantial evidence ... that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country….": Article 10(1). Asylum-seekers are returned or transferred on the basis of this provision, identification typically having been made under the Eurodac system for the comparison of fingerprints. Article 10(1) provides that responsibility of a Member State shall cease 12 months after the irregular border crossing took place.

65. Chapter IV contains Article 15, headed "Humanitarian Clause", which enables a second Member State, even if it is not the Member State responsible, to bring together family members and other dependent relatives at the request of the responsible Member State. Chapters V and VI make provision for the mechanics of the system and for administrative co-operation between Member States.

66. Case C-19/08 Migrationsverket v Petrosian [2009] ECR I-495 is the only case in which the Court of Justice has considered the Dublin Regulation. It concerned the interpretation of the time limits in Articles 20(1)(d) and 20(2) for implementation of a transfer decision. Adopting its standard technique of interpreting a Community instrument in its context, and in the light of its object, the court held that the Community legislation did not intend that Member States offering greater appeal remedies should be disadvantaged by the time limits over those which did not. The Court said:

> "[48]In the first place, it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications."

67. Under the present terms of the Dublin Regulation, the European Commission does not have the power to suspend transfers. However, in December 2008 the European Commission published a proposal for recasting the Dublin Regulation: COM (2008) 820 final. It would confer on the Commission a new power to order suspension of transfers where the examination of asylum claims in the responsible state may not be in conformity with European Union law, the Procedures Directive and Reception Conditions Directive being specifically cited. The recast regulation also provides for a Member State to request that the Commission order a suspension where it is concerned that the other Member State is not providing claimants with the protection to which they are entitled under European Union law.

Reception Conditions Directive, Procedures Directive and Qualification Directive

68. The Reception Conditions Directive 2003/9/EC requires Member States to guarantee a minimum standard of living to asylum seekers and to pay specific attention to the situation of applicants with vulnerabilities or those who are detained. As with the other Directives there is an early reference to the Common European Asylum System and to the Charter of Fundamental Rights: recitals (1), (3), (5). Minimum standards

which normally suffice to ensure asylum seekers a dignified standard of living and comparable living conditions in all Member States should be laid down: recital (7). The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception: recital (8). The substantive provisions of the directive lay down the minimum standards to be applied by Member States in their reception arrangements for asylum seekers. Its provisions bind the Member State to whom a particular applicant applies for asylum. It regulates matters such as the provision of information, documentation, freedom of movement, healthcare, accommodation, access of minors to education, and access to the labour market and to vocational training.

69. The Procedures Directive 2005/85/EC imposes common standards for fair and efficient asylum procedures: recital (3). It establishes minimum standards, gives as its main objective the introduction of a minimum framework, and seeks an approximation of rules on the procedures for granting and withdrawing refugee states: recitals (4)-(6). It respects fundamental rights and observes the Charter: recital (8). Recital (10) states that it is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel have the appropriate knowledge or necessary training. Recital (13) reads, in part:

> "[E]very applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with … access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation [reasons] of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand."

It is said that a basic principle of Community law is an effective remedy: recital (27). The Directive does not apply to the Dublin Regulation process itself: recital (29).

70. Article 8 obliges Member States to ensure that applications are examined, and decisions taken, individually, objectively and impartially. Precise and up-to-date information must be obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited. Personnel responsible for examining applications and taking decisions must have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law. Article 10 provides for

guarantees for applicants for asylum. Member States shall ensure that all applicants for asylum enjoy the following guarantees:

> "(a) they shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC [the Qualification Directive]. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;
>
> (b) they shall receive the services of an interpreter for submitting their case to the competent authorities …
>
> (d) they shall not be denied the opportunity to communicate with the UNHCR …
>
> (e) they shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision …"

Articles 12 and 13 provide for the right to, and requirements for, a personal interview. Under Article 39 there is the right to an effective remedy against an initial refusal of asylum and Article 15(2) provides for free legal representation in such proceedings.

71. The Qualification Directive 2004/83/EC applies not only to those seeking recognition as refugees under the 1951 Refugee Convention, but also to those seeking other forms of international protection. It seeks to adopt common criteria for according protection and a minimum level of benefits for those who fall within its scope: recital (6). This, in turn, should help to limit secondary movements of applicants for asylum between Member States where that is caused purely by differences in legal frameworks: recital (7). Again reference is made to the Charter and full respect for human dignity: recital (10). Consultation with UNCHR, it is said, may provide valuable guidance for Member States when according refugee status. In its substantive provisions the Directive makes comprehensive provision for qualification for refugee status and for subsidiary protection, and for the consequences of the recognition of such claims.

European Commission Actions against Greece

72. Under the European Union treaties the European Commission is entrusted with the responsibility to take legal action, including before the Court of Justice, against Member States in the event of a breach of their legal obligations under European

Union law. Because of their nature such proceedings do not provide an effective remedy to safeguard individual fundamental rights but are an "elite" means of resolving disputes: P Craig & G de Burca, EU Law, 4th ed, 2007, 428.

73. There have been three sets of proceedings brought by the European Commission against Greece, related to its failure to apply the Common European Asylum System. In February 2006 the European Commission took legal proceedings against Greece for its failure to transpose the Reception Conditions Directive. This resulted in the finding of an infringement: Case C-72/06, Commission v Greece [2007] ECR 1-00057 judgment of 19 April 2007. In March 2008 the European Commission commenced proceedings against Greece for failing to comply with its obligations under the Dublin Regulation by not adopting the laws, regulations and administrative measures necessary to ensure the examination of applications by asylum seekers transferred back to Greece under the terms of the Regulation. The Commission withdrew the case after Greece undertook to put in place the necessary legal provisions to enable examination of asylum applications from those taken back. Then on 3 November 2009 the European Commission initiated the first stage of infringement proceedings in relation to access to asylum procedures (lack of interpreters, legal assistance and information) and respect of fundamental human rights, including the principle of non-refoulement, when conducting border controls and treatment of asylum seeking unaccompanied minors: European Parliament, E-5426/2009, Parliamentary Questions, 10 December 2009. It seems that those proceedings are continuing.

V EVIDENCE

Sources of evidence and its treatment

74. The claimant adduces a significant volume of reports from the Council of Europe, UNHCR and NGOs about the conditions for asylum seekers in Greece. As well he relies on witness statements by Ms Danai Angeli. In early 2009 Ms Angeli was employed as a full-time lawyer with the Greek Ecumenical Refugee Programme (GERP). Apart from the Greek Council of Refugees, GERP is apparently the only other official organisation providing pro bono legal advice and assistance to refugees and migrants. Ms Angeli previously worked as a volunteer lawyer with the AIRE Centre for a year. She was also the human rights consultant of the Greek Group of Lawyers for the rights of Migrants and Refugees. In her statement of 19 December 2009 Ms Angeli explains that she is currently doing a PhD in Italy, but that she has continued to be employed by the GERP, travelling between Italy and Greece, and is still a consultant to the Greek Group of Lawyers. She acted as a translator for Human Rights Watch, visiting many detention centres with them in September 2009.

75. The Secretary of State's evidence is presented through witness statements by Janelle O'Grady, a senior executive officer in the United Kingdom Border Agency and a senior caseworker administering the Dublin Regulation. Ms O'Grady has based her statements, inter alia, on information provided by the Foreign and Commonwealth Office, the Greek Dublin unit (her equivalent office in the Greek public service), and other Greek authorities. In her statements Ms O'Grady says that while the Secretary of State has taken into account the concerns of the NGOs, she has attached greater weight to express assurances given in good faith by Greece, another Member State.

76. UNHCR has given evidence. It is not an NGO and it would be wrong to treat it as such. UNHCR is entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees. According to its Statute, UNHCR fulfils its mandate inter alia by, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto": Article 8(a). UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol, obliging states parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of these instruments. In the years following the adoption of UNHCR's Statute, the UN General Assembly and Economic and Social Committee extended UNHCR's competence ratione personae.

77. Importantly for present purposes UNHCR's supervisory responsibility has also been reflected in legal instruments adopted in accordance with what is now Article 78 of the Treaty on the Functioning of the European Union. For example, Article 21(1)((c) of the Procedures Directive states that Member States shall allow UNHCR to "present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure". Recital 15 of the Qualification Directive is to similar effect. In KRS v United Kingdom, the European Court of Human Rights recognised UNHCR's special role. As a practical matter the UNHCR Office in Greece carries out monitoring and visits and has the right of access to asylum seekers, detention facilities, and the administrative and judicial processes for determining protection claims.

