Neutral Citation Number: [2012] EWHC 3004 (Admin)

Case No: CO/6292/11935/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2012

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

The Queen on the application of **(1) Manezah Toufighy** **(2) Sharif Ahmed Duran**	**Claimants**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Paul Turner (instructed by **Azam and Co Solicitors**) for the **Claimants**
Jonathan Hall (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 4 and 5 October 2012
Further submissions: 8, 9 and 19 October 2012

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Judgment

Mr Justice Beatson :

Introduction

1. Council Regulation 343/2003, of 18 February 2003, the Dublin II Regulation, and the Directive it replaced, are important parts of the Common European Asylum System. That system contains substantive minimum standards with respect to the treatment of applicants for asylum and the examination of their applications in Member States. One purpose of the Dublin II Regulation (see Recital 3) is to introduce "a clear and workable method for determining the Member State responsible for the examination of an asylum application lodged within the EU" rapidly, and to prevent forum-shopping by applicants for asylum.

2. Broadly speaking (and subject to special provision for unaccompanied minors and those who have a family member who has been allowed to reside in a Member State), the Dublin II Regulation provides that the Member State that is responsible for a

person's asylum application is the Member State which that person first entered or which granted that person a residence document or visa ("the first state"). The central question in these judicial reviews is whether, although under the Dublin II Regulation Hungary is the state responsible for examining the claimants' applications for asylum, the situation in Hungary ("the first state") means that the United Kingdom ("the second state") is obliged to assume responsibility for doing so pursuant to Article 3(2) of the Regulation.

3. The claimants in the two cases before me challenge the Secretary of State's decision to remove them to Hungary and to certify their asylum and human rights claims on third country grounds pursuant to paragraph 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ("the 2004 Act") as "clearly unfounded". For different reasons they claim that to remove them to Hungary will breach their rights under the European Convention on Human Rights ("ECHR"). They both maintain that, as it cannot be said that their claims are bound to fail, the certification of those claims was unlawful, and they are entitled to in-country appeals before an immigration judge.

4. The claimants originally made what can be described as a "generic" challenge to Dublin II returns to Hungary because of the overall position of asylum seekers and refugees there. They in substance questioned whether anyone can be removed to Hungary under the Regulation. There is still a "generic" aspect to the challenge of Mr Sharif Ahmed Duran, the claimant in CO/11935/2010, but it is less general and only concerns Somali nationals. In the case of Mrs Manizah Toufighy, the claimant in CO/6292/2010, the primary focus is now an allegation that removal to Hungary will violate the Article 8 rights of the claimant's children within the United Kingdom.

5. "Generic" challenges have been made in respect of Dublin II removals to Greece and to Italy. Those concerning returns to Greece have succeeded in both the Grand Chamber of the European Court of Human Rights ("ECtHR") and in the CJEU: see *MSS v Belgium and Greece* [2011] ECHR 108 and Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* and *ME and others v Refugee Applications Commissioner* [2012] 2 CMLR 9. After the hearing in the cases before me, on 17 October 2012, the Court of Appeal gave judgment in *EM (Eritrea) v Secretary of State for the Home Department* [2012] EWCA Civ 1336 rejecting a challenge to Dublin II returns to Italy. These decisions (which are discussed at [76] – [84]) laid down the conditions which such a challenge must satisfy if it is to succeed. But even in the case of a non-generic challenge, they set the legal and regulatory context against which submissions such as those on behalf of the claimants in the cases before me must be assessed.

Factual background and procedural history

6. The procedural history of both cases is complex and somewhat depressing. But it is not unusual. Grounds originally asserted have not been pursued, in the case of one of the claimants, in the light of evidence obtained after proceedings were launched. In that case the effective challenge is now to the defendant's response to amended grounds filed later. That response addressed matters not addressed in the original decisions. In the other case amended grounds were filed some seven months after proceedings were launched. These are therefore cases in which the court is asked to

exercise its supervisory jurisdiction over a moving target. There has been movement by both parties. Particularly in a case requiring its "anxious scrutiny" the court should be flexible, and seek to deal with the substantive issue between the parties at the time of the hearing if it can do so fairly. But care must also be taken lest it appear to become part of the initial decision-making process rather than the body exercising a supervisory jurisdiction.

7. *CO/6292/2010*: Mrs Manizah Toufighy is a 36 year old Iranian national with two children now aged 15 and 12, who arrived in the United Kingdom from Amsterdam on 14 January 2010 and claimed asylum. Her claim is now that, notwithstanding the scheme of the Dublin II Regulation, removing her and her children to Hungary will, having regard to the children's best interests, breach the family's Article 8 rights.

8. On 31 March 2010 the authorities in Hungary accepted responsibility for determining Mrs Toufighy's asylum claim. In the light of that acceptance, in a decision dated 4 May, the Secretary of State declined to consider her asylum claims substantively, and certified the claim on third country grounds. On 7 May 2010 she set directions for the removal of Mrs Toufighy and her children to Hungary. These proceedings were lodged on 3 June 2010, and at that time, the challenge was to the decisions dated 4 and 24 May 2010. Sweeney J granted interim relief staying removal.

9. It appears to be common ground that Mrs Toufighy has never been in Hungary. The decision to certify her claim on third country grounds was based on the fact that she and her children had been issued with Hungarian visas which as a result of Article 9(2) of the Dublin II Regulation made Hungary responsible for examining her application for asylum. It was originally contended on her behalf that the decisions to certify her claim on third country grounds and set removal directions were unlawful because she had never been issued with a Hungarian visa. It was also contended that she and her children would be made destitute if removed to Hungary, so that doing so would amount to a breach of their rights under Article 3 of the European Convention on Human Rights (the "ECHR"). Stadlen J gave permission only in respect of the second of these contentions but neither was pursued at the hearing.

10. *CO/11935/2010*: Mr Sharif Ahmed Duran is a 22 year old Somali national. He arrived in the United Kingdom on 14 May 2010 and claimed asylum. He claims that, if returned to Hungary, he will be at risk of treatment contrary to Article 3 of the ECHR. Alternatively, he claims that, because of the unavailability of family reunion for citizens of Somalia, returning him to Hungary risks treatment contrary to Article 8, either on a freestanding basis, or when read together with the prohibition on discrimination in Article 14 of the ECHR.

11. Because Mr Duran had been in Romania, the Secretary of State first requested the authorities there to accept responsibility for determining his asylum claim. They refused stating that Hungary was responsible for his case. On 16 September 2010 the Hungarian authorities accepted responsibility. In decisions dated 17 September 2010 the Secretary of State (a) declined to consider Mr Duran's asylum claim substantively, and (b) certified it on third country grounds. On 25 October Mr Duran was detained, and directions were set for his removal to Hungary on 18 November 2010. At the time these proceedings were lodged, on 16 November 2010, his challenge was to those decisions At that time it was contended that to remove him to Hungary would place

him at risk of treatment contrary to Article 3 of the ECHR because, if he is so removed, the conditions in camps in Hungary combined with a lack of support will force him to live on the streets and be destitute.

12. Permission in Mr Duran's case was given only three weeks before the hearing before me. This in part was because of a dispute as to whether Mr Duran's case was to be listed together with Mrs Toufighy's case or to be stayed behind it. There also appears to have been an administrative glitch on the part of the Administrative Court. It was only on 22 May 2012 that HHJ Sycamore gave directions in his case, and it was only on 11 September that the application for permission came before Collins J. He granted permission on the papers, and ordered that Mr Duran's case be heard together with Mrs Toufighy's. By then, there had also been a number of important changes in the way the challenges are put.

13. On 20 June 2011, almost a year after Mrs Toufighy was granted permission, amended grounds[1] were served on her behalf. This was done in the light of a report of the Hungarian Helsinki Committee (the "HHC report") concerning her case which is not dated, but was filed on 11 March 2011. The only ground on which permission had been granted by Stadlen J was no longer pursued. This was because the HHC report stated (see section V) that "minimum standards are generally respected although the minimum living standards in Hungary are way lower than in the UK", and that "asylum seekers receive 3 meals a day and accommodation, around 7000 HUF as "pocket money" and basic medical care". In summary, it stated that conditions in Hungarian reception centres, while far from ideal, were not so poor as to put Hungary in breach of its obligations under the relevant EU asylum related Directives (in particular Council Directive 2003/9/EC) or put Mrs Toufighy and her children at risk of treatment contrary to Article 3.

