Neutral Citation Number: [2014] EWHC 1914 (Admin)

Case Nos: CO/5524/2013
CO/585/2013
CO/10023/2012
CO11811/2012
CO/9031/2013
CO/7357/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2014

Before :

MRS JUSTICE ELISABETH LAING

- -

Between :

The Queen on the application of **Mr Mohsen Pourali Tabrizagh** **Mr Tahir Syed** **Mr Saeed Ali** **Mr Ali Omar Mohammed** **Mr Edmond Karaj** **AB (Sudan)**	**Claimants**
- and - **Secretary of State for the Home Department**	**Defendant**

- -

Stephen Knafler QC, Declan O'Callaghan (instructed by **Duncan Lewis**) for **TABRIZAGH**
Stephen Knafler QC, Declan O'Callaghan (instructed by **Duncan Lewis**) for **SYED**
Stephen Knafler QC, Philip Nathan (instructed by **Duncan Lewis**) for **ALI**
Stephen Knafler QC, Declan O'Callaghan (instructed by **Duncan Lewis**) for **MOHAMED**
Stephen Knafler QC, Ms Keelin McCarthy (instructed by **Duncan Lewis**) for **KARAJ**
Greg Ó Ceallaigh (instructed by **Turpin Miller**) for **AB**

Alan Payne and Matthew Donmall (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 14 – 15 May 2014

- -

Judgment

Mrs Justice Elisabeth Laing:

1. The Claimants in these cases have all made asylum claims in the United Kingdom. They have previously made claims in Italy, or (in 2 cases) have been in Italy, and resist their return to Italy under the Dublin Regulation. Their case, in outline, is very simple. They argue that they should have an in-country right of appeal against removal to Italy, because removal to Italy will expose them to a real risk that the rights conferred on them by article 3 of the European Convention on Human Rights ("the ECHR") will be breached. Their claims that they will be exposed to such risks are arguable, they say, which means that the Defendant should not have certified them as 'clearly unfounded'. Those certificates should, therefore, be quashed.

2. The Defendant ("the Secretary of State"), by contrast, argues that the Claimants' claims that they will experience ill treatment in Italy reaching the article 3 threshold are bound to fail, and that she was therefore entitled to certify those claims as clearly unfounded. There is nothing in the general situation in Italy, or in the particular circumstances of any of the Claimants, which would require her not to certify their claims (and thus ensure that they have an in-country right of appeal).

3. The issues to which the rival arguments give rise are:

    (1) what is the test for deciding whether a claimant has an arguable article 3 claim as result of the Secretary of State's intention to return him to Italy; and
    (2) whether the evidence on which the Claimants rely satisfies that test.

4. But the context in which these issues arise is the certificates to which I have referred. It is common ground that the question for me is whether, if these issues were before the First-tier Tribunal (Asylum and Immigration Chamber) ("the FTT") and the Claimants were relying on an argument that their article 3 rights would be breached on return to Italy, their appeals would be bound to fail. I must therefore take the Claimants' factual cases at their highest, but that does not relieve me of the task of considering whether there is any merit in their legal arguments. Nor does it mean that I am bound uncritically to accept the reports on which the Claimants rely, if, either, they are seriously flawed, or unreliable, or if there is other relevant material to which the FTT would be bound to give greater weight, such that I can be confident that their claims would be bound to fail.

A. The facts

Mohsen Pourali Tabrizagh

5. The Claimant in this case, T, is from Iran. He was born in 1989. He has made 2 witness statements. In his second, he says that he became involved in politics just before the 2009 election. He supported the Green Movement. He took part in demonstrations after the result was announced. 3 months later he was told that his house had been raided and his parents arrested. His depression was exacerbated by not

being able to go home; the authorities were looking for him. He stayed with a friend, and tried to kill himself.

6. He moved elsewhere in Iran before going to Turkey. Many people were executed for supporting the Green Party. His brother found an agent to help him escape to Turkey. After a month, he was then put on a lorry and taken to Europe.

7. The lorry stopped in a country he later discovered was Italy. His fingerprints were taken. The Eurodac database shows that this was on 20 September 2012. No-one explained why. He was then released onto the street. He was afraid and alone. The Italian police did not help him. He was homeless for two nights and hungry. It was cold and it was raining. When he went to the police for help he was sent away and they said that if he went back they would beat him up.

8. Drunken people beat him up and took his money. He thinks he was targeted because he looked different. His watch was taken. He thinks they were racist. The police got annoyed with him for asking them for help. One threatened him with a truncheon. He met many asylum seekers who said they had been racially abused. Many, men and women, said that they had been raped and it was not safe for asylum seekers to be there.