78. Throughout the litigation the claimant has been critical that in assessing whether it remains safe to return asylum applicants to Greece the Secretary of State gives predominant weight to the statements of the Greek government over the reports from authoritative international figures and organisations such as the Commissioner for Human Rights of the Council of Europe, UNHCR, Amnesty International, and Human Rights Watch. As pointed out in the January 2010 witness statement of Ms Angeli, the assertions of the Greek authorities about, for example, safeguards against ill-treatment are demonstrably misleading, yet the Secretary of State adopts them uncritically. The claimant does not take issue with a general policy on the part of the Secretary of State to give significant weight to assurances made in good faith by Member States. However, this does not provide any proper basis for a policy of preferring the claims of the Greek government where they conflict with those of UNHCR and the most reputable international NGOs. That does not reflect the approach of the Strasbourg Court.

79. In my view this court's approach to evidence must be that adopted by the Strasbourg Court in Saadi v Italy [2009] 49 EHRR 730: it is not absolved from the obligation to examine whether Member State assurances provided, in their practical application, are a sufficient guarantee that an applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time: para 148. In my view as a Member State of the European Union assurances by Greece are entitled to a very great weight. But as the Strasbourg Court has said, reports from outside the Greek government will be regarded as reliable

depending on the seriousness of the investigations by means of which they were compiled, and whether on the points in question their conclusions are consistent with each other and corroborated in substance by numerous other sources: Saadi, at para [143]. Given the special standing of the UNHCR in this area, its reports must be given particularly careful attention.

80. As indicated earlier, an important rationale of Nasseri No 2, and now this litigation before me as a test case, is to explore whether the evidence is that Dublin returnees to Greece are in a worse position than they were at the time of Nasseri [2010] 1 AC 1 itself. (The Court of Appeal heard argument 17 March and delivered judgment 14 May 2008; the House of Lords heard argument 16 March 2009 and delivered judgment 6 May 2009). That suggests that the appropriate manner of laying out the evidence is to consider what the position of Dublin returnees to Greece was then and what it is now. Casting the evidence in that form enables a comparison of material differences over time.

Refoulement

(i) Nasseri/KRS evidence

81. In the Court of Appeal in Nasseri Laws LJ concluded that "in truth there are currently no deportations or removals to Afghanistan, Iraq, Somalia or Sudan" which he regarded as "critical": [2010] 1 AC 1 [41]. That was echoed in KRS, where the Strasbourg Court cited the United Kingdom Government's assurance, on the basis of advice from the Greek Dublin unit, that no asylum seeker was returned by the Greek authorities to such countries as Afghanistan, even if their asylum application was rejected by the Greek authorities. Rather they were given a letter telling them to leave Greece within a specified time but no action was taken to enforce their removal. The Strasbourg Court accepted the assurances that Greece did not expel persons to, inter alia, Afghanistan, and Iran (of which KRS was a national). It concluded that if Greece were to recommence removals to Iran, the Dublin Regulation itself would allow the United Kingdom government, if they considered it appropriate, to exercise their right to examine asylum applications under Article 3(2) of the Dublin Regulation (p.17).

82. In his printed case before the House of Lords in Nasseri, the appellant included reference, for example, to the 2008 US State Department report that there was only very limited protection against refoulement and to the UNHCR 2008 position paper on the risk of refoulement. In the printed case the appellant set out a detailed critique of the Court of Appeal conclusion: there was no information about why removals were not taking place to these countries currently, for example, whether it was due to concerns as to safety, physical difficulties in transporting asylum seekers to those countries, or budgetary decisions to target particular countries, and whether it was the same reason for each country or different reasons. Nor was there any indications as to when removals might begin again in relation to each country (para. 135-136). Rejected asylum seekers were ordered to leave Greece and their continued presence in Greece in defiance of that order was illegal. Even if simply left in limbo without any temporary legal or administrative protection, there would be an obvious risk that they would be driven by practical necessity to leave Greece (para. 137). That no removals were currently taking place was hardly a sufficient basis to find that Greece would comply with Article 3 such as to obviate the need to examine Greek procedures

(paras. 138-9). There was an absence on the Secretary of State's part of rigorous examination (para. 143).

83. The appellant's printed case continued that UNHCR evidence made it especially difficult for the Secretary of State to assert that nobody had been refouled from Greece (para. 145). New evidence from the Human Rights Watch report, "Stuck in the Revolving Door", demonstrated unofficial, summary, forcible expulsions to Turkey and Bulgaria (paras. 154-6). There was a plain risk of Article 3 ill-treatment within Turkey, so it was unnecessary to show an additional risk of onward refoulement from there, but that risk was also real (para. 157). The later Human Rights Watch report, "Left to Survive" (December 2008), underlined the point (para. 171). On this basis the appellant submitted that the evidence was clearly inconsistent with the assurances given by the Secretary of State as to the alleged absence of any unlawful removals from Greece, the evidence indicating that there have been thousands conducted in the most disturbing and blatant manner, forcing detainees onto small boats to eject them into Turkey when the Turkish security forces were not watching (para. 178).

84. In his speech in Nasseri [2010] 1 AC 1 (with which the law lords agreed), Lord Hoffmann acknowledge that if, as was usually the case, asylum applications in Greece were rejected, persons were given a document directing them to leave the country and their continued presence in Greece was uncomfortable.

> "But there is no evidence, either in the documents before the Court of Appeal or the new evidence tendered to the House, that any Dublin returnee is in practice removed to another country in breach of his Article 3 rights ... I agree with Laws LJ that the absence of any evidence that such removals occur is of critical importance":[44] (my emphasis).

(ii) Post Nasseri/KRS evidence

85. Removal to Afghanistan from Greece commenced by charter flight in July 2009. On 31 July 2009, the British Embassy confirmed that there had been two organised charter flight from Athens in July, one to Pakistan and one to Afghanistan and Pakistan. The flights took place after arrangement with the diplomatic authorities of these countries, although Afghanistan had no representative in Greece. The Embassy said that there were no proper standing arrangements. The Secretary of State says that there are no reports that the Afghan returns were forced. The Greek authorities have informed him that returns to Afghanistan are voluntary and returnees sign a statement to that effect.

86. On 29 January 2010 the British Embassy in Athens reported that it had not identified any information from government sources or other open sources on complaints concerning the circumstances of return of Afghan migrants. A website offering information about problems faced by migrants in Greece, run by migrants, mentioned nothing about complaints regarding the particular Afghan return. There was currently no returns agreement with Afghanistan, nor had there been any public government official statements on a possible intention to start enforced removals to Afghanistan. To the best of the Embassy's knowledge there was no information published in the

media or any other open source to the effect that there are deportations from Greece to Somalia, Sudan, Iran or Iraq, or any formal agreements with these countries.

87. The claimant is sceptical about the Secretary of State's assertion that these Afghanistan removals were voluntary removals. From the evidence about the practices of Greek security forces and police towards asylum seekers, not least the absence of interpretation, there must be real doubt as to whether these returnees were able to make a fully informed and unenforced choice. The Secretary of State had said that there was no reason for him not to accept the assurances of a friendly state such as Greece on this matter. He had failed, as always, to take account of the fact that assurances from the Greek authorities have proved repeatedly unreliable. The Secretary of State had shown no basis why the assurance of the Greek authorities should be accepted. In particular, it was unclear whether those who the Secretary of State claims were removed voluntarily had actually been ordered to leave Greek territory and their continued presence on Greek territory was illegal. The evidence was that those who disobey the order to leave face intolerable conditions, at best, destitution and hunger, shut off from society in a country whose language few can understand and, at worst, detention and inhuman and degrading treatment and illegal expulsion to Turkey. When the Greek authorities had directed that they may not remain in Greece and rendered their continued presence in Greece illegal with the consequences described in the evidence, their agreement to removal could hardly be assumed to be genuinely voluntary.

88. In relation to returns to Turkey the claimant features the Human Rights Watch October 2009 report on unaccompanied children asylum seekers in Greece, which reports on a large-scale crackdown between June and August 2009. During that crackdown the Greek authorities arrested hundreds of migrants across the country, evicting them from run-down dwellings in Athens, bulldozing a makeshift camp in Patras, and detaining new arrivals on the islands.

> "Unaccompanied children caught up in the crackdown were among the many subsequently transferred to detention centres in the north, close to the Turkish border. From there, in secret night time operations, the Greek police forced dozens of migrants - possibly hundreds, including unaccompanied children and potential refugees - across the border into Turkey."