14. The amended grounds recast Mrs Toufighy's claim by raising two new grounds. The first is that she risked being refouled because new Hungarian legislation enacted in 2010 would treat her as a person who had already made an unsuccessful application for refugee status, and that an application for asylum by her would not have suspensive effect. As foreshadowed in the skeleton argument dated 10 September 2012, filed on Mrs Toufighy's behalf by Mr Paul Turner, the refoulement argument was not pursued at the hearing.

15. The second new ground relied on section 55 of the Borders, Citizenship and Immigration Act 2009 and the decision of the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4. This ground has two limbs. The first is that the Secretary of State had not properly considered the best interests of the children. The second is that removal would not be in their best interests. It was submitted that it was not open to the Secretary of State to conclude that the interests of the children were not sufficiently affected as to override her function to maintain effective border control in the United Kingdom.

16. Further representations making these points and contending that to remove Mrs Toufighy and her children would breach their rights under Article 8 of the ECHR were submitted in a letter dated 31 August 2010. The Secretary of State responded to

[1] The amended grounds are dated 29 March 2011.

these matters in a letter dated 2 November 2011 maintaining her decision to certify the claims. Effectively the challenge is now to the decision in this letter, the material parts of which are summarised at [96] below. Permission has not been granted to Mrs Toufighy on the June 2011 new grounds. The Secretary of State is, however, content for the court to consider them, either by granting permission, or on a "rolled-up" basis.

17. In Mr Duran's case the challenge was originally similar to the second (destitution) ground in Ms Toufighy's case. It was submitted that he would be made destitute if returned to Hungary. The defendant's Acknowledgement of Service and summary grounds were filed on 19 June 2012. I have referred to the amended grounds filed on Mr Duran's behalf. Those grounds, dated 6 July 2011, still primarily relied on a risk of treatment contrary to Article 3 of the ECHR if he was returned to Hungary. But alternatively, it was submitted that there was also a risk of treatment contrary to Article 8. It was contended that, even if Mr Duran is granted asylum in Hungary, he would not be able to avail himself of his right to family reunion, because the Hungarian authorities would not permit entry of a Somali partner or wife. The skeleton argument dated 4 September 2012 filed on his behalf maintained that he will be at risk of destitution contrary to Article 3 and, because of the unavailability of reunion for Somali family members, there will be a breach of Article 8, either on a freestanding basis, or when it is read together with Article 14.

The evidence

18. There was a wealth of material about Hungary by international organisations and other bodies before the court. I list the documents in broad chronological order. I have taken much of it into account, but in the remainder of this judgment, I only refer to some of the documents. The first three are now respectively seven and four years old. Some of the others repeat what is in earlier documents. Additionally, in a number of the documents, the lapse of time between the dates of the research or the visits and the date the document was published, makes a document published earlier of more assistance in assessing current conditions because the more recently published one reflects conditions at an earlier time. The documents are:

    (1) The US Department of State's Bureau of Democracy, *Human Rights and Labor report on Hungary* dated 28 February 2005;

    (2) Amnesty International's 2008 *Report on Human Rights in Hungary*;

    (3) Hungarian Helsinki Committee ("HHC") *Report on the Border Monitoring Programme's first year in 2007*, published in December 2008;

    (4) The Fourth Monitoring report on Hungary of the Council of Europe's European Commission Against Racism and Intolerance (adopted on 20 June 2008 and published on 24 February 2009);

    (5) The United Nations High Commissioner for Refugees ("UNHCR") - Age, Gender and Diversity Mainstreaming ("AGDM")ADGM 2009

report, *"Being a Refugee"*, reflecting research in September 2009 but published in August 2010;

(6) UNHCR's notice *"UNHCR Urges Hungarian Government To Urgently Assist Homeless Refugees"* dated 18 December 2009

(7) The UNHCR 2010 report, *"Refugee Homelessness in Hungary"*, published in March 2010;

(8) A download of the Hungary Detention Profile of the Global Detention Project, last updated in April 2010;

(9) The Council of Europe's report to the Hungarian Government on the visit to Hungary by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 24 March – 2 April 2009, published on 8 June 2010;

(10) The AGDM draft Participatory Assessment, Hungary 2010, reflecting field assessments by multi-functional teams conducted during the period 27 September – 1 October 2010;

(11) HHC Information Note on the Treatment of Dublin Returnees in Hungary, December 2011;

(12) Translated extracts from a Proasyl report of February 2012;

(13) The UNHCR's April 2012 report, *"Hungary as a Country of Asylum"*;

(14) A letter dated 25 September 2012 from the European Council on Refugees and Exiles ("ECRE") to Eleni Mavron, in the EU's Presidency.

19. A partially translated document referred to only as a "Suddeutsche Article", which does not contain any of the footnote references to the source material, is, for that reason, of limited assistance. The "objective" bundle in Mrs Toufighy's case also contains the decision of the ECtHR in Application No. 47940/99 *Balogh v Hungary*, a judgment given on 20 July 2004, and the "statutes, regulations and reports" bundle contains a translation of material concerning and summarising a ruling made on 2 April 2012 by the Administrative Court in Stuttgart.

20. The evidence on behalf of Mrs Toufighy consists of her witness statement dated 24 June 2010, a report dated 12 September 2012 by Dr Rozmin Halari, a senior clinical psychologist and an honorary lecturer at Imperial College London, about the impact of the removal from the United Kingdom of Mrs Toufighy and her husband, Mr Khoskhoo, on their two children, and other information about the children. During the hearing I was informed that Mr Khoskhoo's application for asylum had been refused. His position was not said to be relevant to his wife's challenge and there was no suggestion that the Secretary of State would not, as she intends to do, be able to remove the family as a unit.

21. In Mrs Toufighy's case, Mr Turner primarily relied on the HHC's report by Grušer Matevžieč, Jůlia Iván and Orsolya Szántal Vecsera filed about her in her case. It is written in generic language and some of the information in the report is not directly relevant to the asylum process or the Dublin II procedure. Mr Turner's written and oral submissions also relied on (numbers refer to the list in paragraph [15] above) the UNHCR's 2009, 2010 and 2012 reports (5), (7) and (13), the extracts from the Proasyl report (12), the letter from ECRE (13), and the decision of the Stuttgart Administrative Court.

22. The evidence on behalf of the defendant consists of the statement of Tanvir Hussain, a higher executive officer in the United Kingdom Border Agency, the 2010 AGDM report (10), and reports dated April 2011 by officials from the defendant's Country of Origin Information Service ("COIS") about the March 2010 UNHCR report (7) and the HHC's report.

23. In the case of Mr Duran, the evidence filed on his behalf consists of his witness statement, dated 2 March 2011, a statement of his sister, Mrs Ubah Ahmed Duran, dated 23 November 2010, and the HHC's report concerning his case by Grušer Matevžieč and Orsolya Szántal Vecser. This HHC report is also written in generic language and contains some information not directly relevant to the asylum process of the Dublin II procedure. Reliance was also placed on the objective material filed in Mrs Toufighy's case.

24. The Secretary of State's summary grounds in Mr Duran's case relied on the UNHCR's April 2012 report, "Hungary as a Country of Asylum" (13). Because permission was only given on 11 September, shortly before the hearing, in his case no detailed grounds of defence or evidence have been filed. Mr Hall stated that she was content to proceed on the basis that his written submissions in the two cases should be treated as incorporating detailed grounds in Mr Duran's case.

25. I summarise the material parts of the objective evidence which is relevant to the cases of the two claimants in sections (i) to (iv) and that relevant to Mr Duran in section (v). The objective evidence falls into three categories; information about conditions for those who are returned to Hungary, information concerning the position of children of the ages of Mrs Toufighy's children, that is 15 and 12, and information about the particular position and risks to Somalis who are so returned. I deal with Dr Halari's report on Mrs Toufighy's children in section (vi).