9. After 2 days he was put back in touch with the agent who had brought him to Italy. He was eventually taken to the United Kingdom, where he was arrested (on 26 November 2012). The conditions in the detention centre in the United Kingdom were much better than anything in Italy. He has been several times to the GP for depression, but not recently, as talking about his past experiences makes his depression worse. He does not want to go back to Italy. When he found out he might have to, he became suicidal and cut himself.

10. According to the authorities, T was fingerprinted in Italy as an illegal entrant on 20 September 2012. There is no record of his having claimed asylum in Italy. He never received SPRAR or CARA accommodation, so he would be eligible for that, if he were to return to Italy, and if he were to claim asylum in Italy.

11. His asylum claim was certified on third country grounds on 7 January 2013. The decision letter records that "The Secretary of State will normally decline to examine the asylum application substantively if there is a safe third country to which the applicant can be sent." There were no reasons for departing from that practice in his case.

12. On 18 January 2013, his solicitors wrote to the Secretary of State to say that T's removal to Italy would breach his article 3 rights. This claim does not seem to have been particularised in any way, and T's solicitors raised no issues about his individual circumstances. The Secretary of State said in a letter dated 18 January 2013 that his claim was "totally without merit", having regard to the principles established in four cases, two of which I consider below. The Secretary of State certified the article 3 claim as "clearly unfounded".

13. There is a report dated 4 September 2013 from a consultant psychiatrist, who had not seen T's medical records. His impression is that "there is a vulnerability to mental disorder" but it is not clear what. T meets the criteria for adjustment disorder. The

most worrying part of his presentation was his self-harming behaviour. If he were returned to Italy this would be likely to delay his recovery and worsen his adjustment disorder. His post-traumatic symptoms would be likely to get worse. He might become depressed. His risk of suicide was greater than that of his peers, but still, in absolute terms, relatively low. There was at least a moderate probability that T's mental health would deteriorate if he were returned to Italy. He would have more nightmares and might then become depressed. The preferred option was a period of monitoring. A course of anti-depressants might be appropriate. He could be treated in a primary setting.

14. This report did not persuade the Secretary of State to change her position (see her letter of 27 November 2013). If T did suffer from PTSD, treatment was available in Italy. The Reception Directive (see further, below), guarantees access to medical treatment for asylum seekers. The claim that Italy would not comply with its legal obligations was wholly without merit. T's case "did not even arguably" approach the threshold established by the Court of Appeal in *EM (Eritrea)*. The claimant had not adduced any evidence from the United Nations High Commissioner for Refugees ("the UNHCR") or the European Commission, let alone "regular and unanimous reports of international NGOs".

15. The medical evidence did not establish a breach of article 3.

16. Further representations were submitted on 7 April 2014. The Secretary of State rejected these in a letter dated 17 April 2014. By this time, the Supreme Court's decision in *EM (Eritrea)* had been published. The letter summarised the effect of that decision. It listed the 17 reports which had been relied on by T. They did not rebut the "significant evidential presumption" that Italy would comply with its obligations. They did not add significantly to the material which had been considered by the European Court of Human Rights ("the ECtHR") in 6 cases in which it had declared similar applications inadmissible in 2013. The evidence did not rebut the assumption of compliance by Italy with her obligations.

17. The Secretary of State applied the *Soering* test, and asked, first, whether there were systemic deficiencies which could displace the evidential presumption that Italy would abide by its legal obligations. The Secretary of State then asked whether there was evidence of other factors which would give rise to a real risk of a breach of article 3 on return to Italy.

18. The fact that T had been attacked by a drunken person in the past provided no guide to future risk. Italy has a functioning police and judicial system. It was considered that T would be able to access adequate medical care and support. The human rights claim was certified.

19. By a letter dated 12 May 2014, the Secretary of State withdrew the previous decisions, reconsidered the article 3 claim and again certified it as clearly unfounded. The Secretary of State considered a longer list of materials, in response to further representations made on 25 and 28 April 2014. The Secretary of State had considered that material, and all the material in the five linked cases. The Secretary of State noted that T had not said that he had claimed asylum in Italy and had not explained why not. He had asked the police for help, but no more. If he were returned to Italy, he would be able to claim asylum, and Italy would be bound by the relevant Directives. He

would be given the opportunity to claim asylum on return. He would be guided through the process, and would be entered in a project. One attack in the past did not provide grounds for an article 3 risk. The medical report relied on did not disclose a breach of the article 3 threshold. He would have access to healthcare in Italy.

