Neutral Citation Number: [2009] EWHC 2957 (Admin)

Case No: CO/4734/09

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2009

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

The Queen on the application of EW	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mark Symes (instructed by Sheona York, Principal Leagl Officer, Immigration Advisory Service) for the Claimant
Mark O'Connor (instructed by Duncan Lewis & Co for **BM**
Declan O'Callaghan (instructed by Duncan Lewis & Co) for **YM**
Lisa Giovannetti (instructed by the Treasury Solicitor) for the **Defendant**

Hearing dates: 28-29 September 2009

- -

Judgment

Mr Justice Hickinbottom:

Introduction

1. The claimant, EW, is an Eritrean national, who arrived in the United Kingdom on 23 February 2009, when he was arrested by the police having been seen exiting the back of a lorry on the M3 motorway. He claimed asylum, and said that he had come from Eritrea via France. He was detained, and his fingerprints taken and sent for comparison against the Eurodac European fingerprint database. That disclosed that he had been fingerprinted in Italy on 22 September 2008 following his irregular entry into that country.

2. On 1 April 2009, a formal request was made by the United Kingdom to Italy inviting the authorities there to accept responsibility for the claimant's application for asylum under the terms of the Dublin II Regulation. Italy did not respond and so, under the terms of that Regulation, on 5 May Italy was deemed to have accepted responsibility for the claimant's application for asylum by default. That day, the claimant's United Kingdom application for asylum was consequently refused, and certified on safe third country grounds.

3. The claimant made representations to the Secretary of State that he should exercise his discretion and allow the claimant to remain in the United Kingdom due to his family ties with the country, namely that he had a brother who had been granted refugee status living here. On 7 May, that was refused, and removal directions were set for 19 May 2009.

4. On 12 May, the claimant by his legal representatives (Immigration Advisory Service, "IAS") made further representations to the Secretary of State to the effect that to remove him to Italy would be in breach of his rights under article 3 of the European Convention on Human Rights ("ECHR") in that the conditions in Italy for asylum seekers were such that they amounted to inhuman and degrading treatment contrary to article 3. An application for judicial review was made on 15 May, most urgently to quash the removal directions. In the face of the judicial review, the removal directions were withdrawn. Further correspondence ensued, and the Secretary of State formally responded to all of the claimant's representations in comprehensive form on 27 August 2009, rejecting his claims under article 8 (which was then still being pursued) and article 3, and certifying the human rights claims as clearly unfounded. It is that decision which the claimant now in substance seeks to challenge.

5. He does so now on two grounds, as follows.

   (i) His return to Italy would place the United Kingdom in breach of its obligations under article 3 because, as an asylum seeker, he would face "a real risk of destitution and humiliation" there (Amended Grounds and Skeleton Argument 8 September 2009, paragraph 71). The claimant does not pursue the article 3 ground on the basis of his possible refoulement from Italy to Eritrea.

   (ii) In any event, the Secretary of State ought to have considered exercising his discretion to accept responsibility for dealing with EW's asylum claim, because of "patent failures of the Italian authorities" to respect their obligations under article 3 and various European Union Directives as they relate to asylum seekers.

6. At a hearing for directions on 31 July 2009, I ordered that EW's claim be heard with the claims of two others, BM and YM. They too had sought asylum, and were both believed to have had asylum applications pending in Italy when they arrived in the United Kingdom and claimed asylum here. However, upon further investigation, it appeared that BM had been granted a permit to stay in Italy and YM had been granted status in Italy as a recognised refugee. Therefore, in Italy, they each had a different status from EW. As the consequences of their particular status in Italy were still being investigated, those cases were adjourned pending the outcome of EW's claim. However, without prejudice to their being able to present their cases

fully in due course, I gave their representatives permission to intervene in the hearing of EW's application to make submissions on issues which are common with their claims: which they did, and for which I am grateful.

7. This claim was, by my order of 31 July 2009, listed as a rolled-up hearing. I formally grant permission to proceed.

The Law

8. It is an objective of the European Union to establish a Common European Asylum System, with a common procedure and uniform status for those granted refugee status valid throughout the Union and fully compliant with the Geneva Convention relating to the Status of Refugees of 28 July 1951, to achieve "an orderly system for dealing with asylum cases in the European Union" (R (Yogathas) v Secretary of State for the Home Department [2002] UKHL 36 ("Yogathas") at [35] per Lord Bingham). As an early stimulus for the furtherance of that objective, member states worked towards the development of a scheme for ensuring that any application for asylum is dealt with by one member state, and for identifying that state, to avoid multiple claims in different member states.

9. The Dublin Convention of 15 June 1990 (superseded in 2003 by Council Regulation (EC) No 343/2003, "the Dublin II Regulation") established criteria and mechanisms for determining that single responsible state. It is a key provision that the first member state which an asylum seeker enters is responsible for consideration of his application. Article 10 of the Regulation provides that, where an asylum seeker has irregularly crossed the border into a member state from a third (i.e. non-Regulation) country, the member state thus entered "shall be responsible for examining the application for asylum". Chapter V of the Regulation provides that if he moves on to another member state, he may be sent back by the second or any subsequent member state without substantive consideration of his application: although, by article 3(2), any such member state may substantively examine the application and, if it does so, it (and not the first member state) becomes responsible for the application. The Eurodac fingerprinting system assists authorities in detecting multiple applications.

10. In addition to the Dublin II Regulation, several European Directives have been issued with a view to ensuring greater uniformity in relation to asylum seekers, setting minimum standards. Three are of particular importance.

11. Council Directive 2004/83/EC ("the Qualification Directive") sets minimum standards for the qualification and status of applicants.

12. Council Directive 2003/9/EC ("the Reception Directive") concerns the reception of asylum seekers. Member states have to make provision to ensure "a standard of living adequate for the health of applicants and capable of ensuring their subsistence" (article 13(2)). They are required to inform asylum seekers of established benefits to which they are entitled, and of organisations that provide specific assistance and organisations that may be able to help or inform them concerning reception conditions, including healthcare (article 5(1)). That information has to be provided in writing, and in a language that an applicant is reasonably supposed to understand (article 5(2)). Although there are exceptions,

generally asylum seekers have a right to move freely within the relevant member state (article 7(1)). In relation to employment, it is for each member state to determine a period of time, beginning with the date of the application for asylum, in which an asylum seeker will not have access to the labour market which cannot in practice exceed one year (article 11(1) and (2)). In relation to the labour market, member states can give priority to European Union citizens and legally resident third-country nationals (article 11(4)).

13. Council Directive 2005/85/EC ("the Procedures Directive") sets minimum standards for procedures for granting and withdrawing refugee status. These include a requirement that anyone who has a claim for asylum has the right to apply for refugee status (article 6(2)): a right to remain in the member state whilst the application is running its course (article 7): a guarantee that the applicant is informed of the procedure and his rights and obligations under it in a language he is reasonable supposed to understand (article 10(1)(a)), and a right to an interpreter (article 10(1)(b)): and a right to an effective remedy before a court or tribunal (article 39).

14. However, like the Dublin II Regulation, the Directives do not stand alone. They seek "fully and inclusively" to apply the Geneva Convention, described in the Directives' Recitals as "the cornerstone of the international regime for the protection of refugees". In their respective Recitals, they also make clear that they "seek to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members", observing the principles recognised in particular by the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000. Article 1 of the Charter of Fundamental Rights acknowledges that:

> "Human dignity is inviolable. It must be respected and protected."

15. The Regulation is also subject to the overriding provisions of the ECHR, to which all signatories of the Dublin II Regulation are also signatories. Therefore, notwithstanding the Regulation, member states are obliged to ensure that removal does not expose the applicant to a real risk of torture or inhuman or degrading treatment, contrary to article 3 (see, e.g., TI v United Kingdom [2000] INLR 211, KRS v United Kingdom (Application No 32733/08) (unreported, 2 December 2008) ("KRS") and R (Nasseri) v Secretary of State for the Home Department [2009] UKHL 23 ("Nasseri") at [36]).

16. Many signatories to the Dublin II Regulation have transposed its provisions into domestic legislation. So far as the United Kingdom is concerned, Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") establishes a list of safe countries, which includes Italy. Paragraph 3 provides:

> "(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 citizen.

(2) A state to which this Part applies shall be treated, insofar as relevant to the question mentioned in subparagraph (1), as a place

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,

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

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

17. The "safe countries" are therefore deemed safe in two particular respects, namely they are deemed countries (i) in which an applicant will not suffer persecution or (ii) from which an applicant will not be refouled. In line with that, paragraph 5(3) of that same schedule provides that there is no in-country right of appeal to the Asylum & Immigration Tribunal in reliance on the premise that removal to a safe country would either (i) breach the United Kingdom's obligations under the Refugee Convention or (ii) breach the ECHR because of the risk of removal from that state to another state.