(i) Conditions for those returned to Hungary

26. It was common ground, in view *inter alia* of section VI.2 of the HHC report that neither Mrs Toufighy and her family nor Mr Duran would be detained. Accordingly, although there are criticisms of the conditions in which detained applicants for refugee status are held and references (e.g. in pages 4 – 6 of the HHC report filed in Mr Duran's case and the 2012 Proasyl report (12)) to a historic background of unlawful detention and inadequate remedies, these are not relevant in this case. Evidence about the Békéscsaba reception centre is only of limited relevance as it has now closed.

27. What is relevant in the present case are conditions in the open reception centre in Debrecen, those in the open pre-integration facility for recognised refugees and those accorded subsidiary protection at Bicske, and conditions after the refugees leave the Bicske centre. The AGDM's June 2010 Participatory Assessment (10) stated that neither were overcrowded. At the time of the AGDM's visit there were 174 asylum seekers in Debrecen, which had the capacity to take 1289, and 72 refugees and beneficiaries of subsidiary protection in Bicske, which had the capacity to take 450.

(ii) Applicants for asylum

28. Paragraphs 30 – 31 of the UNHCR's April 2012 report (13) stated, in relation to reception conditions, that the Hungarian government was actively co-operating with UNHCR, but that reception conditions and services "fall short of international and EU standards". There is limited access to language learning, and the isolation of the facilities prevents contact with the host society. Those in the camps are not able to pay for local bus tickets. AGDM's June 2010 Participatory Assessment (10) reported that there were problems with all the facilities visited, including Debrecen. Mr Duran's statement (paragraph 7) stated that when he was at Béckéscsaba camp, although they were allowed to leave, the closest major town was two hours away and, as he and others were unable to afford the cost of transport, they had no option but to stay in the camp and felt imprisoned.

29. The UNHCR-AGDM's 2009 report (5) reported that "hygienic conditions in Debrecen remain sub-standard, and bathrooms and toilets need urgent attention. Human excrement was found around residential buildings". As to personal hygiene, the investigator "learned that there were only three functioning washing machines for the entire facility", that mothers "received too few and inadequate nappies for their babies" and "many women also said they needed held to get rid of parasites such as lice". This report stated that the investigators found that living conditions in the building for single men were "barely tolerable" with up to twelve persons sharing rooms that are only suitable for a maximum of six.

30. There are also references in the UNHCR's April 2012 report (13) (paragraph 33) and in the HHC reports to the insufficiency of the medical services at Debrecen, and to tensions and fighting between different ethnic groups. The UNHCR's April 2012 report referred (paragraph 34) to insufficient attention to dietary needs, and then there are other references in the objective evidence to Muslims being given pork and no vegetarian alternative (see also Mr Duran's statement, paragraph 9). The AGDM's Participatory Assessment of 2010 (10) referred to an absence of a mechanism to identify those with special needs at an early stage.

31. Section VI of the HHC report stated that Somali asylum seekers returned to Hungary under the Dublin procedure, if not detained, as Mr Duran will not be, will be placed in Debrecen and subject to the conditions described. This part of the report also stated that hygienic conditions in the camp "are very poor", "bathrooms and toilets are in bad condition", and "personal hygiene is also a challenge, as there are few functioning washing machines for the entire camp and no laundry". The HHC report also stated that there are cockroaches in the entire camp. But the authorities are alive to the problem. The UNHCR's 2012 report (13) stated that the camp is regularly fumigated by the authorities.

32. One reason the "generic" challenge to Dublin II removals to Hungary was abandoned in Mrs Toufighy's case was what was stated in section V of the HHC report, filed on her behalf. Dealing with the impact of the EU Directives on Asylum Seekers in Hungary, it stated:

> "We can conclude that minimum standards are generally respected, although the minimum living standards in Hungary are way lower than in the UK. Asylum seekers reported that reception facilities are poorly equipped and dirty, in recent years there were cockroaches in mass. As minimum living standards are not précised in the Reception Conditions Directive, we cannot confirm that Hungary does not fill EU requirements in general. Asylum seekers receive three meals a day and accommodation, around 7000HUF as 'pocket money', and basic medical care (that is often problematic in the case of more complicated medical issues or language barriers with medical staff)."

33. Notwithstanding the problems identified in AGDM's 2010 Participatory Assessment (10), that document contained positive findings. These included the availability of language classes at Debrecen (attended mainly by children), that children at Debrecen go to school, daily attendance by a doctor, and the availability of a paediatrician twice a week. I have referred to the statement in the UNHCR-AGDM's 2009 report (5) that "human excrement was found around residential buildings". There is no reference to this problem in the reports dealing with the most recent visits and assessments. The UNHCR's April 2012 Report (13) stated that the Hungarian Government actively co-operated with the UNHCR and other non-governmental organisations in monitoring the standards of facilities in the annual participatory field assessment processes: see paragraph 30. Moreover, despite all the problems identified, the UNHCR has not recommended that Debrecen (or, in the case of recognised refugees, Bicske) should not be used let alone that Member States should suspend returns to Hungary (as the UNHCR has, see [80], recommended in the case of Greece.

(iii) Refugees and those with subsidiary protection

34. Recognised refugees and those accorded subsidiary protection are provided with integration support, and language and other training at the Biscke centre. They have an initial entitlement to reside in the Bicske centre for six months. For those who qualify, this may be extended for a further six months and, in exceptional cases for a further twelve months.

35. The evidence identifies a number of inadequacies. This section summarises the evidence on questions other than education, which is addressed in section (iii) below. AGDM's June 2010 Participatory Assessment (10) reported that there are problems with all the facilities visited, including Bicske and (page 4) generally "reception conditions and services in place in Hungary are not conducive to facilitate the efficient integration of beneficiaries of international protection". It also stated that because of the lack of opportunities for employment and social contacts with Hungarian society "enormous pressure is imposed" on them and that they "face difficulties and extreme stress in coping".

36. Mr Turner relied on the references in the UNHCR's March 2010 report (7) that the opportunities to learn Hungarian are limited and that in the UNHCR April 2012 report (13) to limited access (one hour a day) to language learning. Mr Duran's evidence

(paragraph 9) is that there were no educational facilities in Becksaba and he was unable to learn Hungarian. As to the observation that the opportunities to learn Hungarian are limited, the COIS commented that those interviewed in the UNHCR's March 2010 report (7) did not attend the Biscke pre-integration centre, where language instruction is offered (see [34]), for the required period.

37. The UNHCR's notice dated 18 December 2009 (6) and the UNHCR's April 2012 report (13) refer to the problem of homelessness among refugees. The December 2009 notice stated that UNHCR requested "emergency measures" to assist homeless refugees living in Budapest. AGDM's Participatory Assessment for 2010 (10) referred to residents getting food on dirty plastic plates, unsatisfactory medical services, unavailability of winter clothes and absence of vocational training. It also stated that the food is not adequate for children and the quantity is insufficient for a whole family. This last comment was, however, not repeated in the UNHCR's April 2012 report.

38. The reports also refer to difficulties by refugees in obtaining employment and the lack of employment prospects. It is clear that some support is provided. It is also clear that not having a good command of Hungarian is a major barrier. But the overall position must be assessed in the context both of the employability of refugees in the light of their education and qualifications, and the general level of unemployment in Hungary. The COIS's April 2011 comments observed that the March 2010 UNHCR report (7) recorded that 43% of those interviewed had not completed elementary school, and only three individuals had completed secondary school. Two of the interviewees with secondary school education did find employment. The UNHCR report also noted that only five of the fourteen Somali respondents had worked before leaving Somalia, and that the general rate of unemployment in Hungary has been rising. As to opportunities to learn Hungarian after leaving Bickse, the COIS referred to the statement in section 3 of the UNHCR's March 2010 report (7) that, at that stage, refugees and those accorded subsidiary protection are entitled to a further 520 hours of language tuition. That is about ten hours a week for a year.