Tahir Syed

20. The Claimant in this case, S, is from Pakistan. There is no witness statement from him. I have gathered the facts of his case from the Secretary of State's letters to him and the Secretary of State's skeleton argument. Mr Knafler QC, who represented 5 of the 6 Claimants, including S, told me that his instructing solicitors have not had any contact with S for two months. He had no positive instructions from S that he would claim asylum if returned to Italy, and in those circumstances felt unable to advance a case to that effect, although he had no instructions to withdraw the claim, and did not do so. His difficulty is that the relevant legal framework imposes no obligations on Italy in respect of failed asylum seekers.

21. S was born on 2 January 1985. He arrived in Italy on 11 June 2012, and claimed asylum on 27 June 2012. On 2 July 2012, he was given a permit of stay until 1 October 2012. On 30 August 2012, Italian authorities refused his asylum claim. It is reported that he absconded from the CARA at Borgo Mezzanone, on 15 October 2012. In November 2012, he attempted to claim asylum in the United Kingdom.

22. He was removed to Italy on 13 December 2012. On 1 January 2013, he was given a further temporary permit of stay, valid until 1 April 2013. He had not received accommodation from SPRAR, so that he would be eligible for that if returned to Italy. The re-issued permit of stay was for an asylum request. It has now expired, but the fact of its issue confirms that a second asylum claim could have been made. He then absconded from Italy and travelled to Belgium, and was returned to Italy on 27 February 2013. Inquiries in Italy confirmed that S's asylum claim had been refused and he had not been granted subsidiary protection.

23. He was arrested again in the United Kingdom on 20 March 2013 and claimed asylum. He said that he had left Italy. He accepted that he had claimed asylum in the United Kingdom before, in November 2012, and that he had been returned to Italy in December 2012. He feared the Taliban in Pakistan. His hands were damaged and fingerprints of sufficient quality to be checked with the Eurodac database could not be obtained. He had an Italian permit on him. The article 3 claim was refused in terms similar to those in the second letter in T's case.

24. On 19 April 2013, the Secretary of State certified his asylum claim on safe third country grounds. On 8 May 2013, in a response to a pre-action protocol letter, the Secretary of State again certified his article 3 claim on the grounds that it was clearly unfounded, in terms similar to those used in the January 2013 letter in T's case.

25. On 17 April 2014, the Secretary of State withdrew the letter of 8 May 2013 and replaced it with a new decision. It was similar to the Secretary of State's letter of 17 April 2014 in T's case. On the question of individual risk, the Secretary of State referred to S's interview on 21 March 2013, when he had said that he had been in Italy for a few weeks or months before being fingerprinted, and for 6 months after that. He had lived at "Forgia Berganzamo", and the Government had provided all his

food and accommodation and other necessities. He had not worked in Italy. S had failed to point to any past experience in Italy which showed that Italy did not comply with its obligations to him as an asylum seeker. After his asylum claim was refused, he was provided with a 'permit of stay'. He then left Italy, and after he was returned under the Dublin Regulation, his permit was renewed. The Secretary of State again certified the claim.

26. S's claim was reconsidered on 12 May 2014. The reconsideration followed a similar approach to that in T's case.

Saeed Ali

27. Saeed Ali, A, was born on 11 November 1984 in Iran. There are two witness statements from him. The second contains additional claims. In the first statement he says that he had been arrested in Iran, detained for three and a half days, and given 80 lashes for drinking alcohol at a party. His family are very religious and they knew what had happened. Apparently the law in Iran is that if a person is arrested three times for drinking, they are sentenced to death. His family decided to kill him even though he had only been arrested once. He adds in the second statement that his brother stabbed his foot with a knife when he was tied to a chair in the garden. He also adds that he was involved, via friends, in the Green Party. The Secretary of State points out that the first statement, and the asylum screening interview, give different accounts of why A left Iran.

28. So he ran away. He left Iran with an agent in around June 2011. He travelled to Turkey and then to Italy. He was fingerprinted in Italy on 31 August 2011 (30 August according to the Secretary of State).

29. He arrived in Brindisi. He was taken to a detention centre and told that he would be returned to Iran unless he claimed asylum. He was scared, so he applied for asylum.

30. According to the Secretary of State, his asylum claim was registered in Italy on or about 9 September 2011. His claim was decided on 2 April 2012, and he was granted humanitarian protection. That grant was issued on 14 May 2012, to expire on 14 May 2013.

31. A claims that he was in detention for 3 or 4 months and then lived rough on the streets. In the first detention centre, for 10 days, he was in a very small cell with two or three other people. There were no beds or furniture and no access to medical treatment. He asked for treatment for his scalp condition but got none. He had had surgery for it in Iran 9 or 10 times. He was then moved to the next-door camp, where he lived in small cabins with 8 or 9 other people. Hygiene was very poor. When it rained the toilet overflowed in the corridor between the cell and the cafeteria. The dirty water and sewage which he had to walk through to get to and fro came up to his knees.