18. There is no similar deeming provision in the 2004 Act that "safe countries" are countries in which an applicant will not suffer any breach of article 3 of the ECHR. However, there is a presumption - a rebuttable presumption - that member states will adhere to their obligations under international treaties, "[including] their obligations under the European Convention to apply article 3…" (Nasseri at [41] per Lord Hoffman: see also, e.g., Yogathas at [35] per Lord Bingham). Where there is a suggestion that someone may suffer treatment contrary to article 3 in a safe country if removed there, as Lord Hutton said in Yogathas (at [61]):

> "The onus rests on the person alleging that his removal from the United Kingdom would constitute a breach of article 3 by the United Kingdom to show substantial grounds for believing that he would face a real risk of being subjected to treatment contrary to article 3…".

19. Where an applicant relies upon a human rights claim other than a claim based upon possible refoulement, there is an in-country right of appeal to the tribunal under section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 *unless* the Secretary of State certifies such claim to be "clearly unfounded": and he is required to certify claims involving removal to a safe country "unless satisfied the claim is not clearly unfounded" (paragraph 5(4) of Schedule 3 to the 2004 Act). It is the Secretary of State's certification under that provision in this case that denied the

applicant am in-country right of appeal to the tribunal, and is consequently challenged in this application for judicial review.

20. The correct approach for the Secretary of State in relation to such certification was summarised by Lord Bingham in Yogathas at [14]:

> "No matter what the volume of material submitted or the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify if, after reviewing the material, he is reasonably and conscientiously satisfied that the allegation must clearly fail."

However, the threshold for a clearly unfounded claim is a high one: the Secretary of State cannot issue a certificate unless the claim is bound to fail before an adjudicator (see, e.g., Yogathas at [34] per Lord Hope, and Secretary of State for the Home Department v R (Razgar) [2003] EWCA Civ 840 at [31]).

21. Mr Mark Symes for the claimant submitted that, whilst there is a presumption that a European state listed as a "safe country" in the 2004 Act will comply with its obligations under article 3, whether it will in fact (or whether alternatively there is a real risk that it will not, such that a returned applicant will be subjected to inhuman or degrading treatment) is a question open to this court to consider on the evidence before it. That is true. As he submitted, it is part of the rule of law that judges are independent in the sense that they are "free to decide on the legal and factual merits of a case as they see it, free from any extraneous influence or pressure" (Lecture by the Rt Hon Lord Bingham of Cornhill, "The Rule of Law", The Centre for Public Law, 16 November 2006, to which I was referred): and, may I add, they must do so fearlessly, no matter how difficult the issue or how eminent or powerful the party in alleged breach may be. In this court, every day important decisions are challenged where the respondent is an arm of government, usually the United Kingdom Government.

22. However, before I turn to the facts, may I offer two notes of caution. First, to an extent this case concerns the support given to those seeking asylum. As Lord Hope pointed out in R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66 ("Limbuela"), a case concerning the withdrawal of support for destitute asylum seekers because of their late application for asylum, at [13]-[14]:

> "The question whether, and if so in what circumstances, support should be given at the expense of the state to asylum seekers is, of course, an intensely political issue…
>
> It is important to stress at the outset, however, that engagement in this political issue forms no part of the judicial function. The function which your Lordships are being asked to perform is confined to that which has been given to the judges by Parliament. It is to construe the [relevant statutory provisions] and apply [them] to the facts of each case…."

23. I shall return to this issue when I deal with the issue of what amounts to "treatment" for the purposes of article 3 (see paragraphs 86 and following below). However, for

the present purposes the important point to note is that there is no general right to accommodation or a minimum standard of living that can be drawn from the ECHR or the Directives, or from elsewhere in the European or our domestic human rights, social or other legislation. The setting of such a minimum standard - no matter how low - is a matter for social legislation, not the courts. Therefore, given that the claimant's case is based upon the premise that there is a risk that, if returned to Italy, "he will be destitute and homeless on the street", a cautious approach is required by this court to ensure that it does not inappropriately encroach into areas reserved to the political decision of the executive government. I am not engaged upon a public enquiry into how the Italian authorities treat those who seek asylum there. The only questions for me to consider are narrow, and discrete: essentially whether the return of the claimant to Italy would put the Secretary of State in breach of article 3 (the claimant's first ground), or whether in any event he ought to have considered exercising his discretion to consider the claimant's application for asylum (the second ground).

24. But in this case that need for caution is compounded by a second factor. This court is not being asked to consider whether the acts of the United Kingdom will directly result in the claimant's destitution *here*: but rather whether the conditions for asylum seekers in Italy are such that, if returned *there*, the claimant risks destitution, with the result that the United Kingdom would be in breach of its article 3 obligations to the claimant by returning him to Italy. There is no question of the claimant being subjected to inhuman or degrading treatment in this country. The focus of this case is not on alleged deficiencies of the United Kingdom so far as support for asylum seekers is concerned, but the alleged deficiencies of the Italian authorities. This case is therefore, in that sense, a step removed. The extent to which one member state of the European Union can be expected to police the asylum policy of another is limited (see KRS: and Nasseri at [41] per Lord Hoffman). Furthermore, the claimant's attack is upon not only the Italian substantive regime for asylum seekers, but includes an attack upon the alleged inability of the claimant to seek adequate redress from the Italian courts and/or the European Court of Human Rights (and/or, I might add, the European Court, in relation to issues arising out of the Council Directives).

25. These are matters which I will consider further in relation to the substantive issues below (see paragraphs 64 and following). Again, for now, I mark them only as something which should make this court especially careful in its approach. Looked at in one way, this application arguably seeks to extend the rights guaranteed by the ECHR. That is not a task for this court, or for any of our domestic courts. Insofar as it is not for the signatory states directly, it is a matter for the court in Strasbourg (see N v Secretary of State for the Home Department [2005] UKHL 31 at [23]-[25] per Lord Hope).

The Basis of the Claim

26. The claimant conceded that the relevant Council Directives had been properly and fully incorporated into Italian domestic law: the Reception Directive 2003/9/EC by *Decreto Legislativo* (Legislative Decree) 140/2005, the Qualification Directive 2004/83/EC by *Decreto Legislativo* 251/2007, and the Procedures Directive 2005/85/EC by *Decreto Legislativo* 25/2008 (Sheona York Statement 23 July 2009, paragraph 13).

27. Further, Mr Symes for the claimant conceded that the Italian system for dealing with asylum seekers and their applications for asylum, as a system, was compliant with the Directives and was unobjectionable. The claim is therefore distinguishable from, say, Limbuela, in which the complaint was in relation to the system, namely that legislation had withdrawn support from late asylum seekers simply on the basis that they were late.

28. Mr Symes submitted that EW's claim was based upon a consistent pattern of failures properly to implement the Italian system, which were such that, if the claimant were returned, despite the system in place, he faced the risk of destitution and homelessness rendering the Italian authorities in breach of article 3, and hence the United Kingdom would be in breach of article 3 in returning him there to face such conditions. The basis of this challenge is helpfully summarised in paragraphs 11 and 12 of the Mr Symes's Amended Grounds and Skeleton Argument, as follows:

> "11. In summary, the claimant's case is that on or shortly after a return to Italy there is a real chance he will be destitute and homeless of the street, given the fact that the available places in reception facilities fall considerably short of the numbers of asylum seekers; unable to work; unable to exercise any meaningful legal challenge to his plight; and that this cumulatively amounts to inhuman or degrading treatment, contrary to article 3 ECHR, which it is the responsibility of the UK authorities to prevent.
>
> 12. In short, this is because on a return to Italy the claimant faces probable return to the *Questura* where he claimed asylum (Caltanisetta), possibly after a stay in… Rome…."

Those failures also effectively found the second ground because, leaving aside any breach of article 3, it is submitted that such destitution would put Italy in breach of their obligations under (e.g.) article 13(2) of the Reception Directive under which a member state has to ensure a standard of living adequate for the health and subsistence of applicants (see paragraph 12 above). That, it is submitted, should have triggered the exercise of discretion in the Secretary of State to consider the claimant's substantive application for asylum here.

29. The alleged shortfalls in the Italian system relied upon by the claimant as contributing to the allegation that, if he is returned to Italy, he will be exposed to a risk of suffering treatment contrary to article 3, can be identified under three broad heads, as follows:

> (i) a failure to facilitate presentation and prosecution of claims for asylum, incorporating a failure to provide adequate information to allow an asylum seeker properly to present and pursue his application:
>
> (ii) a failure to provide accommodation and financial support for asylum seekers, to the extent to which they risk being homeless and destitute whilst their application is pending:

and

(iii) a failure to provide adequate remedies for these defaults, for example through an effective court system.