39. One of the documents relied on by the claimant was the UNHCR March 2010 report "Refugee Homelessness in Hungary" (7). That report, however, presented only a "snapshot of the situation facing some refugees, largely Somalis, lacking access to adequate housing in Budapest, during a period of six weeks in late 2009". For example, 13 of the 15 interviewees left Hungary when they got status recognition and some did not attend the Bicske pre-integration centre. The report itself stated it did "not purport to provide a thorough analysis of the phenomenon of refugee homelessness in Hungary". The COIS comments on this report stated (3.1 – 3.2) that refugees and those accorded subsidiary protection are eligible for various settlement allowances upon leaving the Bicske pre-integration centre, including a monthly housing allowance, and an establishment grant, and that such persons have the same rights to social security benefits as Hungarian nationals.

40. The objective evidence, in particular the HHC reports, also refers to the position of applicants for refugee status who leave Hungary before a decision has been reached in their case, but later return or are returned. Applications for asylum after their return (see HHC IV.2) will not be regarded as a confirmation or continuation of their original application for asylum. The 2010 Asylum Act provides that second and

subsequent applications for asylum will not in themselves have the effect of suspending the execution of an order for a person's expulsion. The HHC Reports stated (page 13) that HHC did not have any knowledge of cases where a person has been removed prior to consideration of his or her asylum claim under the new law. HHC's December 2011 Information Note on the treatment of Dublin returnees reported that the remedial mechanisms under Hungarian law do not provide a practical solution for the vast majority of applicants for asylum, but also gave examples of the courts overruling a decision to expel a person.

41. Although the objective evidence referred to xenophobic behaviour and acts of discrimination, it was also stated (see, for example, UNHCR report, paragraph 83) considers that Hungary is a country which is "generally considered to have adequate anti-discrimination laws, an effective government complaint agency, and a well-developed civil society".

(iv) The children of applicants and refugees

42. Hungary's Statute on Public Education provides for compulsory education of children in Hungary. There are schools attended by the children of asylum seekers and refugees at Debrecen and Bicske. However, the April 2012 UNHCR report (13) stated (at paragraphs 64 – 68) that Hungary falls short of assuring full and effective participation of foreign children, including asylum-seeking children, in mainstream education. It also stated that schools "are not required to address newcomers' specific needs and opportunities" and it is "left to the discretion of schools to establish an inter-cultural educational programme, including induction and language, and to apply for the limited available funding".

43. The report stated that "schools in towns hosting refugee reception centres, especially in Bicske, and to some extent in Debrecen, tend to resist the enrolment of asylum-seeking and refugee children, as they do not have the funds to provide the necessary extra tutoring for Hungarian language and cultural orientation, and they lack the skills to raise additional funding as the regulations for obtaining…'migrant-norm' funding are complicated". It also stated that schools appear to "fear that local Hungarian parents would take their children out school if refugee or asylum-seeking children are admitted".

44. The consequence of matters such as these is stated to be that such children "may need to go to school in remote towns in Hungary, far from their parents' place of residence" and that "even if they are accepted in local schools, their participation in education is limited without proper assistance". The report also referred to the language difficulties of both parents and children, and to the discontinuation of a migrant education working group in May 2010.

45. Section VI.3 of the HHC report stated:

> "in Debrecen, there [is] one school and one kindergarten who accept asylum-seeking children. Whether an asylum-seeking child can go to school or not, mostly depends on the current situation; how many children are in the camp, is there any empty place in the class, at which period of the year arrived the child. However, since 2010 Inter-Church Aid is providing educational activities for the children in the camp."

and

> "the situation is even worse for those who get tolerated stay, the prohibition of non-refoulment is applicable because they fall outside the scope of the Asylum Act. Compared to asylum-seeking children, they get reduced supports. For example, they are not entitled to the reimbursement for travelling to school, and the families do not receive monthly allowance for children under 14."

46. By contrast, the AGDM Participatory Assessment for 2010 (11) stated, of the pre-integration facility in Bicske, that "the schooling for children is functioning well" (page 17) and (page 22) that the elementary school in Bicske had 30 refugee and asylum seeker students on the day of the visit. The report noted that the school is a special one, which also educates orphans and children with behavioural problems, and observed that the fact that refugee and asylum seeking children are studying in the same institution stigmatises them as being problematic children. It, however, also stated that the teacher is fully professional, trained, flexible and tolerant, and is prepared to work with illiterate students. Each student has an individual education plan and "the teacher's attention is differentiated according to the needs of the individual". The more recent reports do not refer to bus drivers not stopping in front of the refugee reception centre as an earlier report had done.

(v) Family reunion and nationals of Somalia

47. Sections VII and VIII of the HHC report filed in Mr Duran's case dealt with the exclusion in Hungary of Somali refugees from family reunification, and the particular questions as to the integration of Somalis after obtaining refugee or subsidiary status. Dealing with the latter first, I have referred to the material aspects of the position in the reception centre at Biscke at [34] – [38] above.

48. The HHC report stated that housing remained a problematic issue because of the inadequacy of reception conditions in state-run shelters, widespread discriminatory practices in Hungarian society, and administrative difficulties. "[F]or Somalis, it is even harder to integrate into the Hungarian society than for a refugee from any other country" (page 17) and the UNHCR March 2010 report (7) was cited for the proposition that refugee homelessness particularly affects Somali refugees. The report also stated that, because of the inadequacies of the pre-integration at Bicske, "most Somali refugees opted for onward movement to other European countries" and "upon returning, they were punished with homelessness and hunger as a result of exercising freedom of movement and without access to an adequate level of community-based support services in Budapest".

49. The UNHCR April 2012 report (13) referred (paragraph 79) to the insufficiency of access to family reunification in Hungary as being a contributing factor to the onward irregular movement of beneficiaries of international protection in that country. It stated that family reunification is particularly beyond the reach of Somalis, whose national passports are not accepted by the European Union and who cannot, therefore, be issued with a Hungarian visa. It is also stated that International Committee of the Red Cross ("ICRC") travel documents are not recognised under Hungarian law.

50. The reason given in the HHC report for the non-acceptance of Somali travel documents is concern about security. The report stated that Hungary, unlike other EU Member States, has not established an alternative, such as an ICRC travel document

or a laissez-passer document. It also stated that the lack of opportunities to reunite with family members was often given by Somali refugees recognised in Hungary as a reason for leaving the country and moving to another EU Member State.

51. It was said that such departure "often results in an unlawful stay in another Member State, and a later forced or voluntary return to Hungary", but with the result that the individual has lost most opportunities for state-supported housing or integration services in Hungary because of their previous "voluntary" departure. This may be the reason that most of those reported by the UNHCR as sleeping rough in the streets or surviving one night at a time at homeless shelters in December 2009 were Somalis.

(vi) The position of Mrs Toufighy's children

52. Mrs Toufighy and her children had been in the United Kingdom for two years and ten months at the time of the hearing. The decision to remove them to Hungary on Dublin II grounds was made on 4 May 2010, five months after their arrival. The evidence is that they have been at their present school since September 2011, just over a year.

53. Dr Halari's report stated that the children have settled in the United Kingdom and are progressing well at school, where they have many friends. They socialise with friends after school and both attend extracurricular activities. Although Dr Halari stated she did not have access to the children's school reports and relied on what Mrs Toufighy told her, in the context of a challenge to certification, I take her evidence at its highest.

54. Dr Halari's report also stated that the children were traumatised or greatly upset when the family was detained by the United Kingdom Border Agency. The children stated they did not want to leave London because, among other reasons, they did not want to go to places like the detention centre where it was "scary and lonely". Dr Halari stated that she assessed that it is in the best interests of the children to remain in the United Kingdom until, at least, the conclusion of the examination of their mother's application for asylum.

The legal framework and analysis

(i) Certification

55. There is little difference between the parties about the basis upon which the Secretary of State may certify cases as "clearly unfounded". The difference between them is as to the role of this court and the application of the test in the cases before me.