32. He gives a somewhat different account in his second statement. He says that he was in a detention centre for about 10 days, and then he was in a camp for about 10 months. The camp consisted of about 20 metal containers. He was fed, but was always hungry. There was a nurse, but no other medical attention. There were toilets and showers. He suffered from depression, headaches and skin problems. He was given medication

once or twice. He received no legal help and did not know why he was in the camp. His skin problem, the nurse confirmed, was skin cancer.

33. On 19 April 2012, there was an outbreak of meningitis, from which two Pakistani men died. The authorities then cordoned off the camp. The inmates panicked, and escaped. 40 to 50 of them went to demonstrate in a nearby town. They were not permitted to return to the camp. After that, he lived on the streets. He and others found a house in Brindisi to live in. It was in bad condition. They went to the public toilet to wash and were fed once a day by a church.

34. According to the Italian authorities, he was not accommodated in SPRAR accommodation while he was in Italy. He would be eligible for that on his return to Italy.

35. A claims that his refugee claim was accepted on 5 May 2012, but "then there was nothing". He was given no support to live and no benefits. He received no care for his medical condition. He received travel documents and was told to go where he liked. He went to Rome, where he spent two months. He slept in a disused underground station. There was a large number of people there "I would say thousands" sleeping rough. He was given food once a day by a church. He had been a lorry driver in Iran, but could not get a job in Italy as he needed an address.

36. He came to the United Kingdom on 3 July 2012. Before that he had spent two months in France, in conditions similar to those in Italy. According to the decision letter of 17 April 2014, A was "encountered" on 3 July 2012, after a call from Kent police, who report the sighting of 12 men emerging, and running away, from a lorry which had arrived at a farm. A search of Eurodac revealed that A had been fingerprinted on 30 August and 10 September 2011. He was interviewed on 4 and 5 July 2012. He said he had fled Iran because of his involvement in the Green Party.

37. On 26 July 2012, the Secretary of State certified his asylum claim on safe third country grounds. On 20 September 2012, the Secretary of State, in response to a pre-action protocol letter, responded to A's article 3 claim. The Secretary of State certified it on the grounds that it was clearly unfounded, in terms broadly similar to the terms in which she certified T's claim. The Secretary of State added that A's claim to be suffering from cancer was not supported by any medical evidence. But treatment would be available for it in Italy.

38. A medical report dated 6 August 2013 by A's GP says that he is suffering from "chronic ongoing stress and adjustment reaction, and a disfiguring scar on the right side of his head from many previous operations". A appeared to be stuck in "a mild to moderate but protracted depression". It was difficult to predict what would happen if he were detained and removed, but the GP 'imagined' that his depression would worsen and he "may even develop suicidal tendencies".

39. On 17 April 2014, the Secretary of State wrote to A about his judicial review application. She reconsidered the article 3 claim, drawing attention to the difference between the account given in the screening interview and in the first witness statement. The article 3 claim was considered, and rejected. The approach was similar to that in T's second decision letter.

40. On 12 May 2014, the Secretary of State reconsidered A's claim, and re-certified it, on grounds similar to those relied on in the other cases. A had been granted humanitarian protection in Italy which expired on 14 May 2013. If he were returned to Italy, he would have to apply to have that renewed. The medical evidence did not reach the article 3 threshold.

Ali Omar Mohamed

41. Ali Omar Mohamed, M, is from Darfur, Sudan. He was born on 1 September 1988. According to his witness statement, he left Sudan because he had been arrested and put in a camp. He was severely mistreated there. He was told he must join the army or be killed. He said he would co-operate, but then escaped. He crossed the desert to Libya and then after living and working for two years there, had difficulties in Misrata, which led to his imprisonment. He eventually left for Italy, and arrived after 5 days at sea.

42. He says that his fingerprints were taken by force, as he did not want to claim asylum in Italy. He says that he did not claim asylum at any point. He was given an identity document but nowhere to stay and slept on the streets for two years. He was fed in a church. He was not provided with a lawyer or an interpreter. He was not asked about his circumstances, and not given medical attention. He was told to go away each time he approached an office for help. He asked the Italian authorities for help finding accommodation and a job, and was told to approach a church. He was asked if he was a Muslim, and when he said he was, help was refused. He had no suitable documents for applying for a job. He was homeless. He stayed in Italy for 2 years.