89. In her witness statement of 20th January 2010 Ms Angeli refers to Turkish Kurds being expelled to Turkey after they tried to claim asylum. In response to the Secretary of State's argument in the Grounds of Defence, that the practice of informally expelling detainees into Turkey is not unlawful if they have no outstanding asylum claim, the claimant points out that this overlooks two points: firstly, the expulsions are unlawful in international law where there is a real risk of ill-treatment in Turkey and secondly, the defects in the asylum process mean that the fact that someone no longer has an outstanding asylum claim does not indicate that that claim has been properly considered and refused.

90. Of the Greek authorities' actions towards persons entering Greece from Turkey or those detained in detention centres along the Greek-Turkish border, the Secretary of State says that he does not consider that this creates any real risk of refoulement for

Dublin returnees being returned to Athens airport. He says that this conclusion is consistent with the acknowledgment of the UNHCR in their 2009 report (referred to shortly) that no Dublin returnees were amongst the persons deported from Greece to Turkey. There is also the assurance recently provided by the Greek authorities that Dublin returnees will not be transferred to detention centres in Northern Greece nor returned to Turkey under the Greek-Turkish Readmission Protocol.

91. In response to the Secretary of State's assertions the claimant contends the main issue is returns to Turkey which take place outside the framework of the Greek-Turkish Readmission Protocol. Moreover, the assurance that no Dublin returnee will be transferred to detention facilities in northern Greece is flimsy, to say the least. It appears that the Greek authorities were simply asked to confirm the Secretary of State's statement that "During any detention on return from the UK Dublin Returnees from the UK will not be transferred to detention facilities in northern Greece" and the Greek official has simply typed "no". Little weight can be placed on an assurance in the absence of any information as to the identity of the source of the assurance, other than his rank, and in view of the fact that it is drawn from what is described as a draft, informal note, which has not yet been approved at the relevant level of seniority. As Ms Angeli comments in her witness statement of 19 February 2010, while it is correct that Dublin returnees detained at Athens airport on return are not sent to other detention facilities, including those in the north, it is when they are detained afterwards, and there is nothing to distinguish asylum seekers who have been subject to Dublin transfer, that they may be detained in facilities in the north and face expulsion to Turkey.

92. As to the UNHCR evidence, it suggests that there is a real risk that asylum seekers, including from Afghanistan, who are transferred to Greece under the Dublin Regulation, will in turn be subject to refoulement through removal via Turkey. UNHCR notes that the return from Greece to Turkey of persons who may be in need of international protection can occur in several ways. While no Dublin transferees were included in the documented cases of deportation from Greece to Turkey, there were no safeguards in place and Dublin transferees were not exempt from practices which result in forced deportation. To the police implementing arrests and detaining persons, Dublin transferees cannot be distinguished, based on their documentation, from other asylum seekers. They are thus exposed to the same risk of removal. During the summer of 2009, UNHCR documented group arrests by the Greek police and group transfers from detention centres in various locations across the country to detention centres in northern Greece near the Turkey land border. UNHCR notes that persons removed from Greece to Turkey are at risk of onward removal from Turkey, including to countries where they may face persecution or other forms of serious harm. Cases documented by UNHCR included removal of asylum seekers from Turkey to Afghanistan and Iraq.

(iii) Conclusion on refoulement

93. There is the evidence that some Afghan asylum seekers have been returned from Greece to Afghanistan. The Greek authorities confirmed in February 2010 that these removals were voluntary. The British Embassy in Athens has uncovered nothing from migrant sources to suggest otherwise. The claimant questions the voluntary character of the returns but he is not able to point to any direct evidence to the

contrary. In my view all that the new evidence confirms is that a number of Afghans have chosen to return to Afghanistan.

94. There were the incidents of the arrest and transfer of asylum seekers in the summer of 2009 to northern Greece, giving rise to the risk of refoulement to Turkey. UNHCR did not identify any Dublin returnees among those deported to Turkey although even the Secretary of State does not suggest that in future it is impossible that it might happen. There are also continued complaints of refoulement of those seeking to enter Greece from Turkey and there must be a concern about the treatment of such people. However, none of these would be Dublin returnees. There are also the assurances given by the Greek authorities that no Dublin returnees will be sent to the border area with Turkey or sent to Turkey. Overall, none of the evidence mentioned is materially different to what Lord Hoffmann and the other law lords had before them in Nasseri and what was before the Strasbourg Court in KRS.

Procedures for Asylum Claims

(i) Nasseri/KRS evidence

95. In the Court of Appeal in Nasseri Laws LJ canvassed the evidence about Greek asylum procedures, including the Amnesty International criticism that asylum seekers were often interviewed about their claim in the absence of an interpreter and lawyer and could expect to have their claim rejected at first instance [2010] 1 AC 1, para. [36]. There was also the UNHCR 2008 position paper, and its criticism that the situation called into question whether Dublin returnees would have access to an effective remedy and be able to have their claims heard and adjudicated: para [39]. Laws LJ said that he certainly accepted that such evidence as there is, and in particular the UNHCR 2008 position paper, showed that the relevant legal procedures "are to say the least shaky, although there has been some improvement": para [41].

96. In the printed case before the House of Lords for Mr Nasseri, there was reference to reports about the range of serious concerns about the safety of Greek procedures, including procedures applied to someone returned to Greece under the Dublin Regulation, the difficulties in lodging a first claim for asylum, the absence of interpreters and lawyers, the lack of reasons for refusal, the absence of an effective remedy, and the secrecy of the authorities' practices (para 110). The Amnesty and UNHCR evidence was canvassed (paras 112-3, 117-124). The Human Rights Watch report of November 2008, "Stuck in a Revolving Door", was also referred to in relation to asylum procedures – that an asylum seeker in Greece had almost no chance of being granted asylum because of the lack of legal representation, the inappropriate use of accelerated procedures, poor interpreters, the institutional culture of the police (in whose hands the asylum procedure lay, and who took a presumptively negative view of asylum seekers) and the tricks used to knock applicants out of the system (paras. 158-60, 164, 166, 169).

97. In his speech Lord Hoffmann referred to what Laws LJ had said about "shaky" Greek procedures to the changes brought about by the transposition in Greece of the European Union Directives in mid 2008, and to the KRS presumption that Greece would abide by its obligations under them: [33]-[34], [37]. Lord Hoffmann acknowledged that the position in Greece appeared to be, as Laws LJ suggested, that

the practice for dealing with asylum applications may leave something to be desired and that very few applicants were accorded refugee status: [43].

98. In KRS v United Kingdom the Strasbourg Court referred to the UNCHR 2008 position paper and a press release from Amnesty International. In brief, the UNHCR 2008 position paper advised Member States to refrain from returning asylum seekers to Greece under the Dublin Regulation, inter alia, because of the chronic lack of interpreters for asylum seekers; the extreme difficulties facing them in accessing the asylum system and appealing adverse decisions; the very low recognition rate (over a 6 month period all applications for asylum from Afghan and Iraqi applicants were refused); the defects and huge delays in the asylum process which led to asylum seekers being kept in limbo; and a process which was unfair and lacked basic safeguards.

99. The Strasbourg Court in KRS v United Kingdom attached what it called "appropriate weight" to the fact that UNHCR believed that the prevailing situation in Greece called into question whether Dublin returnees would have access to an effective remedy as foreseen by Article 13 of the Convention. The Court observed that the UNHCR's assessment was shared by Amnesty International, the Norwegian Organisation for Asylum Seekers and other non-governmental organisations in their reports. The Norwegian Report was especially scathing, highlighting that the Greek authorities had dedicated very limited resources to handle asylum applications; from more than 20,000 asylum cases given first instance examination in 2007 only 8 persons were given residence permit, 0.04 per cent of the applicants and only 155 on appeal, that is 2.4 per cent; and very few asylum seekers are given legal assistance in Greece, even if they are entitled to this.

100. Despite these concerns, the Court considered that they could not be relied upon to prevent the United Kingdom from removing the applicant to Greece. The presumption had to be that Greece would abide by its obligations under the Procedures Directive. There was also the new Greek legislative framework. Moreover, there was nothing in the materials before the court which would suggest that returnees to Greece under the Dublin Regulation, including those whose asylum applications had been the subject of a final negative decision by the Greek authorities, had been, or might be, prevented from applying for an interim measure from the Court on account of the timing of their onward removal or for any other reason. Greece as a Contracting State was required to make the right of any returnee to lodge an application with the Court under Article 34 of the Convention, and request interim measures under Rule 39 of the Rules of Court, both practical and effective. "In the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant" (p.18).