56. In general, a person may not be removed from or required to leave the United Kingdom while his or her application for asylum is pending: Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), section 77. This general rule does not apply in the case of removal to third-party states; that is states other than the state of which the applicant for asylum is a national or a citizen, which are scheduled and deemed to be "safe states": see paragraph 4 of part 2 of Schedule 3 to the 2004 Act. By paragraph 3 of Schedule 3 to the 2004 Act, Hungary is one of these "safe states". These "safe" states are deemed to be places "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", "from which a person will not be sent to another state in contravention of his Convention rights", and "from which a person will not be sent to another state otherwise than within accordance with the Refugee Convention": paragraph 3(2).

57. Where the Secretary of State certifies that the person to be removed is not a national or a citizen of the "safe state" to which it is proposed to remove the individual, that person may not bring an immigration appeal by virtue of section 92(2) or 93 of the 2002 Act. A person whose claim is so certified is also precluded from appealing under section 92(4)(a) of the 2002 Act on asylum or human rights grounds: see paragraph 5(1) – (3) of Schedule 3 to the 2004 Act. The individual cannot, therefore, challenge certification on the basis that he or she risks removal in breach of his Convention rights (i.e. refoulment) from the state deemed to be "safe".

58. If an individual claims that, even though he would not be removed from the state deemed to be "safe", his or her treatment in that state would amount to a breach of human rights because of ill-treatment by the state, the certification provisions in paragraph 5(1) – (3) do not apply. In such a case, the Secretary of State is, however, empowered to certify that the claim that the individual's human rights will be breached in the state deemed to be "safe" is clearly unfounded: see paragraph 5(4) of Schedule 3 to the 2004 Act. In the case of a state deemed to be "safe", paragraph 5(4) requires the Secretary of State to so certify it, "unless satisfied that the claim is not clearly unfounded".

59. Mr Turner submitted that, in the light of the authorities, for example *R v Home Secretary, ex p. Thangarasa and Yogathas* [2003] 1 AC 290 at [14] and [34], the Secretary of State can only certify a human rights claim as "clearly unfounded" if, after carefully considering the allegation, the grounds on which it is made, and the material relied on, she concludes that the claim is "bound to fail" or "hopeless". He maintained that, since the question whether a claim is bound to fail or not is a matter of legal judgment rather than of discretion, the court is in as good a position as the Secretary of State to decide it and should do so. He relied on the statements of Lord Phillips MR, giving the judgment of the court, in *R (L) v Secretary of State for the Home Department* [2003] 1 WLR 1230 and Lord Bingham in *R v SSHD, ex p Razgar* [2004] 2 AC 438 at [17]. Lord Phillips stated that the question whether an appeal was bound to fail is "an objective one". Lord Bingham stated that "the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator". Mr Turner might also have relied on a number of other statements, including those by Sedley LJ in *TR (Sri Lanka)* [2008] EWCA Civ 1549 at [32] – [34] and Carnwath LJ in *R (YH) v SSHD* [2010] EWCA Civ 116 at [18] – [19] and [21].

60. Mr Hall, on behalf of the Secretary of State, submitted that it is clear from the decision of the House of Lords in *ZT (Kosovo) v Home Secretary* [2009] 1 WLR 348 that the matter is essentially one of review: see [55], [65] and [82] *per* Lord Hope, Lord Carswell and Lord Neuberger. But, whatever the test, it seems clear that the majority in that case considered that, where there is no dispute of primary fact, the difference between a court which "reviews" the Secretary of State's decision and one which exercises its own judgment is a very fine one, and indeed in practice virtually invisible: see *ZT*'s case at [23], [72], [75], and [83] *per* Lord Phillips, Lord Brown and Lord Neuberger.

61. Lord Brown (at [75]) considered that, in the particular context before the court, there was no material difference between a supervisory and an appellate jurisdiction. Lord Neuberger stated that, where there is no dispute of primary fact, application of the normal judicial review test "will, at least normally, admit of only one answer, and a challenge to the Secretary of State's decision will normally stand or fall on establishing irrationality". Although he stopped short of suggesting that there is a hard and fast rule to that effect, he agreed with Lord Phillips that, where the primary facts are not in dispute, if the court concludes that the claim is not "clearly unfounded", "it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary".

62. *ZT (Kosovo)* is, however, not the last word. Apart from the decisions in *TR (Sri Lanka)* and *R (YH) v SSHD* to which I have referred, there are the decisions of the Court of Appeal in *TR (Sri Lanka)* [2008] EWCA Civ 1549 at [33] (Sedley LJ), *AK (Sri Lanka) v SSHD* [2009] EWCA Civ 447 at [33] (Laws LJ), *KH (Afghanistan) v SSHD* [2009] EWCA Civ 1354 at [19] (Longmore LJ) and *R (YH) v SSHD* [2010] EWCA Civ 116 (Carnwath LJ). In that Court's most recent decision, *R (MN (Tanzania)) v SSHD* [2011] EWCA Civ 193, Maurice Kay LJ, in a judgment with which Moses and Sullivan LJJ agreed, sought to give some order to what had become a very complicated and possibly unprincipled body of law. Even with the clarification his judgment has given, it has to be said that first instance judges are left in a somewhat unsatisfactory position.

63. To see why this is so, the starting point is to identify two issues. The first is the approach of the court to certification under section 94 of the 2002 Act and paragraph 5 of Schedule 3 to the 2004 Act. The second is whether there is any difference between the test for certifying a case as "clearly unfounded" for the purposes of section 94 of the 2002 Act, and paragraph 5 of Schedule 3 to the 2004 Act, and the approach under Rule 353 of the Immigration Rules about whether further submissions amount to a "fresh claim". In the context of Rule 353 there are two conditions for a claim to be a "fresh claim". The first is that the submissions are significantly different from the material already considered. The second is that they have "a realistic prospect of success" before a putative Immigration Judge. If they have "no realistic prospect of success" the claim will not be a "fresh claim".

64. The principal reason the guidance is unclear and the position is unsatisfactory is that different answers have been given to the question whether there is a difference between the test for certifying as "clearly unfounded" and the approach under Rule 353. *ZT (Kosovo)* was concerned with further submissions made after the applicant's claim had been certified under section 94 of the 2002 Act. In that case, after considering those representations, the Secretary of State decided to maintain the decision to certify, applying the "clearly unfounded" test under section 94. It was held that the applicable provision was not section 94(2) but Rule 353. However, although the Secretary of State had erred in applying section 94, as the "clearly unfounded" test under section 94 is more generous than the "no realistic prospect of success" test under Rule 353, the error made no difference to the decision. If the section 94 test is more generous to an applicant than the Rule 353 test, it should follow that there is a practical difference between the tests.

65. A different view was taken in *R (YH) v SSHD* [2010] EWCA Civ 116 by the Court of Appeal. The court, however, was concerned with the section 94 "clearly unfounded" test. Carnwath LJ, with whom the other members of the court agreed, concluded (at [18] and [21]) that, in the light of, in particular, *ZT (Kosovo)*, "on the threshold question, the court is entitled to exercise its own judgment", but that the process remains one of judicial review "not a *de novo* hearing, and the issue must be judged on the material available to the Secretary of State". This conclusion appears to have been based on the proposition that there is no practical difference between the judicial review test for section 94 "clearly unfounded" cases, and that for Rule 353's "realistic of prospect of success" test.

66. The position taken in *YH*'s case differed sharply from that taken by Laws LJ in *TK (Sri Lanka) v SSHD* [2009] EWCA Civ 1550, albeit in the context of Rule 353. One reason was that, as explained in *MN (Tanzania)*, the timing of the cases meant that *TK (Sri Lanka)* was not cited or considered by the constitutions of the Court hearing *YH*'s case and *KH (Afghanistan).*

67. In any event, whatever the reason, in *MN (Tanzania)* the Court held that it was not open to the court in *YH*'s case to treat the tests as being the same. That was because of the emphatic statement by Laws LJ in *TK (Sri Lanka)* that the opinions in *ZT (Kosovo)* did not provide authority for the proposition that the "no realistic prospect of success" test in Rule 353 is one that admits of only one answer. Laws LJ stated that the decision in *WM (Congo) v SSHD* [2006] EWCA Civ 1495, holding that the test for reviewing the decision of the Secretary of State as to whether a claim was fresh for the purposes of Rule 353 was the *Wednesbury* test applied with "anxious scrutiny".