43. He then went to Switzerland and France, and Denmark, and, eventually, to Norway, where he claimed asylum in 2009. He was then returned to Italy after about 2 years. He was told that he had no protection and no rights. The police released him and told him that he had 7 days to leave; if he went to another country and was returned to Italy, he would be arrested and imprisoned. He then went to France by train. He claimed asylum there. He burnt his hand to avoid being fingerprinted. He then came to the United Kingdom hidden in a lorry. He claimed asylum in Croydon, was fingerprinted and detained for 6 months in 2012.

44. According to the Secretary of State's Chronology, he arrived in Italy in October 2007 and his asylum claim was registered on 17 October 2007. On 31 October 2007, he was granted subsidiary protection status. This was issued on 28 October 2008, and expired on 28 October 2011. He was fingerprinted in Norway on 20 July 2009. He has not received accommodation from SPRAR, so would be eligible for that on his return to Italy.

45. The Secretary of State certified his asylum claim on 22 October 2012 on safe third country grounds, and again on 25 October 2012. On 1 November 2012, the Secretary of State certified his article 3 claim, made in a letter dated 31 October 2012, as clearly unfounded, in terms similar to those in the other letters to which I have already referred.

46. The Secretary of State issued a further clearly unfounded certificate on 17 April 2014, in terms similar to those in the other 2014 certifications to which I have already referred. In the case of M, there was no evidence to suggest that he did not have the

same rights to employment, welfare accommodation and other support as Italian nationals.

47. The Secretary of State said that article 3 does not impose a general obligation to house, or provide financial assistance to, those granted refugee status. The Secretary of State referred to *Mohammed Hassan v Netherlands* 40524/12, in which the ECtHR had said that the situation of asylum seekers could not be equated with that of a person who had explicitly been granted permission to settle in a country as a refugee, as their status put them on a par, as regards rights and obligations under domestic law, with Italian nationals.

48. If M's permit had expired, and he needed to re-apply for asylum, then Italy was bound by the Reception Directive. The Secretary of State referred to a recent UNHCR report about Dublin returnees (July 2013).

49. On 12 May 2014, the Secretary of State reconsidered M's claim, and re-certified it. The approach was similar to that in the other May 2014 reconsiderations. The Secretary of State took into account an April 2013 witness statement.

Edmond Karaj

50. Edmond Karaj, K, was born on 19 April 1990 and is Albanian. In his 2013 witness statement he said that he is homosexual, and he says his life was threatened in Albania because of a relationship he had there. He passed through Italy, but could not stay there because some members of his family live there, and know that he is homosexual. They will attack him because they disapprove. In Italy he was homeless and slept rough. He will commit suicide if he is returned to Italy.

51. In his 23 April 2014 witness statement, he gives more information. He has three cousins who live in Italy. They do seasonal work and move around a lot. He did not have his fingerprints taken when he went to Italy. He arrived on 5 May 2013. He was in Italy for 5 days. He slept rough. He does not say that he claimed asylum, or that he asked the authorities for any help. He then went to Belgium, and from there, to the United Kingdom, on a lorry.

52. According to the authorities, he entered Italy on 5 May 2013. He sought no help from them. He received no SPRAR or CARA accommodation, so he would be eligible for that if returned to Italy.

53. He was arrested in the United Kingdom on 22 May 2013 as a suspected illegal entrant. He claimed asylum and has been in the United Kingdom since then.

54. The Secretary of State certified his asylum claim on safe third country grounds on 3 July 2013. He made article 3 claims in pre-action protocol letters dated 9 and 16 July 2013. The Secretary of State certified that claim in a letter dated 22 July 2013, in terms similar to the initial certifications in the other cases. The certificate was upheld in a further letter dated 2 August 2013, in response to letters dated 22 and 26 July 2013. A further letter of 17 April 2014, in terms similar to the April 2014 letters in the other cases, again upheld the certification.

55. The Secretary of State reconsidered this K's case on 12 May 2014, along the same lines as the other May 2012 reconsiderations. The claim was re-certified.

AB(Sudan)

56. AB (Sudan), B, was born on 1 July 1989, in Sudan. His witness statement dated 20 October 2011 says that he left Sudan in 2008. He went to Greece and made an asylum claim using an alias. Before a decision was made on his claim, he went to Italy in August 2008. He was arrested, fingerprinted, and sent back to Greece. He was imprisoned there, and, on his release, returned to Italy. He was arrested and detained.

57. He was given a residence permit for 6 months while his claim was reviewed. He had an interview in 2009 with the Italian authorities. They did not know when they would make a decision. He was not given an address and had nowhere to go and no money. He was not given any information about how to support himself, or how to survive. He was homeless, had no food, and could not work. He stayed in an old house with others in the same position. It was attacked up to twice a week. He was abused in the street. The police did not help when asked and harassed them. The police burnt the house down at the end of 2009. He went to France, and then to the United Kingdom.