101. On 11 February 2010, the British Embassy in Athens received a formal note from the Ministry for the Protection of the Citizen, Hellenic Police Headquarters, Security and Public Order Branch of the Hellenic Republic entitled "Questions On Matters Concerning The Dublin II Regulation". It says that all those so returning who have no prior history of having made an application for asylum have, on the basis of the Dublin Regulation, the right to make the relevant application to the police authorities of the Security Department at Athens airport. In those cases where a decision to turn down the application has already been served on a first level at the last known address of the applicant, or if the applicant is of no known address, once the substance of the

application has been considered, Greek legislation provides that the content of the decision, as well as the possibility of submitting a subsequent application for asylum, is notified to an applicant in a language which they can understand. If the decision has not yet been served on the asylum seeker it is so served and they are told that they may lodge an appeal to the Aliens Directorate at Petrou Ralli by filling in the relevant form. An interpreter is provided. Communication takes place in the asylum seeker's native tongue or in a language which they may reasonably be assumed to understand. The interpreters are provided by the Aliens Directorate or by co-operating NGOs.

102. The formal note continues that any supplementary information provided by the applicant while the decision in the first instance is pending is taken into account when assessing the application. Persons returning who have no prior history of having made an application for asylum are confined in an area of the Security Department of Athens airport so that their identity and finger prints can be checked on the national database for any outstanding criminal matters. This procedure, in the vast majority of cases, does not last more than three days. As long as an asylum application is pending applicants by law are provided with a "pink card" which is valid for six months.

103. With regard to the new procedure for dealing with asylum applications the formal note explains that the Minister for the Protection of the Citizen has set up a commission. The commission has arrived at a comprehensive proposal for the handling of asylum applications and the problems and number of cases which have accumulated in recent years. The Commission's proposal concerns three principal categories: (a) the creation of an independent Asylum Service; (b) the management of the backlog of First and Second Level asylum applications that are still pending until the new legislative framework comes into force; and (c) the referring of appeals against first level decisions to an independent Refugee Commission.

104. An earlier formal note of 18 November 2009, under the name of the Secretary General for Public Order of the Citizens' Protection Ministry, read that:

> "The Ministry of Citizen's Protection assures that all asylum seekers who are sent back to Greece through the Dublin Procedure will have unimpeded access to an efficient and fair process."

That note had also explained the proposals for reform of the Greek asylum system and the interim arrangements whilst they were being introduced. As to detention conditions that note also asserted that detention conditions at the Petrou Ralli special migrants centre had been significantly improved. The authorities were doing their best to improve current conditions.

(ii) Post Nasseri/KRS evidence

105. The claimant's case is that if in Nasseri the procedures were "shaky" to say the least, the evidence now available shows that they are wholly unreliable and unsafe in that claimants may be improperly denied access even to these procedures. Contrary to assurances, it is unlikely that asylum claimants subjected to detention and destitution by the Greek authorities will enjoy a practical and effective opportunity to seek remedies in Greece either from national courts or from the Strasbourg Court. The UNHCR position report of April 2008 is invoked, along with the Human Rights

Watch reports and that of Amnesty International in May 2009. In his report of 4 February 2009, the Commissioner for Human Rights of the Council of Europe commended the latest legislation aimed at providing a comprehensive protection regime for asylum seekers but "notes the persistence of grave, systemic deficiencies in the Greek asylum practice that put at risk the fundamental right to seek and to enjoy asylum". In Ms Angeli's statement she refers to asylum seekers often being unable to have the police accept an appeal without a letter in Greek giving notice of appeal. She also refers in her December 2009 statement to statistics for first instance decisions for Athens under the new system from September - October 2009. Out of 342 decisions made, 249 were rejected, 92 were adjourned, and one was granted subsidiary protection. There were no grants of asylum.

106. There is trenchant criticism of the Secretary of State's evidence. Far from there being an asylum appeal to the Supreme Administrative Tribunal which is open to all asylum seekers, as asserted in one witness statement, the position is that asylum appeals have been abolished and the only remedy available to asylum seekers against an initial decision is a judicial review challenge, on limited grounds, to the Council of State. Most asylum seekers will not in practice be able to pursue that without legal representation, and it cannot make a decision on the claimant's entitlement to asylum. Both UNHCR and the Commissioner for Human Rights of the Council of Europe have stated that that is not an effective remedy.

107. The claimant also criticises both an unreliability in the information which the Secretary of State has obtained from the Greek authorities and his partial presentation of that evidence. There is evidence that the Greek government wishes to reform the system but it is at the very least optimistic to suggest that these changes will be brought about imminently. Ms Angeli suggests that it is likely to be three years before the new system is fully implemented. There is apparently no budget for the required changes. It is plain from the evidence that the requirements for a fair, effective, individualised and appropriate examination of asylum claims imposed by the relevant European Union directives are not complied with in the Greek asylum system.

108. Thus, in the claimant's submission, the evidence shows, at the least, a real risk that applicants will be denied a pink/red card without proper consideration of their protection claim. Applicants will then be ordered to leave Greece and left destitute and illegal, subject to detention in grave and practically incommunicado conditions and denied any effective remedy. As Ms Angeli asserts in her witness statement of 20 January 2010, the absence of legal advice and legal aid, the unfamiliarity of Greek courts and lawyers with direct reliance on the Convention, and the practical obstacles to making a Strasbourg application all underscore what are said to be the unreliability of Greek assurances.

109. In its 2009 Observations, UNHCR began by noting with appreciation the commitment of the Greek government to address shortcomings in asylum procedures and was encouraged by the process which has been initiated. However UNHCR observed what it described as consistent problems facing people transferred to Greece under the Dublin Regulation, including both those who have applied for asylum in Greece in the past and those who have not. The UNHCR 2009 Observations highlighted negative decisions issued in absentia, so that the applicant upon return was likely to have missed all deadlines for appealing. In such cases the transferee was served with a deportation order at the airport, without any access to the asylum procedure.

According to the process in place since 2008, Dublin transferees are detained for up to 24 hours at Athens airport without a detention order. But no particular barriers were observed to the filing of asylum applications at Athens airport. The obligation to register or re-register a claim within a short period, given the practical obstacles to such registration, is said to prevent transferees from pursuing their claims.

110. Since the issue of the 2009 Observations, UNHCR has identified that Dublin returnees to Greece have had their claims systematically rejected on credibility grounds. By law, the Greek authorities are required to provide copies of asylum decisions to UNHCR. Reasons for rejection cited in recent negative decisions on Dublin cases, examined by UNHCR, have included "[the fact of] having been in country X in breach of his/her obligations as an asylum seeker and having claimed asylum there shows that the claim is abusive'. A further example stated 'the fact that the claimant did not apply for asylum when he first entered Greece, but only when returned from country Y, shows not only the abusiveness of the claim but also the claimant's wish to reside in the EU using asylum claims in order to achieve this aim." The fact that the claimants departed irregularly from the country after making their initial claims is assumed in Greek decisions on asylum claims to demonstrate that their claims are not genuine.

111. In UNHCR's assessment Presidential Decree 81/2009, which entered into force in July 2009, has had a negative impact on the efficiency in first instance asylum procedures and will aggravate the already large backlogs. Furthermore, it removes important safeguards, including access to an independent administrative review at the second instance. Research into the first instance asylum process carried out by UNHCR revealed shortcomings in the procedure. As regards the second instance procedure, UNHCR is of the view that there is no independent review available of the first instance decision and therefore the right to an effective remedy is jeopardized. Access to judicial review on points of law before the Council of State is limited by a number of practical and legal obstacles including complicated procedural rules, lack of intermediate protection against deportation and lack of free legal aid and interpretation. These shortcomings are, it concludes, in breach of the minimum guarantees provided by the European Union Procedures Directive.

(iii) Conclusion on procedures

112. Subsequent to the proceedings in Nasseri and KRS the implementation of Presidential decree 81/2009 removed the right to appeal against a first instance decision leaving only a limited right of judicial review before the Council of the State. However, the new Greek government decided to amend the system introduced by Presidential decree 81/2009, with the assistance of NGOs, with a view to improving the asylum structures and procedures. As indicated the UNHCR has endorsed these proposal reforms, describing them as a welcome development. UNHCR has also commented that the specific procedure now at Athens airport for new asylum claims to be lodged did not create particular barriers. That is relevant for Dublin transferees.

113. There can be no doubt that in practice the procedures continue to be shaky, as Laws LJ characterised them in Nasseri. Dublin transferees are at risk of not obtaining meaningful access to the asylum procedure. The upshot may be that they will be served with deportation orders without being able properly to pursue their claim. Looking at matters in the round, however, it is not evident to me that there is any

material difference from the position considered in KRS and Nasseri. The position was quite unsatisfactory then and that continues to be the case, despite the aspirations for reform.