68. The conclusion in *MN (Tanzania)* is therefore that, on the present state of the authorities, there is a difference between the approach to "fresh claim" Rule 353 cases and cases of "clearly unfounded" asylum or human rights claims. Maurice Kay LJ considered: (i) the two classes of case had been set on different tracks (see [6]); (ii) the difference between them is not illogical because in Rule 353 cases the individual has already had full access to the immigration appellate system (see [16]); but (iii) an assimilation of the tests would be justifiable but is not possible on the present state of the authorities (see [16]).

69. It is unsatisfactory for the law to be in this state. There are powerful statements by judges in the House of Lords and the Supreme Court favouring the court having a primary power to decide, both in section 94 cases and in Rule 353 cases, but a power so to decide only on the material that was available to the Secretary of State. They also consider the tests to be the same. However, the most recent Court of Appeal authority which binds this court has held that the scope of review is broader or more intrusive in the section 94 "clearly unfounded" cases than in the Rule 353 "no realistic prospect of success" cases.

70. Fortunately, the difficulty produced does not affect this case because it is clear that this is a "clearly unfounded" case, albeit one governed by paragraph 5 of Schedule 3 to the 2004 Act rather than section 94 of the 2002 Act. In *MN (Tanzania)*, it was stated (see [2011] EWCA Civ 193 at [14]) that the *ratio* of *YH*'s case is limited to section 94 cases. Carnwath LJ stated that the court is entitled to exercise its own judgment provided that the issue is judged on the material available to the Secretary

of State and in relation to section 94, that was approved in *MN (Tanzania)*. There appears to me to be absolutely no difference between the meaning of and approach to "clearly unfounded" in section 94 cases and its meaning in cases that fall to be governed by paragraph 5 of Schedule 3 to the 2004 Act.

71. The position in the authorities which bind me thus appears to be as follows. In the context of section 94 of the 2002 Act and paragraph 5 of Schedule 3 to the 2004 Act the court is entitled to exercise its own judgment but only on the material available to the Secretary of State. In the context of Rule 353, despite the statements of Lord Phillips and Lord Brown in *ZT (Kosovo)*, the test is *Wednesbury* applied with "anxious scrutiny" but, if Lord Neuberger's judgment is added to the mixture, and if there is no dispute of primary fact, "normally" the test will admit of only one answer.

72. One difficulty with this is that it reduces the difference between review and appeal to vanishing point save in a case the court treats as exceptional. It is well recognised, for example, see *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1131 *per* Laws LJ, that within a judicial review jurisdiction there is a spectrum, a "sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake". But, in the context of the "clearly unfounded" test, the approach of Lord Phillips, Lord Brown, Carnwath LJ and possibly Lord Neuberger appears to go beyond the exercise of supervisory jurisdiction by way of judicial review. This is because, save in respect of questions of jurisdictional fact and questions of law, that jurisdiction generally precludes a substitutionary approach.

73. The justification for a substitutionary approach in this context may be that the question whether a claim is bound to fail at the Tribunal is particularly suitable for determination by a court, involving, as it does, questions of access to an independent adjudicative body. The question can be described as "highly justiciable". Maurice Kay LJ stated in *MN (Tanzania)* (at [16]) that a generous approach to the scope of the judicial review jurisdiction where the decision denies a person access to the immigration appellate system at the outset is understandable. But it is important not to lose sight of the fact that the jurisdiction remains a reviewing jurisdiction, and that the, admittedly labyrinthine, legislative provisions in the 2002 and 2004 Acts give the Secretary of State a certain "gate-keeping" function as to the availability of an appeal by the process of certification. Care must be taken not inappropriately to deprive the Secretary of State of that function.

(ii) Dublin II

74. The next component of the legal background concerns the Dublin II Regulation. I have summarised the purposes of the Regulation in [1] and referred (at [4]) to the cases which considered the circumstances in which it will be unlawful to remove a third-country national to another EU Member State under that Regulation.

75. By Article 3(2) of the Regulation, a Member State ("the second state") may assume responsibility for examining an application for asylum lodged in it even if, under the Regulation, another state ("the first state") is responsible for doing so. Where the second state does not assume responsibility, it is clear from the decisions of the Strasbourg Court, the CJEU, and the Court of Appeal in *EM (Eritrea) v SSHD* that an

applicant who asserts that it is obliged to do so must overcome a very high hurdle to succeed.

76. I first consider the decision of the CJEU in *NS v SSHD* and *ME and others v Refugee Applications Commissioner* [2012] 2 CMLR 9 on 21 December 2011. It is clear from both the opinion of Advocate General Trstenjak and the decision of the Court that the hurdle is high. The Advocate General's opinion stated (AG 123) that serious infringements of the relevant European Union Directives including the Reception Directive by the Member State primarily responsible (the first state) will not suffice to create an obligation on the part of the transferring Member State (the second state) to exercise the right to assume responsibility for examining the asylum claim under Article 3(2). They must "also constitute a violation of the fundamental rights of the asylum seeker to be transferred". This was because of the need for consistency and a clear and workable method for determining the Member State responsible for the examination of an application for asylum. To hold otherwise would (AG 126) create a "far-reaching exception" which "could result not only in the rules on responsibility formulated in Regulation 343/2003 [the Dublin II Regulation] being completely undermined", but "also jeopardise the aim of those rules, which is to determine rapidly the Member States responsible for examining asylum applications lodged in the European Union".

77. The judgment of the CJEU went further. The Court stated (at [82]) that it did not follow "that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Members to comply with the provisions of Regulation 343/2003". What is required (see [86]) are "substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State". In such a case, transfer would be incompatible with that provision of the Charter.

78. The CJEU considered the earlier (January 2011) decision of the Grand Chamber of the Strasbourg Court in *MSS v Belgium and Greece* [2011] ECHR 108. It stated ([89]) that "the extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of transfer of the applicant MSS, a systemic deficiency in the asylum procedure and the reception conditions of asylum seekers". The CJEU referred to "regular and unanimous reports of international non-governmental organisations" bearing witness to this, and stated ([92] and [94]) that these reports and systemic deficiencies must be known to the Member State which has to carry out the transfer.

79. In *MSS v Belgium and Greece*, the Belgian authorities had relied on the Strasbourg Court's earlier decision in Application 32733/08 *KRS v United Kingdom* [2009] 48 EHRR SE, and on MSS's failure to advance any particularised grounds in support of his claim to fear ill-treatment if removed to Greece. They maintained these factors justified their decision to remove him MSS to Greece. The United Kingdom intervened in the proceedings, arguing that a second state would only be obliged to assume responsibility under Article 3(2) of the Regulation "in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have

access to the court in the State responsible [under the Regulation] for dealing with the asylum application": at [331]. This submission was rejected.

80. The Grand Chamber referred to the numerous reports and materials that had been added to the information available at the time of the Strasbourg Court's decision in *KRS*, and to a letter from the UNHCR to the relevant Belgian Minister unequivocally asking for the suspension of transfers to Greece. The court attached critical importance to the UNHCR's request. It stated that, in view of the reports and materials, the general situation in Greece was sufficiently known to the Belgian authorities. Accordingly, the applicant should not be expected to bear the entire burden of proof or the consequences of failing to advance any particularised grounds. As to the test, the Grand Chamber reiterated what had been said in its previous decisions. The test was that applicable where a person challenged removal on Article 3 grounds. It is necessary to show "substantial grounds … for believing that the person concerned faces a real risk of being subjected to torture, or inhuman or degrading treatment or punishment in the receiving country".

81. The third and most recent decision is that of the Court of Appeal in *EM (Eritrea) v SSHD* [2012] EWCA Civ 1336, the "generic" challenge to Dublin II removals to Italy. In that case, as in those before me, the challenge was to certification of the claims. Accordingly, the claimants had to show that the submission that to return them to Italy under the Dublin II Regulation would entail a real risk of inhuman or degrading treatment in violation of Article 3 qualified as (see [59] above) unarguable, "bound to fail", or "hopeless". The court also considered whether, in one of the cases (*MA*'s case) it could be tenably argued that the best interests of MA's two children in remaining in the United Kingdom gave her and the children tenable Article 8 grounds for resisting removal to Italy.