30. I consider the allegations concerning the substantive system for applications for asylum in Italy (i.e. (i) and (ii)) in paragraphs 64 - 100 below, before dealing with the allegation that there are inadequate remedies for any such failings (i.e. (iii)) in paragraphs 101-113. However, before I consider those allegations, it may be helpful briefly to consider, first, the Italian immigration system (paragraphs 31-46) and, second, the claimant's version of events with regard to his period in Italy before he came to the United Kingdom (paragraphs 47-63).

The Italian Immigration System

31. The vast majority of those entering Italy irregularly do so by sea, and are taken to a *Centro di Primo Soccorso ed Assistenza* (Emergency Assistance Centre, "CPSA") at Lampedusa, an island off Southern Italy. This acts as a short term transit centre.

32. Of those, most (perhaps 75%) seek asylum. If they do not, they are promptly returned to their country of origin. If they do indicate an intention to seek asylum, they are generally kept at Lampedusa for identification. They are then moved to another part of Italy.

33. Having been relocated, they apply for asylum to the Immigration Office of the *Questura* (the Provincial Police Headquarters). The application has to state the reasons for seeking asylum, and provide information and documents necessary in support of the application, and a valid identification document or (if there is none available) personal details and a correspondence address. The applicant is given a copy of the application.

34. The *Questura* send the application to the relevant *Commissione Territoriale per il Rifugiato* ("*Commissione*", the Territorial Commission for the Recognition of Refugee Status) which decides whether to grant refugee status. Notice of the interview before the *Commissione* is given to the applicant at the address he has provided. It is a legal requirement that that interview takes place within 30 days (article 27.2 of *Decreto Legislativo* 25/2008) - but in practice that time limit is not always respected (Dr Christopher Hein Report, paragraph 2.5), although when longer is taken the *Commissione* are bound to inform the applicant (article 27.3). If the applicant does not attend, the *Commissione* is able to decide the application on the papers provided.

35. The *Commissione* makes its decision, and sends it to the applicant, within 3 days of the interview (article 27.2). It can grant refugee status: or ask the *Questura* to issue a residence permit for one year on humanitarian grounds: or refuse the application. If the application is refused, the *Questura* requests the applicant to leave the country within 15 days.

36. During this time when the application for asylum is being made, the applicant may stay at a *Centro di Accoglienza* (Reception Centre, "CDA") for up to 20 days. At that centre, he is entitled to urgent medical treatment and to leave the centre during

the day. If the *Commissione* has not considered the application before he leaves, the applicant is given a *Permesso di Soggiorno* (Residence Permit) for 3 months renewable until the application has been considered. Once granted a *Permesso di Soggiorno*, the applicant is free to leave the centre and in any event can only stay there for 20 days. The permit enables the applicant to register with the *Servizio Sanitario Nazionale* (National Health Service) and receive medical care on an equal footing with Italian nationals. It does not entitle the applicant to work because (as I understand it) it is a requirement of registering with the local *Ufficio Anagrafe* (Register Office) that the applicant holds a residence permit for more than 3 months. Being registered with the *Ufficio Anagrafe* is a requirement to work, and for a number of administrative formalities such as obtaining a driving licence.

37. There are several different types of accommodation in which an asylum seeker may be accommodated, having left a CDA:

> *Centro di Accoglienza per Richiedenti Asilo* (Reception Centres for Asylum Seekers, "CARA"): Temporary initial accommodation: this accommodation hosts asylum seekers for a period of 20-35 days, to enable the processing of their application. Following relocation, this is the main source of accommodation places - but it is strictly time-limited. If this accommodation is not provided, then the state is obliged to provide money for accommodation, but that is limited to the equivalent sum for a maximum of 35 days, i.e. about €1,000 (article 6.7 of *Decreto Legislativo* 140/2005, as explained in paragraph 1 of Maria Romano's email to Sheona York dated 29 July 2009).
>
> SPRAR (System of Protection for Asylum Seekers and Refugees) Projects: SPRAR is a network of local institutional bodies funded to enable them to provide accommodation for refugees and those seeking asylum. These centres are primarily for those who have been granted refugee status, and they are accommodation places at which refugees can stay for 6 months or for up to a year in cases of the particularly vulnerable. However, some places can be and are used for those who are seeking asylum. Evidence from the Italian Ministry of the Interior (Department for Civil Rights and Immigration) suggests that the number of places available in 2009 is 3,000 in total, of which 450 are assigned for the particularly vulnerable.
>
> *Centro di Identificazione ed Espulsione* (Identification and Expulsion Centre, "CIE"): These are used for the detention of immigrants who are subject to expulsion, but also may house some asylum seekers during the course of their applications.

38. The number of central government sponsored accommodation places was the subject of some debate before me. The total number of places in the types of accommodation to which I have referred was in the region of 9,000-9,500. However, (i) some of those places are taken by those with refugee status, rather than by those whose applications are still pending: (ii) the number excludes accommodation places made available by local authorities (such as the City of Rome) and non-governmental bodies: (iii) the Italian Government has committed funds for making additional places available in the light of the continuing rise in the numbers seeking asylum (the Secretary of State's decision letter of 27 August 2009 refers to 5,000 more places being made available): and (iv) these places take no

account of asylum seekers who have some means of support, e.g. from family, friends and communities in Italy - Dr Hein refers to the fact that newly arrived Eritrean asylum seekers in Rome may be hosted in self-managed centres run by the Eritrean community (Report 18 November 2008). On the evidence before me, the number of places actually available for asylum seekers is therefore uncertain.

39. If, after 6 months from making the asylum application it has still not been determined, a residence permit for 6 months is issued. That allows the applicant to register with the *Ufficio Anagrafe* (see paragraph 36 above), and therefore allows access to the employment market.

40. Whilst the application is pending, the applicant is not entitled to work - but is entitled to *Contributo di Prima Assistenza* of €17 per day: and free medical assistance (Gatwick Detainees Welfare Group document on the Italian Asylum System, enclosed with the application for judicial review at page 90 as objective evidence).

41. If the *Commissione* refuse an asylum application, there is a right of appeal to the President of the *Commissione* whose review is to be conducted within 15 days. There is also an ability to appeal to the competent civil court, an appeal having to be made within 30 days.

42. In relation to those returned to Italy under the provisions of the Dublin II Regulation, the Italian legislation and system does not differentiate between them and any other asylum seeker. Unless the applicant has formally abandoned his application, or the *Commissione* has decided that application, the evidence was that all Dublin II returnees are simply admitted or readmitted to the Italian asylum system.

43. However, in practice, they do not enter the country by sea through Lampedusa - but via Rome or Milan Airport, where there are special arrangements to ensure temporary accommodation even before any residence permit is issued or reissued: and where there are services to transport them to the province where they made their Italian application, which remains responsible for it.

44. There was evidence before me from Alfredo Romano, the Director of the Department of Immigration at the *Commune di Roma* (the local authority for Rome) and the Director for the *Centro ENEA* (the ENEA Centre) in Rome. Although the meaning of the acronym was not apparent from the evidence before me, the *Centro ENEA* is a facility provided by the City of Rome for those who have already been granted asylum or at least have been the subject of a "first reception programme", with a view to integrating them better into Italian society by way of intensive courses etc. For those with refugee status, the mean length of stay is about 10 months. However, 80 places are set aside for Dublin II returnees, who arrive back at Rome at the rate of 20-30 per week. They are housed at the centre for about 15 days, whilst their asylum status is checked as is the status of any previous application they have made. They are then usually relocated to the *Questura* where they made any earlier application, to await a decision on that application. For returnees, it is therefore a transit stop, but a useful one because, on the basis of evidence submitted on behalf of the claimant from the centre's website, it appears that it has the facilities to ensure that the returnees are put into or returned to the

Italian system of asylum applications, and they also have access to any information that may be useful to them in relation to their applications and their rights and obligations pending determination of their application. One of the centre's objectives is to facilitate "ways of providing services" and developing partnerships with other public institutions which have responsibilities towards these groups. In particular, they investigate available accommodation within the SPRAR system.

45. Just on the figures available for numbers of places, the length of stay for a returnee and numbers of returns to Rome, it is likely that a Dublin returnee to Rome will be sent to the *Centro ENEA*: but I accept that it is possible that, if for example there is an sudden influx of returnees, a Dublin returnee may be sent straight back to the province where his original application was made without going through the *Centro ENEA*.

46. In relation to Milan, I understand that there are special arrangements for Dublin returnees there too. I had no evidence of details of those arrangements. There was certainly no evidence that they are significantly different from those in Rome.