58. According to the authorities, he claimed asylum in Italy on 7 August 2008. On 10 December 2008, he was granted refugee status for 5 years. His permit of stay was issued on 3 January 2009, and expired on 3 January 2014. He was never accommodated in SPRAR accommodation, so this would be available to him on his return. There is nothing on the Eurodac database to suggest that he was fingerprinted in Greece.

59. B was encountered by police on 6 June 2011. He claimed to have entered the United Kingdom clandestinely. He claimed asylum and was interviewed.

60. B's asylum claim was certified on safe third country grounds on 15 July 2011. On 1 August 2011, the Secretary of State, in response to a pre-action protocol letter, certified B's human rights claim as clearly unfounded. On 17 March 2014, the Secretary of State re-certified the human rights claim, in terms similar to the April 2014 letters in the other cases. The Secretary of State noted that B's experiences in Italy had taken place at a time when he did not know that he had been granted refugee status. On that basis, they were not evidence that Italy would not abide by the Qualification Directive if B were returned there.

61. The claim was reconsidered and recertified on 12 May 2014. In that reconsideration, the Secretary of State relied on the admissibility decision of the ECtHR in *Hassan* (see below). The ECtHR had distinguished the position of refugees from that of asylum seekers, as the former are entitled to the same rights as Italian citizens. The mere fact of return to a country where one's economic situation is worse is not a breach of article 3. If pending renewal of his refugee status the B were regarded as an asylum seeker, the Secretary of State relied on the other recent admissibility decisions; there was no basis for thinking that B would not benefit from what was available in Italy.

Infringement proceedings

62. The European Commission began infringement proceedings against Italy in October 2012 claiming that it had failed to comply with the obligations imposed on it by the relevant Directives. These seem to be making slow progress (see the Claimants' reply).

The other evidence

63. The Claimants relied initially on a large number of reports from various non-governmental organisations ("NGOs"). In his oral submissions for the Claimants, however, Mr Knafler QC relied on three recent reports; a report dated July 2013 from the UNHCR, a report dated December 2012 prepared for the Braunschweig Administrative Court pursuant to its order of 28 September 2012 to take evidence, based on research done in October and November of 2012, and a report dated October 2013, and based on a fact-finding mission carried out between May and June 2013, by the Swiss Refugee Council ("the SRC"), which is an independent umbrella organisation for those entities in Switzerland which help refugees. It has a particular interest in the working of the Dublin Regulation in Italy, as the vast majority of Dublin returnees to Italy are returned by Switzerland.

64. Mr Knafler QC's approach is a pragmatic approach, for two reasons.

65. First, many of the older reports were in existence, or were considered by the ECtHR, when, in the admissibility decisions to which the Secretary of State has referred in the recent reconsiderations of these Claimant's cases, it declared several article 3 claims based on conditions in Italy to be manifestly unfounded. The July 2013 UNHCR report was available at the date of the later admissibility decisions, but is not referred to in them. Two of the admissibility decisions refer to the 2012 UNHCR report. The Braunschweig report antedates the admissibility decisions, and is not referred to in any of them, but I do not find that surprising, as it is evidence requested by but one of many national courts which have had to consider these issues. The SRC report, while it considers evidence assembled in May and June 2013, was not published until after the admissibility decisions.

66. The ECtHR did not find, in any of the admissibility decisions, on the basis of the material which was available in mid-2013, that there were systemic deficiencies in the way that Italy handles asylum claims, or provides for asylum seekers, or for those who benefit from international protection ("BIPs"). The FTT would not be bound to follow that conclusion, and it relates to material which is nearly a year old, but the FTT would be bound to give it very significant weight in its assessment. The ECtHR is an international court, with an appreciation of the international context, and, in particular, it is in a uniquely strong position to compare the situation in Greece at the time of *MSS* (where it did find systemic deficiencies) with that in Italy, which it has considered several times during April to August 2013. The ECtHR is much better placed to evaluate the effect of this type of evidence than is the FTT, as the FTT would be bound to acknowledge.

67. For reasons which I will later explain, the FTT would be bound not to treat the proof of systemic deficiencies as a sine qua non for the displacement of the evidential assumption that member states will comply with their EU obligations. But the admissibility decisions give proper weight to the evidential presumption of

compliance. It is not arguable, therefore, that there is any proper reason for the FTT to fail to give those admissibility decisions very significant weight.