82. The judgment of the court, delivered by Sir Stephen Sedley, was that, in the light of the decisions of the Strasbourg Court and the CJEU, the threshold in Dublin II and cognate return cases is uniquely high. It (see [61]) "requires the claimant to establish that there are in the country of first arrival systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers…[which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhumane or degrading treatment…". The court stated that the sole ground on which the second state is required to exercise its power under Article 3(2) of the Regulation and entertain a reapplication for asylum or humanitarian protection is that the source of risk to the applicant is a "systemic deficiency" known to the second state in the first state's asylum or reception procedures. It decided (see [62]) that "short of this, even powerful evidence of individual risk is of no avail".

83. Although the court stated (see [63]) that the totality of evidence about Italy was "extremely troubling and far from uncritical", that evidence it did not come up to the required mark. The court considered that, while there were a number of implicit and explicit suggestions of systemic failure, the evidence was neither unanimous nor compellingly directed at such a conclusion. It also considered that greater weight had to be given to a more recent UNHCR report than to earlier evidence. Despite many shortcomings and casualties in Italy's system for the reception of asylum seekers and refugees, the court concluded that the system was not "itself dysfunctional or deficient".

84. As far as the Article 8 claim based on the best interests of MA's children, the court considered that there was no real possibility of it being upheld on an in-country appeal to an immigration judge. It stated that an Article 8 submission based on the position of the children had to face "the formidable fact … that the children's position in this country, albeit through no fault of theirs, is both fortuitous and highly precarious, with no element whatever of entitlement". It considered (see [71]) that, once it was required to deem conditions for refugees in Italy to be compliant with Italy's international obligations, the case against removal of MA with her son was "too exiguous to stand up in any legal forum when set against the history of her entry and stay here, and the legal and policy imperatives for returning her to Italy".

(iii) Analysis

85. I have stated that Hungary is one of the "safe" states referred to in [55] above. The question is whether, on the evidence before her, the Secretary of State was entitled to conclude that the claimants' case that the high hurdle that is required for the UK to be obliged to assume responsibility under Article 3(2) of the Dublin II Regulation was "bound to fail".

86. The totality of the evidence about Hungary is troubling. There are serious deficiencies in both reception conditions and the process of integrating refugees and those with subsidiary protection into Hungarian society. I have stated that, in the light *inter alia* of the HHC reports, it is not now contended that, if Mrs Toufighy is removed to Hungary and Mr Duran is returned to Hungary, their treatment would breach the requirements of the Reception Directive, Council Directive 2003/9/EC. It is also no longer contended that Mrs Toufighy and her children risk exposure to conditions that meet the high minimum threshold required to constitute a breach of Article 3 of the ECHR. Her case is now exclusively based on Article 8 and the best interests of her children.

87. In Mr Duran's case the evidence comes nowhere near establishing that, if he is returned to Hungary, he will risk the sort of systemic exposure to humiliating, degrading or inhuman conditions that meet the minimum threshold to constitute a breach of Article 3. Mr Turner accepted that it was likely he would be accepted as a refugee, and placed at Bicske. I have set out the shortcomings in the processes and facilities offered. However, for those who remain at the Bicske centre, there is language teaching, albeit of a limited sort, and there is also some assistance with training opportunities, although these are also limited. Mr Turner focussed his submissions on Mr Duran's likely position after his placement at Bicske ends. He submitted that the objective evidence shows that Mr Duran risks destitution and conditions constituting a breach of Article 3 because of the deficiencies in Hungary's system for integrating refugees, or at least that, in the context of a challenge to certification, it cannot be said that the case is "unarguable" or "hopeless".

88. Despite the shortcomings I have identified, I reject Mr Turner's submission about the evidence as to the individual risk to Mr Duran. The evidence does not show he will be at risk of homelessness and destitution after his placement there at Bicske ends. As far as the risk of homelessness is concerned, refugees and the beneficiaries of subsidiary protection have the same rights and obligations as Hungarian nationals to social

security benefits. They, moreover, have an entitlement to a monthly housing allowance and an establishment grant. After leaving, refugees and those accorded subsidiary protection are also entitled to a further 520 hours of language tuition which, as I have stated, is about 10 hours a week for a year.

89. It does appear that there is a particular incidence of homelessness on the part of Somali refugees. The objective evidence, however, is (see [39] – [40] and [48]) that the risk of homelessness lies on those who, after being granted asylum in Hungary, choose to relocate to another country and then return or are forcibly returned to Hungary. Unless Mr Duran puts himself in that position, he will not expose himself to that risk.

90. Both the claimants face an additional hurdle. This is that, as a result of the decisions of the Grand Chamber of the Strasbourg Court, the CJEU, and the Court of Appeal in *EM (Eritrea)*, even if they can show they face a real risk of inhuman or degrading treatment if returned to Hungary, so that their claims would, in Sir Stephen Sedley's words, "plainly be arguable and unable to be certified" ([2012] EWCA Civ 1336 at [61]), what is now required is that it is established that, in the country of first arrival, the "first state", here Hungary, there are "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers", which are known to the second state, here the United Kingdom. The Court of Appeal accepted that "short of this, even powerful evidence of individual risk is of no avail", and also recognised (see [71]) knock-on effects in the context of claims based on Article 8.

91. Despite the shortcomings and the troubling aspects of some of the evidence about the position in Hungary, it does not show systemic deficiencies. It records active co-operation in monitoring standards (see [33]), there are some positive findings in the more recent reports and assessments (see [33]), and it is stated that the legal structures are generally adequate despite failings in individual cases (see [40] – [41]) The particular problems faced by Somalis appear from the evidence to have resulted in many of the cases because they have not availed themselves of the facilities available when they are accorded refugee status. For these reasons, what I have referred to as the "generic" aspects of Mr Duran's challenge to Dublin II returns of Somali nationals to Hungary must fail.

92. What of the claims that the removal of Mr Duran and Mrs Toufighy and her children would give rise to breaches of Article 8? I first consider Mr Duran's claim. While the submission that removing him with a consequent effect on his relationship with his adult sister, who has been supporting him in this country, was not formally abandoned, neither Mr Duran's statement nor that of his sister provide evidence of the "further elements of dependency involving more than the normal emotional ties" which are required if an Article 8 claim by an adult is to get off the ground: see *Kuthagas v SSHD* [2003] EWCA Civ 31 at [14] and *Etti-Adegbola v SSHD* [2009] EWCA Civ 1319 at [22]. Mr Turner's submissions focused on the fact that, in Hungary, Somali refugees are excluded from family reunion.

93. There are several difficulties with this. First, no evidence was put before the court that Mr Duran is only capable of forming family life with another Somali national who is currently unable to enter Hungary. There was not, in fact, any evidence that he was in any relationship whatsoever, for example, with anybody who he has met while in the

United Kingdom. This aspect of the claim is highly speculative. Even if, as at the hearing I indicated I was prepared to do, I assumed that evidence of Mr Duran's likely cultural preference for a Somali partner would be available before an immigration judge, this aspect of the claim remains speculative. Mr Turner's submissions were directed to the position after Mr Duran had acquired refugee status. Once that has occurred, he will be able to obtain refugee travel documents enabling him to move within other Dublin II Regulation states, a number of which have a Somali community. Moreover, even if Mr Hall's submission that, for the purposes of Article 8, an individual must present a case in which there is a "real risk" of a complete denial or nullification of the right to family life, puts the matter too high, in view, for example, of the statement of Lord Carswell in *EM (Lebanon) v SSHD* [2009] 1 AC 1198 at [53], it is clear from that and other cases that what must be shown is a "very strong case", "a flagrant denial", violation or destruction of "the very essence" of the right to respect for family life: see *EM (Lebanon)* at [3], [41], and [46] *per* Lord Hope, Lord Bingham and Baroness Hale.