Conditions in Greece

(i) Nasseri/KRS evidence

114. In KRS the Strasbourg Court quoted from the recommendations which the Committee for the Prevention of Torture of the Council of Europe had published following its visit to Greece in February 2007. The Committee had noted the inadequate physical conditions of asylum seekers in detention but also that there was no regime offering purposeful activities, that staffing arrangements in the detention facilities were totally inadequate and that proper health care services were not provided. The Court also referred to the UNHCR 2008 position paper's criticism of reception procedures for Dublin returnees at Athens airport and the Central Police Asylum Department, responsible for registering asylum appeals. In a passage quoted by the Court UNHCR urged Greece to issue promptly the awaited ministerial decision to establish the criteria for the provision of a daily financial allowance. Furthermore, UNHCR called upon Greece to ensure that the situation of children was given primary consideration and that the current reception conditions for unaccompanied minors be urgently reviewed.

115. The Norwegian NGO report, which the court quoted, contained critical sections on reception conditions and police treatment of asylum seekers. There were only approximately 750 available places at reception centres, so asylum seekers were left to fend for themselves, as best they could. The Strasbourg Court quoted these passages from the report:

> ""It is impossible to respect the asylum seekers' legal protection and fundamental social rights with resources as limited as those made available by Greek authorities.
>
> In our opinion the deficiencies in the Greek asylum process, documented through this report, entail that there is a discord between the preconditions on which the Dublin II Regulation was founded and procedural practices followed in Greece. In our opinion the Greek system does not guarantee even minimum basic legal protection for the asylum seekers".

116. The lengthy quotation from the Amnesty International press release of 27 February 2008, referred to by Laws LJ in Nasseri [2010] 1 AC 1, was set out at length in the Strasbourg decision. It reported that asylum seekers have been held in conditions amounting to arbitrary detention, pending the examination of their claim. The quotation from the press release also included Amnesty International's concern for the well-being of an estimated 2,500 people, including unaccompanied children as young as nine years old, evicted from their makeshift homes in the port area of Patras, most believed to be asylum seekers from Afghanistan.

117. In its judgment the Strasbourg Court noted that under the Reception Conditions directive, Greece had to provide minimum standards for the reception of asylum

seekers. The presumption had to be that Greece would comply with its obligations (p 17). In the court's view the objective information on conditions of detention in Greece was of some concern, not least given Greece's obligations under the Reception Conditions Directive and Article 3 of the Convention, but if any claim under the Convention were to arise from those conditions it should also be pursued first with the Greek domestic authorities and thereafter in an application to the court (p 18).

118. In the course of his judgment in Nasseri Laws LJ included a quotation from an Amnesty International press release of 27 February 2008.

> "Amnesty International has repeatedly called on the Greek authorities to take concrete measures to improve the conditions for asylum seekers including by resolving the legal limbo in which they are left — without documents and without access to any social services in practice … Greece does not return people to Afghanistan and yet does not process their asylum application in a prompt, fair way, leaving them in limbo without legal status and therefore without rights": (para 36).

Laws LJ said:

> "There are clearly concerns about the conditions in which asylum seekers may be detained in Greece. It is not however shown that they give rise to systemic violations of Article 3."

119. In Mr Nasseri's printed case for the House of Lords there were references to the conditions faced by asylum seekers in Greece. Those ordered to leave Greece, but not physically expelled, were subject to harassment and repeated detention (para 149). As well as the evidence in the Human Rights Watch "Stuck in the Revolving Door" report, there were also extracts from the report of the Commissioner for Human Rights of the Council of Europe of February 2009 (on detention conditions) and from Ms Angeli's statement (on the destitution of those denied a red/pinkcard): paras 173, 197.

120. In his speech in Nasseri [2010] 1 AC 1 Lord Hoffmann outlined the pressures to which Greece was subject because of the number of migrants entering its territory ("a considerable strain upon its administrative and humanitarian resources": para 28); referred to the evidence before the Court of Appeal, in particular about detention ("it was not suggested that they amounted to ill-treatment of such severity as in themselves to involve a breach of Article 3 by a returning state":para 34); and derived from KRS the proposition that if the complaint was not about refoulement, but about the conditions under which a returned asylum seeker would be held in Greece, that should be taken up with the Greek authorities and, if unsuccessful, before the Strasbourg Court by way of complaint against Greece: para 39. Lord Hoffmann held that other Member States were entitled to assume – not conclusively presume, but to start with the assumption – that other Member States will adhere to their treaty obligations, which includes their obligations under the European Convention to apply Article 3: para 41. The conditions under which asylum seekers were kept in Greece was a Greek problem: para 44.

(iii) Post Nasseri/KRS evidence

121. In her witness statement of 19 February 2010 Ms Angeli exhibited two press articles from September 2009 indicating that the Athens airport detention centre was severely overcrowded with as many as 240 detainees in accommodation designed to hold 26, resulting in a lack of adequate space for detainees to sleep, rest or exercise, and an increased risk of infection with scabies, tuberculosis and hepatitis. These press reports echoed the earlier Human Rights Watch report, that those returned under the Dublin Regulation consistently comment on the treatment received. Human Rights Watch concluded that it did not regard inhuman and degrading treatment as systemic in Greece but it was also not uncommon. On release from the airport, Ms Angeli's evidence is that Dublin returnees are no longer provided with a red card but, rather, with a "service note", which advises them to go to the Alien's Directorate at Petrou Ralli to register their claim. They are given no information about how to find the Aliens Directorate and the note is written in Greek.

122. The note obtained at Athens airport indicates that a person has expressed the wish to claim asylum but it does not give any access to work, benefits or health care. A returnee can only obtain the red/pink card giving him the status of registered asylum seeker from the Aliens Directorate. Without a red/pink card, returnees are therefore prohibited from working and the evidence is that they are overwhelmingly likely to be destitute and homeless, without access to medical care or any other form of support. Without a red/pink card, Ms Angeli observes that returnees are also vulnerable to detention, which can lead to transfer to the north and informal expulsion.

123. In order to obtain a red/pink card, Dublin returnees must thus join the thousands of others attempting to register a claim at the Petrou Ralli centre each week. Consistent with UNHCR evidence, Ms Angeli explains that if a Dublin returnee finds the Aliens Directorate, he then faces the same problems as other asylum seekers trying to obtain access. There are often hundreds of asylum seekers and migrants outside. The guards prevent access to the building. Police come out at 6.30am and 8.00am and will ask some of those outside what they want and may deal with those queries. However, it is chaotic and many return time and again to stand outside, unable to get the attention of officials to deal with their case. Some are eventually dealt with after two-four weeks waiting, but others never get to the head of the queue.

124. In evidence on his behalf the Secretary of State now accepts that returnees are given a service note, along with an explanation that they must go to Athens Asylum Department at Petrou Ralli so that their claim can be processed. The Greek authorities' formal response of 11 February 2010 explains that at Petrou Ralli they will be given a red/pink card, valid for 6 months. The British Embassy in Athens reported on 16 November 2009:

> "Dublin returnees are held at the Athens airport, usually for a period of 3 days and are then left to their own devices. If they find their way to the Asylum Division at Petrou Ralli Street, Athens, they are usually not allowed access because of the large number of people waiting outside the premises."

125. Even if they are able to obtain a red/pink card, the claimant's evidence is that Dublin returnees are nonetheless likely to face the same problems of destitution and

homelessness as other asylum seekers. Ms Angeli states that the right to seek employment is in practice illusory without a tax number. A tax number will not be granted without an address. Thus homeless asylum seekers will not obtain one and an employer will not in practice grant legal employment. Moreover, asylum seekers can only be employed if there is no Greek or EU citizen to do the work. This is consistent with the conditions for employment set out in Article 4(1) of Presidential Decree 189/1998.

126. Ms Angeli's evidence continues that the Greek authorities provide support for only a small fraction of registered asylum seekers. When support is provided, it is accommodation and essential living needs. Those who are not accommodated are denied any support in cash or in kind. Fewer than 1000 accommodation places are available, including those not funded by government agencies. Most asylum seekers are given no allowance, even for the basic essentials of life. UNHCR confirms this in its paper published on 11th January 2010 as does the Austrian Red Cross/Caritas Report of 2 December 2009. The evidence is that claimants cannot rely upon the Greek authorities to provide them with shelter and subsistence in accordance with the Reception Conditions Directive.