68. That approach is not displaced by the fact that the Grand Chamber of the ECtHR has, more recently, on 12 February 2014, heard an application concerning return to Italy under the Dublin Regulation, in *Tarakhel v Switzerland* (29217/12). Mr Payne, for the Secretary of State, tells me that this case, unlike the present cases, involves a family with children. There has not yet been a decision from the ECtHR, and the FTT could not, and should not, speculate about what ECtHR might decide, or about why it decided to hear the case. Nor is that approach displaced by the fact that some German courts have made interim orders preventing return to Italy under the Dublin Regulation. There have, according to the witness statement of Mr Jacobs, been only 6 cases in which a final determination has been made precluding transfer to Italy.

69. In this context, I should mention, that, for reasons I shall give later, it is not properly arguable that the decisions of the Court of Justice of the European Union ("the CJEU") in *NS*, of the Supreme Court in *EM (Eritrea)* and of ECtHR in *MSS*, and the later admissibility decisions about Dublin returns to Italy, are enunciating different tests about what is necessary to show a real risk that article 3 will be breached in the context of a return under the Dublin Regulation. Mr Knafler QC did not suggest this, rightly, in my view. The FTT could not, therefore, decide that the approach of the ECtHR in the admissibility decisions is either irrelevant, or wrong. The admissibility decisions were all cited to the Supreme Court in *EM (Eritrea)* and three are referred to in the judgment, with no indication of disapproval. Mr Knafler QC rightly submits that they were not expressly approved by the Supreme Court. Nonetheless, I would have expected, and the FTT would expect, the Supreme Court to have indicated clearly if it considered that the approach taken by the ECtHR in them was wrong, as the Supreme Court's decision was to remit the cases before it to the Administrative Court to determine on the facts, applying the approach in *NS* as explained by the Supreme Court.

70. Second, the situation has changed since the periods covered by the earlier reports. On the one hand, the Italian authorities have actively responded to the strains in the system which were noted in 2011 and 2012 in some of the reports. On the other, it could be said that the situation faced by the Italian authorities has deteriorated.

The number of places available for asylum seekers and BIPs

71. The Claimants suggest that the number of spaces in accommodation provided for asylum seekers and BIPs in Italy is now about 31,000, or slightly more. Mr Payne, for the Secretary of State, says the figure is 29,000, to which must be added the exceptions referred to in paragraph 23 of Mr Dangerfield's witness statement, and some 6000 or so extra spaces for arrivals by sea (which would not be available for the Claimants on return). I accept this qualification of that figure. The evidence shows that the places have been substantially increased by the Italian authorities in response to the increasing demands for such accommodation. The current numbers greatly exceed the numbers of spaces which were available in the past in official accommodation, during the periods considered by the reports which are relied on. They also exceed the 1000 spaces which were available in Greece for "tens of thousands" of asylum seekers at the time of *MSS*.

72. It is convenient here to mention the North African Emergency ("the NAE"), when about 60,000 people arrived in Italy by boat, during the course of 2011. According to one source quoted in the Braunschweig report, 50,000 new spaces were created by the civil protection department in 2011 in response to this, and by November 2012, 21-22,000 asylum seekers were still in that accommodation, while the remaining 28,000 had either disappeared or been deported. This shows, and the FTT would be bound to conclude, that the Italian authorities have, in the past, responded to extraordinary strains on the system by creating extra accommodation places.

73. It is also convenient to mention the high grant rate in Italy. This is in marked contrast to Greece, at the time *MSS* was decided, where the grant rate was extremely low.

The numbers of asylum seekers and BIPs seeking accommodation

74. This is much less clear on the evidence. There is evidence of the numbers of people arriving illegally in boats during 2014, a comparison of those figures for 2014 and 2013, and annual arrival figures for 2008-2013. By 14 April 2014, over 20,000 had arrived, compared with about 2,000 by that time last year. If the current trend continues, last year's figure of nearly 43,000 will be exceeded significantly, and figures tend to rise in the summer months, so the figure could be considerably bigger.

75. What is not so clear is how many of those who arrive each year stay in Italy, and for how long, and of those, how many claim asylum, and if so, whether successfully or not. The figures for the NAE illustrate this difficulty; by November 2012, over half of those who had arrived in 2011 had dropped out of sight. The SRC report states that in February 2013, when the emergency centres were closed down, 16,000 or so remaining 'refugees' were given 500 euros as an incentive to leave the accommodation and integrate. The UNHCR report for 2012, see below, records that there were 17,352 asylum claims in 2012. In 2011, there were 4645 Dublin returnees, and in 2012, there were 3,551. 2,981 of those were returned by Switzerland. As Kenneth Parker J observed, in *EM (Eritrea*) at first instance [2012] EWHC 1799 (Admin), at paragraph 28, statistical exercises aimed at establishing capacity against demand are "futile" because the picture is so fluid. The SRC report candidly accepts that many key numbers are missing.