94. Mr Duran's case also relied on Article 14 because refugees with other nationalities were not excluded from family reunion. It was submitted that removing him to Hungary therefore placed him at risk of discriminatory treatment on the basis of nationality. I accept Mr Hall's submission that, in the circumstances of Mr Duran's case, Article 14 adds nothing to his claim.

95. I turn to the submission that the removal of Mrs Toufighy and her family would give rise to a breach of Article 8 because it is plain from both the objective evidence and Dr Halari's report that the children's best interests are to remain in the United Kingdom. It was not contended that the position of the children was addressed in the original decisions in May 2010 declining to consider Mrs Toufighy's application for asylum and setting removal directions. Mr Hall relied on the response after these proceedings were lodged to Mrs Toufighy's June 2011 amended grounds and her 31 August further representations in the Secretary of State's letter dated 2 November 2011.

96. The letter dated 2 November stated that the position of Mrs Toufighy and her children had been considered in the light of section 55, the decision in *ZH (Tanzania)*, the reports submitted on her behalf, and the submissions in the amended grounds and the further representations. It also stated that, consistently with that:

> "The [Secretary of State] has first considered the impact of removal to Hungary of the children as a primary consideration, before going on to assess the cumulative weight to be attached to *other primary or important considerations* (such as maintaining immigration control and complying with international obligations)".

The letter then set out further information the Secretary of State had obtained about conditions in Debrecan, the relevant reception centre, and the particular position of Mrs Toufighy's children.

97. The letter also set out what the yearly AGDM Participatory Assessments stated about *inter alia* conditions in reception centres and the education of asylum seekers and

refugees in Hungary. It stated that the Secretary of State had concluded that removal of Mrs Toufighy and her children would not breach section 55 because the children would remain with their parents, disruption to their education would be temporary and minimal, and adequate educational provision would be available to them in Hungary.

98. Mr Turner relied on the test set out by Baroness Hale in *ZH (Tanzania)* [2011] UKSC 4 at [29] and [33], i.e. asking "whether it is reasonable to expect the child to live in another country" and treating the best interests of the child as "a primary consideration" in making the proportionality assessment under Article 8 although those can be outweighed by the cumulative effect of other considerations. The factors Baroness Hale stated have to be considered included the level of the child's integration into this country, the arrangements for living and for looking after the child in the other country, and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

99. Mr Turner submitted that the letter dated 2 November 2011 did not properly consider or evaluate the best interests of Mrs Toufighy's children, because it cannot be in their best interests to be removed to Hungary, where they will likely not continue to receive the education that they presently receive, and where they will, at best, be living in Debrecen, the conditions of which I described earlier in this judgment. Whatever the failings on the part of the defendant at the time of the original decisions and before this point was first raised, the letter dated 2 November addresses the position of the children and does so explicitly in terms of section 55 of the 2009 Act, although what is important in this context is (see *AJ (India) v SSHD* [2011] EWCA Civ 1191 at [18] – [24]) substance and not form.

100. Mr Turner maintained that the later decision was flawed because the Secretary of State did not obtain the views of Mrs Toufighy's children about removal from the United Kingdom. He relied, in particular, on the decision in *R (Tinizaray) v SSHD* [2011] EWHC 1520 (Admin) at [19(5)] where, in the light of Baroness Hale's judgment in *ZH (Tanzania)* and section 55 of the Borders, Citizenship and Immigration Act 2009, HHJ Anthony Thornton QC stated that the views of a child who is capable of forming his own views "must be heard". In this case the defendant did not seek out the views of the children, who are aged 15 and 12, and Dr Halari's report post-dated the letter dated 2 November 2011 by some ten months. The Deputy Judge's statement goes further than the more nuanced and subtle treatment of how the defendant is to discover the child's own views in paragraphs [34] – [37] of Baroness Hale's judgment in *ZH (Tanzania)*. But, in any event, the views of the children, as stated in Dr Halari's report, are before me, and I am able to take them into account in determining whether, in the light of all the circumstances, an Article 8 claim based on their best interests is "clearly unfounded".

101. Notwithstanding the extensive submissions made, in the light of the decision of the Court of Appeal in *EM (Eritrea) v SSHD* it is possible to take this aspect of the case relatively shortly. In the context of a challenge to certification, the question for me is whether the Article 8 claim by Mrs Toufighy and her children is "clearly unfounded" and "bound to fail". In considering whether it is arguable that removal of these children with their mother will disrupt their family life and is disproportionate, it is important that the aim is to remove the family as a unit, i.e. including the father, and that it is not contended that they will not be so removed.

102. Mr Turner relied on the difference in living conditions and educational opportunities in this country and those that the children would face in Hungary. He recognised that the fact that educational standards in Hungary are lower would not make removal a disproportionate interference with the children's Article 8 rights, but submitted that their cases cannot be characterised as simply turning on different educational standards. He argued that in assessing whether the human rights claim was "clearly unfounded" the different educational standards had to be considered together with the hygiene, medical and sanitary conditions in Debrecen, the evidence of exposure to fighting between different ethnic groups, and the psychological impact on the children of what happened (see [54]) when the police in this country detained them and their parents. However, borrowing Sir Stephen Sedley's words in *EM (Eritrea)*'s case at [70], Mr Turner has still to face the formidable fact that the children's position in this country, albeit through no fault of theirs, is both fortuitous and highly precarious, with no element whatever of entitlement. They have only been at their present schools since September 2011.

103. Mr Turner invited me to apply the principles stated in *ZH (Tanzania)* and in *R (Tinizaray) v SSHD* [2011] EWHC 1520 (Admin) but to disregard the facts of those cases. He thus in effect invited me to determine whether the Article 8 claim by Mrs Toufighy and her children is "clearly unfounded" and "bound to fail" without any comparison of the facts of her case and the facts in those cases. This, however, does not take into account, for instance, that the factors Baroness Hale stated must be considered in one of the passages relied are all highly fact-specific. Seeking to apply the principles formulated by her or by HHJ Judge Anthony Thornton QC without regard to the facts they were considering is to consider those principles shorn of their context.

104. The court, of course, strives to identify the principle stated in a previous authority, but in a common law system the application and development of legal principle depends on the judge exercising a professional reaction to individual fact situations: for a powerful and classic statement of the process see Lord Goff of Chieveley's Maccabean Lecture, *In Search of Principle* (1983) 69 Proc Brit Acad 169. The removal of the claimant in *ZH (Tanzania)* and her 12 and 9 year old children, would have removed them from the state in which they had always lived, of which they were both citizens, and in which their father, with whom they had had a good relationship, would remain. In *Tinizaray*'s case the child, aged 9 at the time of hearing, was born in the United Kingdom and had lived here for the entirety of her life. Thos are very different contexts from that in Mrs Toufighy's case. Although her children are now settled in school, she and the children have been in the United Kingdom for less than three years. They are here only because, again borrowing Sir Stephen Sedley's words in *EM (Eritrea)*'s case at [71], their mother has been able to resist removal for that period.

105. To conclude, and this time adapting the words of Sir Stephen Sedley in *EM (Eritrea)*'s case at [71], once conditions for refugees in Hungary are found to be compliant with that state's international obligations, since the removal of Mrs Toufighy and her children is pursuant to the Dublin II Regulation, the case against their removal is "too exiguous" to stand up in any legal forum when set out against

the history of her entry and stay here and the legal and policy imperatives for removing her to Hungary.

Conclusion

106. For the reasons I have given at [95] – [105], in Mrs Toufighy's case, where her application has been considered on a "rolled up" basis, I have concluded that the Secretary of State was entitled to certify the human rights claim based on the best interests of the children. Notwithstanding the length of this judgment, I have therefore concluded that the claim was "clearly unfounded" and bound to fail. In those circumstances, it follows that permission should be refused, and I do so.

107. In Mr Duran' case, for the reasons I have given at [87] – [91], his "generic" Article 3 challenge fails, and for the reasons I have given at [92] – [94] his Article 8 challenge also fails. His application is dismissed.