127. As for those without a red/pink card Ms Angeli concludes that there is a risk of being arrested and, depending on the attitude of the police, informal expulsions. When not detained, the Human Rights Watch evidence was that undocumented asylum seekers often live in dire poverty with inadequate food, health care, and shelter. Ms Angeli comments that until the Dublin Regulation returnee can complete the registration process and obtain a red card there is a heightened risk of arrest each day because, while most police recognise the red card, many will not recognise anything else. Research carried out by the Greek Union for Human Rights in November 2009 revealed asylum seekers being held in detention centres, even when their claims were still pending.

128. In its 2009 position paper UNHCR stated that accommodation capacity in Greece for asylum seekers is grossly insufficient and that as a result many have no shelter or other state support. Single adult male asylum seekers have virtually no chance of benefiting from a place in a reception centre. The centres are generally understaffed and under-resourced, lack appropriate support services and often offer inadequate material conditions. Registered asylum seekers do not receive any financial allowance to cover daily living expenses, notwithstanding Greek law and as a result many live in conditions of acute destitution. Dublin transferees face the same problems.

129. The UNHCR 2009 observations paper said that while detention of asylum seekers who arrive in an irregular manner is not mandatory under Greek legislation, in practice they are systematically detained. At several entry points, the period of detention is prolonged if an individual applies for asylum. UNHCR also notes that conditions in administrative detention facilities are generally inadequate with the exception of two centres. Even there concerns arise due to severe overcrowding, lack of well-trained staff, the absence of formalized regulations and financial constraints. In other locations asylum seekers are detained in unsuitable facilities, such as warehouses and police stations.

130. On 31 July 2009 the British Embassy in Athens conveyed information from the Greek Ombudsman that "conditions in Soufli and Petrou Ralli facilities remain pretty much unchanged. As regards conditions of detainment in themselves ... those chiefly depend on the variable of the occasional congestion rate ... If numbers increase - as is usually the case - to 200-300 then conditions are deplorable ... The current period is one of such rising numbers". However, the Secretary of State has received an informal assurance that no claimant returned under the Dublin Regulations would be held in the type of detention facilities referred to in SD v Greece.

(iii) Conclusion on conditions

131. Dublin returnees are generally released within a maximum of 24 hours of arrival at Athens airport. There is a chance of later detention, along with other asylum seekers, but all I can say is that the risk is speculative. In practice it seems that Dublin returnees are not given their red/pink cards at the airport but are required to attend Petrou Ralli. The British Embassy in Athens confirmed the chaos at Petrou Ralli in July last year. Even if applicants obtain a red/pink card the chances of being granted asylum are very low. There are restrictions on employment opportunities for those with a red/pink card. The conditions facing those who remain in Greece without a red/pink card after having been served with a decision requiring them to leave are harsh. Only very limited accommodation or support is available for asylum seekers. Many asylum seekers continue to live on the street. Coupled with poor living conditions there was the attempt by the Greek police in the summer of 2009 to remove asylum seekers from various derelict buildings in Athens. However appalling the conditions are, however, they are not materially worse than what was in evidence before the courts in KRS and Nasseri.

VI ISSUE 1: ARTICLE 3 ECHR, CERTIFICATION AND THE DEEMING PROVISION

132. The claimant contends that should he be removed to Greece the destitution and detention he would likely suffer there would give rise to a real risk of treatment incompatible with Article 3. The Greek authorities prohibit those with a red/pink card from working other than in jobs for which no Greek or European Union citizen can be found. The evidence also shows, in his submission, that at the least there is a real risk of asylum seekers, including those who have been transferred to Greece under the Dublin Regulation, being denied effective access to the asylum procedure, falling out of the procedure for administrative reasons, especially if homeless, and being wrongly refused asylum on the basis of an unfair and unsafe procedure. The consequences engage Article 3 since the asylum seeker will then be treated as an illegal immigrant and ordered to leave Greece, thus being prohibited from working and liable to repeated arrest. In other words defective determination processes for asylum seekers in Greece may leave him there illegally, facing even worse conditions, including detention. The Secretary of State's certification of his human rights claim as clearly unfounded under paragraph 5(4) of Part 2 of Schedule 3 of the 2004 Act is, on these bases, plainly wrong and unlawful.

133. Moreover, the claimant submits that there is a risk that, if returned to Greece, there is the possibility of his removal to another state. This risk of indirect refoulement means, in his submission, that the inclusion of Greece in the list of safe countries where this will not occur by the application of paragraph 3(2)(b) of Part 2 of Schedule

3 (the deeming provision) of the 2004 Act is incompatible with Article 3. He therefore seeks a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998, that paragraph 3(2)(j) of Part 2 of Schedule 3, by which this deeming provision is applied to Greece, is incompatible with Article 3.

Should the certificate be quashed?

134. ZT Kosovo v Secretary of State for the Home Department [2009] UKHL6; [2009] 1 WLR 348 determines that, on a challenge to the certificate, this court must ask how the Article 3 claim advanced by the claimant would fare before the tribunal. The Court must apply a judicial review approach, using anxious scrutiny. In my view, when the elements of the claim are subjected to anxious scrutiny, there can be only one answer to the question whether the claimant has shown that there are substantial grounds for believing that return to Greece would expose him to a real risk of being subjected to Article 3 mistreatment. That answer is in the negative. The tribunal would uphold the certificate that the Article 3 claims are clearly unfounded.

135. As to the risks of detention in Greece, the evidence is too speculative to amount to substantial grounds for believing that there is real risk of detention in conditions breaching Article 3. Dublin returnees are only detained at the Athens Airport Security Department for a maximum of three days, if they have no previous asylum history. Moreover, the Greek government has given the United Kingdom government an assurance that Dublin returnees will not be sent to detention centres in northern Greece.

136. The recent Greek detention cases SD v Greece and Tabesh v Greece are of no assistance since they turned very much on their own facts. Neither applicant in these cases was a Dublin returnee. In SD v Greece that was the detention of a former Turkish political prisoner for some two months in dismal conditions near the border and then another 6 days at Petrou Ralli. In Tabesh the applicant did not claim asylum until after his detention ended. That detention was for possession of a false document to which he was not entitled, followed by detention with a view to removal to Afghanistan, which proved impossible absent travel documents.

137. As far as conditions in Greece for Dublin returnees, and other asylum seekers, are concerned, there is no doubt that on the evidence they leave a great deal to be desired. The Greek formal note of 16 February 2010 asserts that Dublin returnees can pursue their asylum claim when back in Greece. That, however, does not address the difficulties associated with the application procedures at Petrou Ralli. Greek law provides for an applicant to be issued with a pink/ red card while the asylum process is pending, valid for six months, and entitling the application to employment and to medical assistance. Even if this law worked in practice, there is a limitation of employment opportunities to positions not open to Greek or European Union citizens. The repercussion for asylum claims is obvious: the destitute Dublin returnee is not in the best position, to say the least, to pursue a claim. However House of Lords cases such as Limbuela [2006] 1 AC 396 and N [2005] 2 AC 296, as explained in Part III of the judgment, mean that the failure by the Greek Government to provide the means of subsistence does not amount to a breach of Article 3 by the Secretary of State in this type of expulsion case case.

138. Moreover, the Secretary of State's decision to certify is consistent with compelling authority. Nasseri [2010] 1 AC 1 did not feature the challenge to the clearly unfounded certificate which the present claimant advances, that his human rights will be breached in Greece. The challenge there was that Mr Nasseri's human rights would be breached by onward refoulement. However, it will be recalled that Lord Hoffmann in Nasseri clearly considered the issue of conditions in Greece for Dublin returnees, both the lack of adequate arrangements to consider claims (paras [42]-[43]) and the "uncomfortable conditions for asylum seekers in Greece (para [43]). He said:

> "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": [44].

In KRS v United Kingdom the Strasbourg Court adopted the same approach: there was a presumption that Greece would abide by its obligations, including those guaranteed by Article 3, and in the first instance matters should be taken up with the Greek domestic authorities (p.18).

The "deeming provision"

139. As to whether the deeming provision is incompatible with the claimant's rights under Article 3, the incompatibility issue has recently, and authoritatively, been decided by the House of Lords, in Nasseri. The deeming provision precludes an argument that Article 3 will be breached which is based solely on the risk of onward refoulement from Greece. At the time of the decision in Nasseri, Greece was not removing anyone to Afghanistan. The House of Lords held that if that was so, there was in practice no risk of a breach of Article 3 based on onward removal and that, therefore, the deeming provision was not incompatible with Mr Nasseri's Convention rights. In reaching that conclusion, the House of Lords relied on the approach of the European Court of Human Rights in KRS. The position now is that some Afghans have returned to Afghanistan, but they have gone voluntarily. In the absence of any evidence of compulsory removals to Afghanistan, the position is not materially different from that which was considered by the House of Lords in Nasseri. It follows that the deeming provision is not, on the current evidence, incompatible with the claimant's rights under Article 3.