The Claimant's Experience in Italy

47. EW was born in 1974, in Adikeih, Eritrea. His brother left the country and successfully claimed asylum in the United Kingdom. His father was imprisoned for not paying a fine that was imposed because the brother had left the country without authority: but his father has been released and now lives in the Sudan. The claimant has other brothers who live in Switzerland and Saudi Arabia: and sisters who live in Italy and Saudi Arabia. He also has one sister who still lives in Eritrea, as does his mother.

48. The claimant trained in Eritrea as a nurse. He left the country in June 2008 because he claims to have faced persecution because of his religious beliefs - he is a Pentecostal Christian - and the Eritrean Government wished him to gather information on a Jihadist movement that was operating where he worked. The risk of persecution for his religious beliefs was the most causally potent.

49. He said fear of imminent arrest because of his religious activities triggered his departure from Eritrea. He travelled through Sudan to Libya, where he stayed from 28 June until early September 2008. He then paid an agent $12,000 for passage across the Mediterranean in an inflatable boat with another 80 people. After 3 days at sea, the boat sprang a leak - and he and his fellow travellers were rescued by an Italian boat and taken to Lampedusa. He arrived in Italy on about 9 September 2008.

50. At the centre to which he was taken, there was a Tigrean interpreter. Through him, he was asked his name, his nationality and whether he wished to claim asylum. The claimant said no further questions were asked, but his fingerprints were taken. He stayed at Lampedusa for about 2 weeks, during which time he shared a mattress on the floor outside - and had two meals per day.

51. He was then transferred to a CDA at Caltanisetta, Sicily. Conditions were better, but, although again there seems to have been an appropriate interpreter, the claimant was confused as to what was happening. He had a bed to himself, and three meals

per day. After a couple of weeks there, he was given what he referred to as "an appointment card" and he said he was asked to return in 3 months. That document is no longer available: but in their letter of 12 May 2009 (referred to in paragraph 4 above), the claimant's legal representatives IAS assumed that this was in fact a *Permesso di Soggiorno*. The claimant had to leave, he was told, "for new arrivals". Although the evidence is that he was entitled to some form of subsistence allowance (see paragraph 40 above), he said that he was given no money or form of support: he said he was "more or less booted out of the camp as they did not provide [him] with alternative accommodation" (Claimant Statement 13 May 2009, paragraph 14).

52. He slept under a bridge for 4-5 days, and then went to live with his sister and her husband in Milan. After 2 weeks, his brother in law asked him to leave without giving him reasons. He slept rough under a tree for a further 5 days, and then decided to come to the United Kingdom.

53. He travelled to Paris by train. He did not apply for asylum there, because he thought that the French system was similar to that in Italy: and he wished to be where his brother was in the United Kingdom. He had two encounters with the French police. On the first, they detained him for 3 hours before giving him a piece of paper requiring him to leave France. On the second occasion, he showed the police that request to leave, and they released him.

54. After two unsuccessful attempts, he made it to the United Kingdom in the back of a lorry on 23 February 2009. He was apprehended, as I have indicated, exiting the back of the lorry on the M3. He remains in immigration detention.

55. That was the claimant's version of events. Of returning to Italy, he said (Statement 13 May 2009 paragraph 17):

> "I also do not want to return to Italy because I would have nowhere to stay and it is uncertain whether the Italian authorities would process my asylum application. I did not have a good experience during my last stay in Italy: for many days I had nowhere to sleep and I had to sleep rough. I have a brother in the UK and I would like to claim asylum here.

56. He maintains (IAS letter dated 12 May 2009) that:

> "…no procedures whatever were undertaken in respect of his asylum application, despite his being handed to the Italian authorities by an NGO from a boat. He was fingerprinted and detained (in poor conditions) then moved to another detention centre and issued with what is presumed to be a 3 months temporary admission paper, but not interviewed about his claim, nor provided with any information about the procedures his claim would follow, nor any assistance whatever….
>
> [He] claims that he was effectively not admitted to the asylum process in Italy, and in fact was effectively deterred from entering the process, despite having been assisted by an NGO to land in Italy and handed to the authorities, and being

> provided with a temporary paper lasting 3 months. Beyond the few weeks in detention (in poor conditions) he was offered nothing. He was denied accommodation and support, and, after spending a short time at his sister's home in Milan, was forced to support himself by begging. He was given no advice or medical assistance... at all."

57. Precisely what happened to the claimant in Italy is not easy to determine. He has not always been frank. In his United Kingdom screening interview (which he signed to mark that he understood that he must answer the screening interview questions fully and truthfully), he did not mention having travelled through Italy at all - but rather that he went from Port Sudan to an unknown port in France, in a ship full of cars, before getting a train to Calais. He did say that he had been fingerprinted in France, of course another safe country under the 2004 Act. On arrival in the United Kingdom, he had damaged fingerprints that made identification and tracking through Eurodac difficult. He said in that interview that he had not applied for asylum in France, because: "Not able to as being directed by other man" - by whom I understand he meant the agent who had arranged his transport.

58. His account is at best unconvincing, and confused. In the documents he is recorded as having entered Italy on 9 September 2008: after fingerprinting, he was transferred to the CDA at Caltanisetta on 22 September: and he left Caltanisetta on 29 September 2008 before a decision had been made on his asylum application. In his Italian papers, the claimant is marked as at 29 September 2008: "Subject absconded from reception centre before asylum decision". On that basis, he was only in Caltanisetta for a week, before absconding. He said that he was there for about 2 weeks and then, far from absconding, he was thrown out. In any event, on either version of events (i.e. his own, and that suggested by the documents), he stayed less than the 20 days that is the maximum stay in a CDA: and, on his version of events, he was not provided with accommodation in a CARA nor was he provided with money in lieu.

59. More importantly, as I have indicated, his own representatives assumed, as I do, that the 3 month "appointment card" to which he referred was a reference to a *Permesso di Soggiorno*. Indeed, the claimant now accepts that it was a *Permesso di Soggiorno* (Amended Ground and Skeleton Argument, paragraphs 1 and 3). Under the Italian system, such a residence permit is only given after an applicant has been identified and has made an application for asylum. As the claimant points out in his own evidence, the Italian authorities are not slow to return those who irregularly land on their shores and who make no claim for asylum. Until the grant of that permit he would also have had to stay at the CDA. On the evidence before me, it is inconceivable that the claimant would have been given a *Permesso di Soggiorno*, with the privileges that are attached to it, without his having made an application for asylum - indeed, the claimant himself accepts that that is the case: "The very fact that he was not returned confirms that he claimed asylum" (Amended Grounds and Skeleton Argument, paragraph 89). Therefore, I do not accept the claimant's assertion that he was not admitted to the Italian asylum system, or that he was deterred from entering it. I am satisfied that he applied for asylum in Italy by the time he had left the Caltenisetta CDA, i.e. he did so within a short time of arrival and identification. There is no evidence that he was deterred from making an

application, or that that application was not passed on promptly to the *Commissione* for consideration. The claims in the letter before action of 12 May 2009 to the contrary are unfounded. On the other hand, it is not only conceivable but likely - and I accept - that he had not been called to an interview by the *Commissione* by the time he left the CDA, which was within a week or two of him having made his application.

60. The entry in the documents for 29 September 2008 - "Subject absconded from reception centre before asylum decision" - suggests three things. First, it suggests that he did leave Caltanisetta on that date. Second, it suggests that, although he had made an application for asylum, it had not by that time been determined by the *Commissione*. I accept that it had not: and indeed I accept that he had not been asked to attend an interview with the *Commissione* before he left the CDA. Third, it suggests that he may not in fact have been required to leave the CDA, but rather he absconded. That also may fit in with the dates, because to leave on 29 September would mean that he had been there only 7 days, rather than the maximum of 20 days: and there is no evidence that he was offered any accommodation in a CARA or money in lieu.

61. Therefore, the evidence as to what happened when (and the circumstances in which) he left Caltanisetta is far from clear. However, pending determination of his asylum application, I am satisfied that, as he accepts, he was granted a *Permesso di Soggiorno* for 3 months. Once granted that, he would have been entitled to leave the CDA. For the purposes of this application, in his favour, I accept that he did not abscond but was rather asked to leave: and he was told that, if his application had not been dealt with by the *Commissione* within than time, he would have to return to the local *Questura* to renew it. In the meantime, he would be unable to work because the permit was for less than 6 months (see paragraph 39 above).

62. The claimant says that, having left Caltanisetta, he slept rough for 4-5 days, before spending 2 weeks at his sister's house in Milan. He was then asked to leave there. He spent a further 5 nights living rough, before determining to travel to the United Kingdom. I accept that evidence. He claims that, on leaving Caltanisetta, he was given no information about his rights, or available accommodation or any financial support to which he was either entitled or upon which he may have been able to drawn. I do not necessarily accept that: and return to the question of provision of information below (paragraphs 74-75).