VII ISSUE 2: THE SOVEREIGNTY CLAUSE: ARTICLE 3(2), DUBLIN REGULATION

140. The so-called sovereignty clause, Article 3(2), of the Dublin Regulation, was quoted earlier. Under it Member States, on their own initiative, can decide to examine an asylum application lodged with them by a third-country national, even if that is not their responsibility under the criteria laid down in the Regulation. The Strasbourg Court recognised in KRS v United Kingdom that Article 3(2) provides a mechanism by which a Member State may itself suspend transfers where it is concerned that the receiving state will not comply with its obligations. The Court stated that

> "if Greece were to recommence removals to Iran, the Dublin Regulation itself would allow the United Kingdom Government, if they considered it appropriate, to exercise their right to

examine asylum applications under Article 3(2) of the Regulation" (p.17).

141. It is submitted in this case, on behalf of the claimant, that the Secretary of State should exercise his discretion not to return him to Greece because Greece will not abide by the obligations which European Union law imposes on it for his benefit. In other words the Secretary of State shall exercise his discretion so as to make good the deficiencies in Greece's compliance with European Union law. The Secretary of State concedes that the power under Article 3(2) must be exercised compatibly with the objectives of the Dublin Regulation and permits him, on a discretionary basis, to assume responsibility for determining a claim for asylum. These include circumstances, for example, where exceptional compassionate circumstances militate against removal from the United Kingdom. However, the Secretary of state contends that the Dublin Regulation does not impose any obligation on him not to return an asylum seeker to Greece on the basis of a risk that it may not observe the provisions of European Union law which apply to the treatment of asylum seekers generally.

Secretary of State's policy in relation to Article 3(2)

142. A useful starting point is to consider the Secretary of State's current approach as to the exercise of his discretion under Article 3(2) of the Dublin Regulation. At the hearing I inquired as to that policy. Subsequently I was informed that the Secretary of State exercises his discretion to withdraw third country action, under Article 3(2) of the Dublin Regulation, on a case by case basis. There is no policy or formal guidance. Through his officials the Secretary of State considers each case on its individual merits where an applicant is returnable under the Dublin Regulation. Although there is no formal guidance, however, officials at executive officer level or above may recommend the exercise of the Secretary of State's discretion where it is considered unreasonable to remove an applicant. But there is no formal policy that certain individuals, for example those over a certain age or with certain illnesses, fall into a category resulting in Article 3(2) being exercised. However, the Secretary of State may take the view that an individual's circumstances are sufficiently exceptional so as to warrant exercising his discretion under Article 3(2). All recommendations to exercise the Secretary of State's discretion under Article 3(2) must be signed off by an official at senior executive officer level or above. Once approved the third country certificate, if one has been produced, is withdrawn and the individual's asylum claim is considered substantively in the United Kingdom.

143. The Secretary of State's approach contrasts with that of some other Member States. The majority of Member States have restricted Dublin Regulation returns to Grece to certain categories of returnees. Thus Germany does not remove unaccompanied minors, asylum seekers with serious medical conditions, elderly persons or those considered vulnerable. The result seems to be that in 2008, of 800 formal requests made to Greece, 130 were considered on a substantive basis in Germany. In the period 1 January - 13 October 2009, of 1567 formal requests made, 497 had been accepted for substantive consideration in Germany. Other countries such as Austria, Belgium, Denmark, Hungary and Switzerland have adopted comparable approaches under which certain categories of asylum seekers are not returned to Greece. There is no suggestion in the evidence that Member States are adopting the same policy of non-return of Dublin Regulation asylum seekers to Member States other than Greece.

Jurisprudence on Article 3(2)

144. There are at least two decisions from the courts of Member States other than the United Kingdom which address the circumstances in which a Member State is obliged to utilise the power under Article 3(2) of the Dublin Regulation to take responsibility for an asylum claim for which it is not responsible under the Chapter III criteria. The two decisions are in apparent conflict.

145. Mirza v Refugee Applications Commissioner, Irish High Court, 21 October 2009 was a judicial review of three returns to Greece under the Dublin Regulation. Representing the applicants the Irish Refugee Legal Service requested the Commissioner to exercise his discretion under Article 3(2) and accept responsibility for determining their asylum applications. The Refugee Legal Service criticised asylum procedures in Greece on the basis of, inter alia, the decision of some Member States to suspend returns to Greece; the UNCHR 2007 study and UNHCR 2008 position paper; and orders of the European Court of Human Rights prohibiting transfers to Greece as an interim measure under Rule 39 of that court's rules. However, the applicants did not challenge the conclusion of the Commissioner that, on the evidence, there was no risk to their being exposed to treatment contrary to Article 3: [47]: see also [83]. Clark J observed that Greece had given a standard assurance that the asylum claims of two of the applicants would be considered. The third applicant appeared to accept that her asylum claim had already been determined in Greece.

146. As to the argument that Ireland had an obligation to derogate under Article 3(2) of the Dublin Regulation, by reason of the absence of an effective asylum system in Greece, in breach of the recitals to the Dublin Regulation and Article 18 of the Charter of Fundamental Rights, Clark J concluded firstly, that the Commissioner had not acted unfairly or irrationally in considering all the information on the situation in Greece and the representations on behalf of the applicants: [72]. As a matter of law the terms of the Dublin Regulation did not mandate derogation in any situation. The only identified situation where an obligation to derogate arose was where the proposed transfer would give rise to a breach of a Member State's obligations under Article 3 of the Convention. Citing AH (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 985, Clark J said that an asylum determination procedure which did not comply with international standards would not engage Article 3 unless the consequences of the decision subjecting a person to it may engage Article 3: [96]. After referring to Nasseri [2010] AC 1, KRS v United Kingdom and other cases, Clark J concluded that only where substantial grounds have been shown for believing that the person concerned would, if transferred, face a real risk of being subjected to treatment contrary to Article 3, that person should not be transferred: [84], [96], [100]. There was no risk of this in the present cases. An appeal from Clark J's judgment is now pending before the Supreme Court of Ireland.

147. By contrast with Mirza, the German Administrative Court, Frankfurt, in a judgment of 8 July 2009, BeckRS 2009 36287, Transfer of Asylum Applicants to Greece, quashed a removal order to Greece of an Iranian applicant who had arrived in Germany via Greece. The case is on appeal. The court had before it the applicant's evidence, the UNHCR 2007 study and UNHCR 2008 position paper. It interpreted Article 3(2) of the Dublin Regulation as guaranteeing a right to any person affected by it. Understanding the application of Article 3(2) came, it held, from the Dublin

Regulation as a whole, the related directives and the Charter of Fundamental Rights. To the extent that the directives were not transposed or applied in a Member State, other Member States were not exempt from their obligations under the Refugee Convention to examine an asylum application. After taking the claimant's circumstances into consideration, the court concluded that the applicant's asylum proceedings in Greece were not in conformity with the Reception Condition Directive and the Procedures Directive. These findings were, in principle, suited to bring into play the agency's discretion to exercise the sovereignty clause in Article 3(2) of the Dublin Regulation.

> "On the basis of the facts of the case, the court of decision is secure in its conviction that the respondent's discretion is reduced to zero ["Ermessensreduzierung auf Null"]. In this context, on the one hand the Chamber must consider the binding effect of Regulation (EC) No 343/2003 [the Dublin Regulations] which is based on the necessity to achieve an adequate allocation of tasks amongst the Member States of the European Union in order that the right to asylum can be guaranteed in practice. On the other hand, as above all expressed in the recitals cited, the Regulation virtually takes it for granted that a right to asylum binding for all member states exists and is actually applied promptly. These two considerations must be balanced."

148. So far, the court said, it had been recognised in German law that serious infringements of the European Convention on Human Rights, or the risk of these, might result in a "reduction of discretion to zero" when examining whether the sovereignty clause should be exercised. The directives only set minimum standards and that so far, at least in part, there was no general consensus amongst Member States about their scope and validity. Thus only serious infringements of the Procedures Directive and Reception Conditions Directive, domestic basic rights or safeguards guaranteed in human rights conventions were of significance. But from the evidence taken, the court was satisfied that the applicant suffered serious impairment of his procedural rights and reception conditions, which violated the essential core and the substance of the relevant directives. These impairments were serious, as they ran contrary to the applicant's entitlement to fair, unbiased and prompt proceedings in which he could reasonably protect his rights to secure his basic necessities of life until his application was decided. The applicant's statements supporting this conclusion were credible given the reports, opinions and statements of specialists. The agency was obliged to make use of the sovereignty clause in Art 3(2) of the Dublin Regulation as the conditions for reduction of discretion to zero were met.

Conclusion on Article 3(2)

149. In Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Abdulla v Bundesrepublik Deutschland the Grand Chamber of the Court of Justice of the European Union recently considered the interpretation of the Qualification Directive 2004/83/EC. The Court noted that it was apparent from recitals 13, 16 and 17 in its preamble that the Geneva Convention constituted the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive were adopted to guide the competent authorities of the Member States in the

application of that convention on the basis of common concepts and criteria. It concluded that the provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties. It added:

> "[54] Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter."

150. Recital 10 of the Qualification Directive , as indicated earlier, states that the Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights and, in particular, to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members. The court in Abdulla added that the assessment under the directive, whether the established circumstances constitute such a threat that the person concerned may reasonably fear persecution, "must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union": [90].

151. If any authority were needed, Abdulla establishes that the Dublin Regulation, in particular the sovereignty clause, Article 3(2), must be interpreted and applied in the context of the Common European Asylum System and of fundamental rights as recognised in European Union law. In accordance with principles of European Union law its recitals are important aids in determining its scope and purpose, although they yield in the face of a contrary substantive provision. As we have seen the recitals to the Dublin Regulation begin with the Common European Asylum System and, at recital 15, assert the Regulation's observance of the fundamental rights and principles acknowledged, in particular by the Charter of Fundamental Rights.

152. Under the Common European Asylum System Member States must examine the applications of third-country nationals who apply for asylum with respect to the substantive rights of those who are deemed to be their responsibility. In my view there is nothing in the Dublin Regulation which requires the Secretary of State to use the Article 3(2) discretion to examine the substantive rights of others simply because aspects of the Common European Asylum System which apply to the receiving State, in this case Greece, are not fully observed. Provision for the respective responsibilities of individual Member States is made by those aspects of the Common European Asylum System which apply to each. It is Greece's responsibility to implement the provisions of the constituent instruments in its own territory just as it is the United Kingdom's. To require the Secretary of State to exercise the Article 3(2) discretion to make good any deficiencies in Greece's compliance with the different aspects of the Common European Asylum System would be, in a sense, inimical to the purpose of the Dublin Regulation. As indicated earlier one of its purposes is to prevent secondary movements of asylum seekers caused by differences in the conditions in different Member States. If a failure of a Member State were a reason to exercise the Article 3(2) discretion, it would encourage forum shopping and lead to delay in the determination of claims. The proposed changes to the Dublin Regulation, it should be added, cannot influence its current application.

153. The decision of Clark J in the Irish High Court in Mirza v Refugee Applications Commissioner is consistent with this approach. The German Administrative Court case, Transfer of Asylum Applicants to Greece, is in part, fact-specific, based on what had actually happened to the applicant in Greece, and not based on what might happen to him in the future because of general criticisms of the Greek system. The German Administrative Court was concerned that the applicant's asylum proceedings in Greece were not in conformity with the Reception Directive and the Procedures Directive, and that he suffered in Greece serious impairment of his procedural rights and reception conditions.

154. Moreover, in the passage quoted the Administrative Court, Frankfurt, seems to reason from "a right to asylum binding for all Member States …" That, in my view cannot constitute a basis for such reasoning in this type of case since the Dublin Regulation is expressly drafted on the basis of that right. The Dublin Regulation recognises that right but does not go further to constitute a right to claim asylum in a Member State of choice or more than once: see also R (MK (Iran) v Secretary of State for the Home Department [2010] EWCA Civ 115, [42], [68], [70]-[75]. The claimant cannot make good a free-floating right to claim asylum.

155. Recital 15 of the Dublin Regulation records that it respects the fundamental rights and principles recognised in particular by the Charter of Fundamental Rights. Given the Polish and United Kingdom Protocol, the Charter cannot be directly relied on as against the United Kingdom although it is an indirect influence as an aid to interpretation. It will be recalled that Article 1 of the Charter makes human dignity inviolable, Article 18 provides that the right to asylum shall be guaranteed, and Article 19(2) provides that "no one may be removed to a State where there is a serious risk that he or she would be subjected to inhuman or degrading treatment". None of these rights are directly enforceable against the Secretary of State. A transfer under the Dublin Regulation cannot be challenged on the basis that it is not compatible with the right to human dignity or the right to asylum, or will be in breach of Article 19(2).

156. In my view, however, the Secretary of State must exercise his discretion under Article 3(2) of the Dublin Regulation taking into account these rights. That follows because the rights have a binding, interpretive quality through their recognition in the recitals. The Secretary of State must ask himself whether, on the available evidence, there is a risk that Greece will not respect the human dignity of the claimant or not examine his right to asylum effectively: Articles 1, 18 of the Charter. In practice the considerations relevant to Article 19(2) will have already been factored into the consideration of Article 3 of the Convention. Having taken these matters into account the Secretary of State, confronted with an asylum application, may need to apply Article 3(2) to examine it himself. That is the case even though he does not bear responsibility under the criteria laid down in the Dublin Regulation. Only then will the United Kingdom act fully in accordance with its obligations under European Union law.

157. None of this would breach in my view the Protocol by enforcing the Charter of Fundamental Rights in the United Kingdom. Nor does it equate to a Member State, in addition to complying with its express obligations under the Dublin Regulation and the other instruments of the Common European Asylum System, having to police the compliance of other Member States with their obligations under these instruments. Such an approach would cut across a clear purpose of these instruments, which is that

there should be consistency between Member States. It would also be inconsistent with one of the aims of the Dublin Regulation, which is that the responsibility of a Member State for dealing with an asylum application should be established quickly. And it would be contrary to the approach in Nasseri [2000] 1 AC 1 and KRS v United Kingdom, both of which, for reasons of curial propriety, I must apply. Serious and consistent breaches of the Common European Asylum System by a Member State, so claimants do not have access to an effective and lawful procedure and the guarantee of a right to asylum, is a matter at a European institutional level between that Member State and the Commission. Unlike the instant proceedings the Member State would be present and have the opportunity to answer the allegations.

158. There is no evidence that in this case the Secretary of State has considered these fundamental rights recognised in European Union law and applicable as he exercises his powers and discretions under a European Union instrument, the Dublin Regulation. The "case by case" approach of the Secretary of State to returning asylum applicants to Greece under the Dublin Regulation does not assist in demonstrating that the Secretary of State has taken into account, as relevant factors, the fundamental rights guaranteed in European Union law. However, had the Secretary of State considered fundamental rights I cannot see that it would have added anything to this claimant's case. He is not in a vulnerable category and, on any of his accounts, he has demonstrated a great deal of resourcefulness. The impact of his return to Greece on his human dignity has been considered as part of his Article 3 claim. So, too, has the issue of exercising his right to asylum in an effective manner. In this sense this claimant's case in relation to the sovereignty clause is academic.

CONCLUSION

159. In my judgment the Secretary of State is generally entitled under the Dublin Regulation (EC) No 3433/2003 to return an asylum seeker to the Member State identified under the hierarchy of criteria in its Chapter III as the Member State responsible for determining the claim for asylum. That general obligation, however, is subject to three exceptions. The first is where the Secretary of State is satisfied that the return of asylum seekers to the responsible Member State would be incompatible with the European Convention on Human Rights, for example, because of the risk that the Member State will onwardly refoule them in breach of their Article 3 rights. The second exception is where the asylum seeker makes a human rights claim, on grounds other than an alleged risk of onward refoulement from the Member State in question and the Secretary of State is satisfied that the human rights claim is not clearly unfounded. For the reasons explained these exceptions do not apply in this case.

160. The third exception arises under Article 3(2) of the Dublin Regulation, the Sovereignty Clause, which permits the Secretary of State to assume responsibility for determining a claim for asylum. The Secretary of State must exercise his discretion under this provision in accordance with European Union law. To avoid a breach the transferring Member State may have to invoke this clause. Transfer by a Member State under the Dublin Regulation to a second Member State must accord with fundamental rights as recognised in the European Union. The obligations of the transferring State are set out in the Dublin Regulation and these include observing fundamental rights. In this case, however, for the reasons I have given, these fundamental rights have no purchase. I dismiss the claim.