63. With that background, I now turn to the shortfalls in the Italian system relied upon by the claimant to found his claim that there is a real risk of him suffering living conditions in Italy that are inhuman and degrading if he is returned there: and consequently the claim that the Secretary of State would himself be in breach of article 3 by returning him to Italy.

The Alleged Substantive Failures of the Italian System for Applications for Asylum

64. I will deal first with the claimant's contention that the Italian system for dealing with applications for asylum is deficient in two broad respects namely (i) the system fails to facilitate presentation and pursuit of asylum claims (including the contention that the information provided is inadequate): and (ii) if the claimant is returned to Italy there is a risk that, pending determination of his asylum application, he will be

left homeless and destitute such as to amount to inhuman and degrading treatment within the meaning of article 3.

65. In respect of these issues, a large amount of evidence and submissions was lodged, mainly on behalf of the claimant. It will be helpful if, at the outset, the decks are cleared to an extent.

66. First, it was submitted on behalf of the claimant that the Italian state authorities are simply xenophobic. For example, in paragraph 95 of the Amended Grounds and Skeleton Argument, it is said: "There is a 'consistent pattern' of acts and omissions by the Italian authorities which are discriminatory and anti-foreigner that are together capable of showing article 3 incompatibility". The claimant's solicitor, Ms York, further says: "No-one spending any time in Italy, or reading any newspapers or watching the news, can be in any doubt whatever about the Government's drive against foreigners" (Sheona York Statement 17 August 2009, paragraph 9). I found such generalisations unhelpful: and, moreover, unsupported by the evidence relied upon by the claimant to make good the point.

67. For example, the claimant relied upon a report dated 16 April 2009 by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 13-15 January 2009. That report is lengthy and apparently comprehensive. It notes the constructive nature of the discussions the Commissioner had with the Italian Government, and his appreciation for "the authorities' readiness and openness to dialogue with him" (paragraphs 2 and 3). In relation to asylum seekers, he commended "the determination that was shown to him by the competent authorities to uphold a high level of provision of international protection to all foreign nationals in need thereof" (paragraph 81). The very high success rate of applications for asylum was noted, namely 50% of applicants (paragraphs 70 and 80), a rate that is in fact somewhat lower than suggested elsewhere in the evidence. That success rate belies the simple suggestion that the Italian authorities are institutionally xenophobic, or do other than strive to comply with their obligations to take legitimate refugees under the Refugee Convention. Similarly, neither does (e.g.) the BBC news item from 12 May 2009, "Italy MPs back migrant crackdown", assist the claimant: because, according to that item, Prime Minister Berlusconi made it clear that "those who meet the conditions for political asylum" would be welcomed into Italy. It is also noteworthy that the Hammarberg Report criticises (e.g.) conditions in Lampedusa, improper refoulement of asylum seekers to Libya, and the criminalisation of certain activities by irregular immigrants (i.e. those outside the system altogether): but it does not criticise or refer to the alleged practices relied upon by the claimant, nor does it criticise the time taken for the Italian authorities to determine such claims. The concerns of the claimant were not apparently shared by the Commissioner for Human Rights of the Council of Europe.

68. These very broad generalisations do not show a consistent pattern of adverse behaviour by the Italian authorities to foreigners; nor do they assist the claimant's claim, which focussed upon the conditions of asylum seekers in Italy and, in particular, the conditions that the claimant would face in Italy as a Dublin returnee.

69. The claimant's particular concerns were two-fold. First, he asserted that the Italian authorities frustrate the making and pursuit of asylum claims, in which I include the suggestion that they do not process claims within a reasonable period.

70. So far as evidence of the claimant's own previous experience in Italy was concerned, I have already dealt with this to an extent: there is no evidence that his claim was anything but accepted and sent to the *Commissione* for processing. Given the limited time that the claimant spent in Italy afterwards and his failure to make any enquiries as to how long the determination of the application might take, there is no evidence in his particular case that the application was being dealt with other than with reasonable expedition. There is no evidence as to what has become of the claim in the claimant's absence from Italy: but, if it has lapsed, then the evidence is that it can be revived or renewed on return.

71. Nothing in the evidence of BM and YM (which are considered further below: see paragraph 73) suggests that their claims were not facilitated and processed. The claimant relies upon the evidence of three other asylum seekers, AH, MF and HU. The first two appear to have spent a considerable time in Italy, and their status whilst they were there is unclear from their evidence. I note that the status of both BM and YM was, upon investigation, not found to be as they had first indicated. AH says that he was given leave to remain in Italy for a year, which appears to be on some basis other than a *Permesso do Soggiorno*, and would in any event have entitled him to work. His main complaint appears to be the difficulty he had in obtaining a renewal of that leave. That is very different from the basis of this claim. MF was a minor, and she appears to have been placed in some form of supported accommodation and later with Eritreans in Rome for a considerable time, during which she was subjected to abuse from both from other young people and adults. Again, her claim has a very different basis from this. The evidence of UH is very limited. None of these cases has been specifically investigated by the Secretary of State. The evidence in them is at best confused. This evidence falls very far short of persuading me that, in Italy, there is systematic antagonism towards asylum seekers, such that there is anything approaching a consistent pattern of their claims being routinely not admitted or otherwise frustrated during their course.

72. Nor do I accept that there is any evidence of a consistent pattern of applications for asylum taking an unreasonable length of time to determine in Italy. As I have indicated above (paragraph 34), once an application has been submitted to the *Commissione*, they are legally required to invite the applicant for an interview within 30 days, and thereafter determine the application and notify the applicant within 3 days. Although Dr Hein indicates that the 30 day period "is not always respected", he does not suggest that there is widespread and/or substantial delays in the interview process - although he accepts that, where the applicant has changed address, there may be difficulties in practice in notification of the interview details getting to him.

73. The evidence does not support unreasonable times being taken to determine claims. On the claimant's own case, he only lived rough for 5 days after he left his sister's house in Milan before he left for the United Kingdom. He did not delay in making his decision to travel to the United Kingdom. Before leaving Italy, he does not appear to have made enquiries as to how long his wait might have been before he had an interview with the *Commissione*, or how long after that the determination of

the application might have been thereafter. Although anecdotal, some evidence as to how long applications for asylum may take to process in Italy can be derived from the cases of BM and YM - particularly as each of those cases was originally based upon the failure of the Italian authorities to process claims and the conditions in Italy pending the determination of those claims. In the case of BM, he entered Italy on 30 July 2006, and was granted a one year permit on humanitarian grounds on 6 September 2006 (about 5 weeks after arrival). In the case of YM, he entered Italy on 11 September 2007. Although the date of the decision granting him political asylum is unknown, it was before 16 December 2007 (about 2 months after arrival) when he was issued with a permit to stay as a recognised refugee. That evidence, such as it is, suggests a period of no more than 2-3 months from application to determination. The other individual cases relied upon by the claimant, to which I refer above, do not offer any compelling evidence in relation to delays in process. Italian law requires the *Commissione* to interview the applicant within 30 days - the evidence of Dr Hein suggesting that, although that time limit is not always honoured, there are not routine gross delays in interviews - and the determination has to be made and notified within 3 days thereafter (i.e. within 33 days of application). The evidence suggests that, at worst, many applications are dealt with in a few months and most within 6 months.

74. In relation to information, on leaving the United Kingdom, the claimant will be given information as to the procedure in Italy and his rights and obligations. On arriving in Rome or Milan, he will be transmitted through special facilities for Dublin returnees, with facilities for giving information, identifying what has happened to the original application and making any new application necessary. Assistance will be given in relation to information about available accommodation places, and subsistence to which he may be entitled. I am unconvinced by the claimant's version of events in Italy so far as provision of information was concerned whilst he was there in 2008. For example, contrary to his initial assertions, I am satisfied that he made an asylum application. Tigrean interpreters were available both at Lampedusa and Caltanisetta, and it would have been open to the claimant to make enquiries about anything he was uncertain about. But, in any event, the evidence with regard to Dublin returnees and provision of information is clear. There are special facilities to ensure that they have the information they need to make or pursue their asylum claim, and (e.g.) find accommodation and obtain any subsistence they may be due in the meantime. There is no compelling evidence that a Dublin returnee would have any deficiency in relation to relevant information - and in particular no evidence of a consistent pattern of deficiency in that regard.

75. There is a presumption that a friendly state will comply with its international obligations. There is before me no evidence - and certainly no compelling evidence - of the Italian authorities systematically, routinely or even regularly frustrating the making or pursuit of asylum applications: or delaying the determination of asylum applications to any unreasonable degree: or failing to provide appropriate information to those seeking asylum (but, particularly, Dublin returnees). In those regards, the claimant has failed to show any consistent pattern of failure on the part of the Italian authorities.

76. The claimant's second and main contention was that asylum seekers are put out onto the streets without any support during the currency of their application. This second

contention is of course linked to the first, because the claimant asserted that the period taken to determine an application (and hence the period of living without support) may be significant. The claimant's solicitor put it thus:

> "…[I]t is clear to me that it is more probable that if my client is returned to Italy, he may spend 15 days in the ENEA Centre and then be sent back to Caltanisetta, or be put straight back to Caltanisetta…. Then, after possibly a further 20 days or 35 days in one or other of the reception centres there, will almost certainly be forced to return to the streets, to begging and worse, and with little prospect of his asylum application being dealt with within a reasonable time, or of obtaining necessary social assistance while waiting: and no practicable domestic legal remedy…." (Sheona York Statement 23 July 2009, paragraph 88).

77. However, as I have said, the evidence is that applications are generally determined within a few months. The lack of housing in the meantime was the focus of the claimant's concern. In respect of that, neither the ECHR nor any other European legislation imposes a duty on any state to house all those within its jurisdiction. The evidence of Ms Maria Romano (submitted on behalf of the claimant) was that, under Italian law, the Italian state has no obligation to house anyone. Not even an Italian national has any right to accommodation in Italy. If and when an asylum applicant is granted refugee status, he is treated as Italian nationals are treated, i.e. he is put on a housing waiting list if his needs warrant that. In the evidence, there is no indication as to how long he may be on that list before housing is allocated. As Ms Romano points out, the difference between a person with refugee status (or, indeed, an Italian national) on the one hand, and an asylum seeker on the other, is that the latter is not put on the list unless and until his application is successful.

78. Pending determination of the application, I have set out the sources of accommodation that will be open to the claimant who is returned under the Dublin Regulation. After any transit stop (e.g. in Lampedusa on first arrival, or Rome or Milan for Dublin returnees), an asylum applicant will usually be accommodated in a CDA for up to 20 days and then a CARA for up to a further 20 or 35 days (or alternatively be entitled to money in lieu to enable him to find accommodation for a similar period). He will then be required to leave there, if his application has still not yet been determined.

79. As I have indicated above, the precise number of accommodation places in Italy for asylum seekers is unclear on the evidence that was before me (see paragraph 38 above). However, it is clear that the Italian authorities have recently had to cope with an incredible increase in asylum seekers. Again, precise figures are difficult to identify: but the claimant accepts that the formally recorded asylum applications in Italy rose from 14,000 in 2007 to over 31,000 in 2008 (Sheona York Statement 23 July 2009, paragraph 27): and the number of arrivals at Lampedusa rose from 11,749 to 30,657 in the same period, of which the vast majority applied for asylum. Lampedusa, which is of course transit in nature, has facilities for only 850 people: in one week alone in December 2008, there were a reported 2,000 arrivals (paragraph 29). That gives some idea of the increase involved, and the sort of challenge the Italian Government faced as a result. The Italian Government has

dedicated increased resources to the accommodation of asylum seekers: but I accept that, understandably, they may not have kept up with that increase, to ensure that every asylum seeker that requires accommodation is assured of it. None of the evidence suggests that every asylum seeker is guaranteed accommodation either whilst his application was pending or if and when refugee status is granted. The evidence of Dr Christopher Hein was that, although many Dublin returnees will find accommodation, "it cannot be excluded that in some cases no accommodation is provided" (paragraph 3.1).

80. Although, whilst Dublin returnees have better and more focussed facilities for finding accommodation and, as a Dublin returnee, it is likely that the claimant will be found accommodation whilst his application for asylum is determined, I accept that, if he is returned to Italy, he may not have provided accommodation for the entire period.

81. In summary, therefore, on the basis of the evidence before me, with regard to the claimant as a Dublin returnee to Italy, the following is likely.

(i) He will be transferred from the United Kingdom to Rome or Milan, where there are special facilities available for such returnees. Those facilities should ensure that either (a) the claimant's application for asylum in Italy will be identified, and he will be given information about it: or (b) if that application has lapsed (for example, because it has been determined in his absence) then he will be given information as to renewing that application.

(ii) If in Rome, he will be housed in the *Centro ENEA* for up to 15 days. There is no evidence before me as to the accommodation arrangements in Milan, although I understand there are special arrangements there. There is no evidence that arrangements in Milan are significantly different from those in Rome.

(iii) After Rome or Milan (or, in the unlikely event that he is not accepted into the Dublin-transit facilities in Rome or Milan, immediately upon his return to Italy), the claimant will be transferred to Caltanisetta CDA where he will be able to stay for up to 20 days. By that time, he may have been interviewed by the *Commissione*. If not, he may be housed in one of the accommodation places available, e.g. a CARA for a further 20-35 days. It is likely that he will be so housed somewhere, but a real risk that no place will be available.

(iv) It is likely that his application will be determined by the *Commissione* within a few months of his return or re-application. If it is not determined within 6 months, then the claimant will be entitled to work until the application is determined. Until the application is determined or he is able to seek work, the applicant is entitled to €17 per day.

82. On the basis of that, is there any real risk of Italy being in breach of article 3 of the ECHR? That article provides:

> "No one shall be subject to torture or to inhuman or degrading treatment or punishment."

83. The claimant contends that, because there is a risk that he will be homeless and destitute as an asylum seeker in Italy, it would be a breach of article 3 to return him there. That is founded upon the premise that there is a risk that Italy would be in breach of its obligations towards the claimant under article 3 if he were returned there by reason of the living conditions to which he will be subjected. He relies upon Limbuela for the proposition that poor living conditions can amount to inhuman and degrading treatment in breach of article 3.

84. Limbuela is authority for that limited proposition. The claimants sought asylum in the United Kingdom, but did not do so "as soon as reasonably practicable after their arrival". As a result, although destitute, they were excluded from the support from the National Asylum Support Service granted to asylum seekers under Part VI of the Immigration and Asylum Act 1999 by section 55(1) of the Nationality, Immigration and Asylum Act 2002. Section 55(1) forbade the provision by the Secretary of State of support for those who made a claim for asylum which he was satisfied was not made as soon as practicable after that person's arrival in the United Kingdom: although that prohibition was itself restricted by section 55(5), which provided that the section should not prevent the Secretary of State providing support to avoid a breach of article 3 of the ECHR. The question was whether the withdrawal of support for those applicants would put the Secretary of State in breach of that article.

85. The House of Lords held that it both could and, on the facts of that case, did. Mr Symes before me relied upon that case in respect of the article 3 threshold, and in particular in support of his proposition that the minimum level of severity required by article 3 could be met by living conditions. The House of Lords held that it could: but cases would be fact-specific. However, they held that in the ordinary course that threshold may be crossed if, as a result of a withdrawal of support under section 55(1), a person was obliged to sleep in the street, or was seriously hungry, or was unable to meet the most basic requirements of hygiene. In the particular cases before them, they found that there was an imminent prospect of such a condition, and so the Secretary of State would be required to provide support under section 55(5) to prevent a breach of article 3.

86. That case is important is relation to the article 3 threshold, an issue to which I shall return shortly. However, their Lordships were at pains to stress that article 3 does not prescribe a minimum standard of social support for those in need: it does not require the state to provide a home or a minimum level of financial assistance to all within its care (see paragraphs 22-23 above). The level of such assistance is a matter for political judgment, and a state will not be in breach of article 3 if it simply stands passively by and allows individuals' standard of living to fall to an "inhuman or degrading" level. As Lord Scott put it, at [66]:

> "It was submitted by… counsel for the Secretary of State, that a failure by the state to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and other necessities of life could not by itself constitute "treatment" for article 3 purposes. I agree with that submission, whether the individual is an asylum seeker or anyone else. It is not the function of article 3 to prescribe a minimum standard of social support for those in need (cf

> Chapman v United Kingdom (2001) 33 EHRR 399). That is a matter for the social legislation of each signatory state. If the individuals find themselves destitute to a degree apt to be described as degrading the state's failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3. Just as there is no Convention right to be provided by the state with a home, so too there is no Convention right to be provided by the state with a minimum standard of living: 'treatment' requires something more than mere failure."

87. Hence, "treatment" requires *some* positive action by the state. Lord Scott went on (in [67]) to say that the denial of support under section 55(1), coupled with the bar on working, amounted to such positive action. Lord Hope made a similar analysis (at [56]). In identifying the hallmarks of "treatment", Lord Bingham (at [6]) expressed himself in full agreement with the Court of Appeal in R (Q) v Secretary of State for the Home Department [2003] EWCA 364 at [56]-[57], where they said:

> "56. In our judgment the regime that is imposed on asylum seekers who are denied support by reason of section 55(1) constitutes treatment within the meaning of article 3. Our reasoning is as follows. Treatment, as the Attorney General has pointed out, implies something more than passivity. Asylum seekers who are here without a right or leave to enter cannot lawfully be removed until their claims are determined because, in accordance with the UK's obligations under article 33 of the Refugee Convention, Parliament has expressly forbidden their removal by what is now section 15 of the 1999 Act. But while they remain here, as they must do if they are to press their claims, asylum seekers cannot work…
>
> 57. The imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction."

88. Therefore, in respect of circumstances in which it is alleged that living conditions amount to a breach of article 3, Limbuela suggests a two-stage test: first, there has to be positive action by the state (rather than mere passivity on its part) and, second, that action has to result in conditions for the claimant that meet the threshold for "inhuman and degrading" within the meaning of article 3.

89. However, Mr Symes submitted that positive action was not now required - a state could be in breach of article 3 by mere passivity - because of the effect of (e.g.) article 13(2) of the Reception Directive by which Member States are required to make provision to ensure "a standard of living adequate for the health of [asylum] applicants and capable of ensuring their subsistence" (see paragraph 12 above). Relying upon the obligations imposed on signatory states by the Charter of Fundamental Rights of the European Union on a state to "seek to ensure full respect

for human dignity and the right to asylum of applicants for asylum and their accompanying family members" (as recited in the Recitals to the Directive) and The Government of South Africa v Grootboom 2000 (11) BCLR 1169 (CC), Mr Symes submitted that article 3 could now be breached by mere passivity in a member state not affording a person within the jurisdiction of that state the accommodation and wherewithal to maintain that required dignity. Limbuela (he submitted) had not taken into account the full implications of the Reception Directive.

90. I do not agree. The opinions in Limbuela were clear in reinforcing the proposition that article 3 did not require a member state to provide accommodation for all within its jurisdiction, nor provide a minimum standard of living (see paragraphs 22-23 above), and it required more than a state's passivity for breach. The Reception Directive was promulgated on 27 January 2003, nearly three years before Limbuela. That Directive was clearly in the minds of their Lordships: Lord Hope refers to it at [34]. It is inconceivable that their Lordships analysed the nature of a state's article 3 obligation without having fully in mind that state's obligation under the Reception Directive, including article 13(2) of that Directive.

91. The nature of a state's obligation under article 3 is clearly set out in Limbuela. The article is aimed at positive acts of state-sponsored violence. If they meet the threshold of seriousness (to which I shall come shortly), such acts are absolutely prohibited. Where the acts are not directly those of the state, the state will only be the subject of this prohibition if it supports such acts by positive, intentionally inflicted acts of its own. What amounts to "positive action" will no doubt depend upon the circumstances of a particular case and, in some circumstances, the state may be required to take positive steps to prevent ill-treatment at the hands of others (see, e.g., R (Bagdanavicius) v Secretary of State for the Home Department [2005] UKHL 38 at [24] per Lord Brown of Eaton-under-Heywood, E v Chief Constable of the Royal Ulster Constabulary [2008] UKHL 66 at [44] per Lord Carswell, and R (B) v Director of Public Prosecutions [2009] EWHC 106 (Admin) at [65]). But this is not a case of the state being called upon to prevent the positive mistreatment of citizens at the hands of others. Nor is it a case that falls into the "very exceptional" category of D v United Kingdom (1997) 24 EHRR 423 (cf N v Secretary of State for the Home Department [2005] UKHL 31, a case perhaps closer on its facts to this case). Nor can the analysis I have set out be affected by any additional obligation that might fall on a state by other provisions, such as those of the Reception Directive. In the circumstances of this case, mere passivity on the part of a state cannot lead to a breach of its article 3 obligations. The two-stage Limbuela test (set out in paragraph 88 above) applies.

92. The first stage asks, is article 3 engaged at all? What positive acts of the Italian public authorities could amount to such positive action? Clearly, the mere fact of homelessness - and the state's failure to provide housing, or a minimum standard of living - is insufficient. In Limbuela itself, it was found that the statutory scheme that prohibited late applicants for asylum receiving assistance, even though destitute, was regarded as sufficient positive action. As Lord Hope put it (at [56]):

> "… [T]he imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere

> inaction. This constitutes 'treatment' within the meaning of the article."

In that case, it was the positive step by the legislature of withdrawing support that amounted to "treatment" which, subject to the threshold requirement, might be inhuman or degrading.

93. The case before me case is not on all fours with that. In Limbuela, in section 55(1) of the 2002 Act, there was an intentionally and systemically inflicted legislative act. In this case, Mr Symes conceded that the Italian system for asylum applicants was unobjectionable. He submitted that it was the implementation of that system that was objectionable.

94. I consider Mr Symes' concession well-made. I had some initial concern about it, because, like the United Kingdom statutory scheme considered in Limbuela, the Italian asylum seekers scheme prohibits an applicant from working (albeit for 6 months as opposed to 12 months in the United Kingdom scheme). However, the evidence was that that prohibition on work is offset in Italy to an extent by an entitlement to €17 per day benefit (*Contributo di Prima Assistenza*: see paragraph 40 above). The level of benefit is, of course, a matter entirely for the Italian authorities. Therefore, outside the field of accommodation, there is no positive action by the Italian authorities that could amount to "treatment" within article 3.

95. Nor do I consider that there is any positive act of the state in relation to accommodation. As I have indicated, there is no right to accommodation in Italy for anyone, even an Italian national. The only difference between such nationals (and those who have obtained refugee status) and asylum seekers, is that the latter are not put on any waiting list for state-sponsored housing (see paragraph 77 above). A failure to place a category of people onto a housing list in these circumstances does not seem to me to be positive action amounting to "treatment" in the terms of article 3.

96. However, even if I am wrong (and the prohibition on working and/or failure to place on the housing list amount to "treatment"), that is only the first stage. The second stage of the article 3 test concerns the threshold. It is necessary to ask (in the words of Lord Hope in Limbuela at [58]):

> "… whether the treatment to which the asylum seeker is being subjected by the entire package of restrictions and deprivations that surround him is so severe that it can properly be described as inhuman or degrading treatment within the meaning of the article".

"Inhuman and degrading treatment" for the purposes of article 3 has "a high threshold" (Bensaid v United Kingdom (2001) 33 EHRR 10 at paragraph 40.

97. This second stage requires the consideration of the evidence and circumstances in the round (Soering v United Kingdom (1989) 11 EHRR 439 at paragraph 89, and Pretty v United Kingdom 35 EHRR 1 at paragraph 52). Lord Hope discussed some relevant factors in Limbuela (at [59]):

> "… whether the asylum seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant…."

98. When it comes to the evaluation of conditions of a group which are alleged to create a real risk of inhuman treatment to an individual within that group, there has to be compelling evidence of a "consistent pattern" of mistreatment such that anyone returning faces a real risk of coming to harm even if not everyone does (see, e.g., AA (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 149 at [14] and [21], per May LJ). In this case, there is no such evidence.

99. In the claimant's case, the deprivations and restrictions that he might suffer, even if (contrary to my view) they amount to treatment, are few and relatively minor. The claimant is a man, in good health. He spent very little time enduring any deprivations in Italy, before he decided to travel through France to the United Kingdom. If he were returned, it is very likely that he would have the benefit of several weeks' accommodation and then, if his application had not been determined, the likely time before its determination would be no more than a few weeks. During that time, although without accommodation, he would be entitled to €17 per day: although I stress that I do not consider that receipt of that daily sum is determinative of this issue. This case is, therefore, on its facts, very different from Limbuela. On the facts of this case, the claimant has failed to satisfy me that, even if he would be subjected to "treatment" for the purposes of article 3, it would not meet the high threshold of "inhuman and degrading".

100. For those reasons, the claimant has not satisfied me that, if he were returned to Italy, there is a real risk that he would be exposed to inhuman or degrading treatment within the meaning of article 3.

Failure to provide adequate remedies for these defaults

101. However, if there were such a risk, Miss Giovannetti submitted that it is not appropriate that challenges made on the basis that a fellow contracting state is or may in the future be in breach of its obligations under the ECHR are made in another state, in proceedings in which the state in alleged breach is not a party and has no opportunity to answer the allegations itself.

102. That submission was based upon the authority of KRS, a case concerning an Iranian national who sought asylum in the United Kingdom having made an earlier application in Greece. He opposed return to Greece on the basis that, in making that return, the United Kingdom would be in breach of its own obligations under article 3 because, if returned, there was a risk that (i) he would be refouled from Greece to Iran, and (ii) as an asylum seeker in Greece, he would suffer inhuman and degrading

treatment whilst waiting for his application to be determined. The claim was consequently brought against the United Kingdom.

103. The European Court of Human Rights found that there was no evidence or risk of refoulement from Greece, and in any event any claim ought to be made in Greece. The Court said (at page 18):

> "The Court recalls in this connection that Greece, as a Contracting State, has undertaken to abide by its Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by article 3. In concrete terms, Greece is required to make the right of any returnee to lodge an application with this 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. On that account, the applicant's complaints under articles 3 and 13 of the Convention arising out of his possible expulsion to Iran should be the subject of a Rule 39 application lodged against Greece following his return there, and not against the United Kingdom."

104. In relation to conditions for asylum seekers in Greece, the Court went on to say (at page 18-19):

> "… [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."

105. That was reflected in Lord Hoffman's comments in the later case of Nasseri, a refoulement case (at [39]):

> "… [I]f 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."

106. The European Court of Human Rights in KRS consequently found that the United Kingdom would not breach its article 3 obligations by returning the applicant to Greece under the Dublin II Regulation: and, in refusing to admit the application, the Court considered the application against the United Kingdom "manifestly ill-founded" (page 19).

107. Mr Symes submitted that (i) this case was distinguishable from KRS because that case essentially considered refoulement from a fellow contracting state, rather than concerning conditions for asylum seekers in such a state: and (ii) the justice system in Italy did not give any appropriate relief for someone in the claimant's position (i.e. someone who is, contrary to article 3, left homeless and destitute as an asylum seeker).

108. In relation to Mr Symes' first submission, I do not accept that KRS is distinguishable. The European Court of Human Rights was considering two bases of the applicant's article 3 claim: refoulement and conditions for asylum seekers in Greece. In relation to the latter, as the short extract I have quoted suggests, they had objective evidence from the Committee for the Prevention of Torture, a UNHCR Position Paper on the return of asylum seekers to Greece under the Dublin II Regulation, and a Report from the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee and the Greek Helsinki Monitor. That evidence suggested that conditions for asylum seekers in Greece were very poor: e.g. that there was not adequate provision of functioning toilet and shower facilities, products for personal hygiene or clean bedding, that exercise time was severely limited, that there was no financial allowance, and that reception facilities for minors were inadequate without a child even having a guaranteed place at a reception centre. In particular, the evidence was that (i) it was difficult for those who wished to apply even to lodge an application for asylum in Greece: and (ii) the number of reception centre places were inadequate and "the majority of asylum seekers are left to fend for themselves, as best they can". Although of course the objective evidence was different, KRS therefore had a very similar basis to the claim before me. The comments of the European Court I have quoted above (paragraph 104) were made in that context (as were the comments of Lord Hoffman in Nasseri: paragraph 105 above). KRS and this case are not distinguishable.

109. Although KRS is not strictly binding on me, of course I have to take into account the comments of the European Court of Human Rights; and I find them persuasive. In the case before me, the Italian authorities have been severely criticised and, although I have not found the substance of those criticisms made out on the evidence before me, the Italian Government is not a party to these proceedings and has not had any opportunity to respond to those criticisms. They would do so if, as the Court in KRS suggested, proceedings were brought against the Italian Government in Italy and, if necessary, in Strasbourg. That is a powerful reason for this court not becoming engaged with the issues, unless bound to do so.

110. However, Mr Symes submitted that the justice system in Italy was inadequate for that job. He submitted that they were slow, and in practice did not and would not grant relief to anyone seeking a judicial determination on (e.g.) a decision by the Italian authorities not to afford accommodation to an asylum seeker. Insofar as the Italian Government was in breach of its article 3 obligations, it was submitted that there was no effective relief available in Italy.

111. However, as I indicated above (paragraph 13), article 39 of the Procedures Directive requires signatory states to give a right to an applicant for asylum to an effective remedy before a court or tribunal. There is a presumption that Italy will comply with that obligation. On the evidence before me, if it had been necessary for me to

have decided this issue, I would have found that the claimant has failed to rebut that presumption.

112. The evidence as to available remedies in Italy was neither clear or consistent. However, the evidence of Lorenzo Trucco (who was interviewed by the claimant's solicitor, Sheona York, on 10 August 2009) was that a decision not to give accommodation was appealable to the *Tribunal Administrativo Regionale* ("TAR", the Regional Administrative Court): although he said there was a considerable backlog in that court, and other procedural requirements that would make proceedings difficult for an asylum seeker in practice, e.g. the requirement of having an *Anagrafe* before proceedings are commenced and a fee of €250. Dr Trucco had never heard of a case in which the TAR had made a "statement of rights" requiring an authority to provide accommodation to an asylum seeker. However, the jurisdiction of the civil courts had recently shown signs of evolving to make claims concerning asylum and humanitarian protection justiciable in those courts. There was very little evidence before me as to how a matter might be referred to Strasbourg.

113. This evidence is not entirely satisfactory; but on the basis of it, even if I had found that there was a risk that the Italian authorities would be in breach of article 3 in their treatment of the claimant on his return, I would not have been satisfied that that could not and should not properly be dealt with by the Italian Courts and, if necessary, by a reference to the European Court of Human Rights. In relation to asylum claims, the jurisdiction and jurisprudence of the Italian courts is, on the evidence I have seen, still in the process of evolving. Given the extraordinary recent increase in claims, that is unsurprising. Such an increase has no doubt put considerable pressure on the Italian courts, as well as on the substantive systems for asylum applications. However, the evidence before me falls far short of proving that the Italian courts fail to provide adequate effective relief in appropriate asylum cases, as they are required to do by the Procedures Directive as well as, indirectly, by article 3.

Conclusion: Human Rights Claim

114. Those who come to the United Kingdom seeking refuge, have often faced appalling persecution and frequently a terrible journey from where that persecution took place to Europe. Having faced that awfulness, I do not say that the conditions they face on reception are always as good as they may expect or even deserve. However, that is far from saying that those conditions, here or elsewhere in states that are signatories to the ECHR, amount to inhuman and degrading treatment that is prohibited by article 3.

115. For the reasons I have given, the claimant has not satisfied me that, if he is returned to Italy under the Dublin II Regulation, he will be exposed to a risk of suffering treatment contrary to article 3. Indeed, despite the best efforts of Mr Symes (who could not have pursued this claim better), he has failed by a significant margin. Given that absence of risk, I consider that the Secretary of State was justified in certifying this claim as "clearly unfounded". He was justified in being reasonably and conscientiously satisfied that the allegation must clearly fail. The court's role is essentially one of review, with anxious scrutiny (ZT (Kosovo v Secretary of State for the Home Department [2009] UKHL 6). However, for the avoidance of doubt,

having given the matter anxious scrutiny, I too am satisfied that, on the evidence, an appeal to an Immigration Judge would be bound to fail.

116. The first ground consequently fails.

The Discretion Ground

117. I can deal with the second ground - that the Secretary of State erred in failing to exercise his discretion to consider the claimant's substantive asylum application here, under article 3(2) of the Dublin II Regulation (see paragraph 9 above) - shortly. Mr Symes submitted he ought to have exercised his discretion and considered the substantive asylum claim in the light of "patent failures of the Italian authorities" to respect their obligations under article 3 and various European Union Directives as they relate to asylum seekers.

118. As I have found, the Italian authorities are not in breach of their obligations under either article 3 - nor, on the basis of my findings, are they in breach of the various relevant European Directives, and in particular article 13(2) of the Reception Directive.

119. One main thrust of these submissions was that sending the claimant back to Italy where his dignity will not be properly respected "may cause him to seek his fortune elsewhere in the European Community" (Amended Grounds and Skeleton Argument, paragraph 119) - hence undermining the policy of the Directives to prevent secondary movements around the European Union. That, as a discrete argument, has no merit. It is clear that, if the substantive applications for asylum of the claimant and others like him were determined here as opposed to Italy (where, under the Dublin II Regulation, they ought to be considered) that may lead to movement of asylum seekers within Europe from Italy to the United Kingdom, that itself would largely defeat the main purpose of the relevant scheme, namely to ensure that each asylum seeker makes only one claim and in the country identified in accordance with the provisions of the Regulation.

120. However, the second ground fails because, for the reasons I have given in relation to the first ground, there is no evidence that Italy avoids or seeks to avoid its international obligations towards asylum seekers. The premise upon which this ground is based is consequently false: and the second ground too fails.

Conclusion

121. As indicated above, this matter was listed before me as a rolled up hearing. Having granted permission, for the reasons I have given I shall dismiss the claim. I shall hear submissions in relation to costs, and any other consequent matters. In due course, I shall also be pleased to hear submissions in relation to the disposal of the cases of BM and YM, and other claims which I understand are stayed pending this judgment