The UNCHR reports

76. The authorities are clear that the UNCHR reports have a special status, for the reasons explained by Sedley LJ in *EM (Eritrea)* [2012] EWCA Civ 1336; [2013] 1 WLR 576. Moreover, as Mr Payne, for the Secretary of State, points out, the UNHCR's operation in Southern Europe is based in Rome, so it is in an especially good position to assess conditions in Italy. The absence of a call from the UNHCR to halt Dublin removals to Italy is not decisive, of course. But it is something to which the FTT would have to give considerable weight, on any view.

77. Before I consider the 2013 UNCHR report, I will summarise the 2012 report. The 2012 report had noted the significant strains caused by the NAE in 2011, and worries about what would happen when that accommodation was phased out. It stated, however, "overall" that Italian reception facilities (which I describe below) are "able to provide for the reception needs of a significant number of asylum seekers". Some

problems were identified, for example, in relation to standards of the services provided. The number of sea arrivals in 2012 was 20% of the 2011 figure.

78. It notes what it calls "mixed migratory flows" consisting of asylum seekers and migrants who do not claim asylum. Its observation is that those who are in Italy "generally do not experience major difficulties in applying for international protection". The overall recognition rate of 30% is also noted, but it says that some improvements are needed. The SRC report give a higher grant rate, perhaps because it includes grants of subsidiary protection; the rate it gives is 61.9% in 2012.

79. The UNHCR report describes the reception facilities: Reception Centres for Asylum Seekers (CARA), Reception Centres for Migrants (CDA), local projects established in the context of the Protection System for Asylum Seekers and Refugees (SPRAR), and centres in metropolitan areas, complemented by the 2011 emergency reception plan. It says that there were about 2000 CARA places, 5000 CDA places, and 3000 SPRAR places. So the numbers of places have increased since the date of this report.

80. The UNHCR report said that there were shortcomings with the integration of refugees, which might hinder their efforts to become self-reliant. Measures offering specific support to refugees for access to the labour market need to be "rolled out". The UNHCR recommended affirmative action in this regard.

81. The 2013 UNHCR report found despite significant improvements since 2012, "gaps" in provision remained, in relation to the reception of asylum seekers, and the integration of refugees and BIPs, significant numbers of whom lead deprived and marginalised lives.

82. There had been positive improvements in access to the asylum procedure, but reports of delays continued. This can affect Dublin returnees, and can result in delays in access to reception. Dublin returnees are usually returned to the main airports. In principle NGOs are informed about their arrival to give information about the asylum procedure and to activate it.

83. The UNHCR was satisfied with the overall protection standards in the context of the asylum procedure, including recognition rates. Appeals against negative decisions are subject to delays, but have suspensive effect.

84. The arrival of 63,000 people by sea in 2011 had led to a deterioration in reception conditions which continued in 2012 and 2013. 28,000 people were channelled automatically into the asylum procedure by the authorities. An emergency reception plan was agreed, and 22,000 new arrivals were accommodated. The quality of the services they received was not high enough. Conditions also deteriorated in CARAs, mainly due to overcrowding. The response to the NAE highlighted the need for a consolidated and coordinated national system. There was need for comprehensive reform, but the government centres were able to provide for the reception needs of a significant number of asylum seekers. Support measures for recognised refugees, on the other hand, were "vastly insufficient".

85. Asylum seekers were entitled to work if their asylum claim had not been decided in 6 months. Dublin returnees registered as asylum seekers generally had access to transit accommodation centres on their return to Italy, but BIPs did not. The places were

insufficient, and Dublin returnees may have to wait some days at airports before they are placed. It was difficult in practice for some asylum seekers to enrol in the NHS. The quality of the services varied.

86. Integration prospects for BIPs were seriously limited and are one of the most problematic areas of the Italian asylum system. There is no comprehensive strategy for this. The ability of the SPRAR system to do this is limited. Only one third of BIPs had access in 2011 to reception assistance aimed at their inclusion provided by SPRAR. So many BIPs are housed in centres for the homeless and in emergency accommodation. Growing numbers are destitute and homeless. Integration programmes are decentralised and patchy. Many BIPs do not get support tailored to their needs to help them into work, reducing the likelihood of their getting jobs.

87. Neither the 2012, nor the 2013, UNHCR report, calls for any member state to suspend Dublin returns to Italy. The reports reveal a picture of general compliance by Italy with its EU and international obligations, while also disclosing some operational difficulties. It would not be open to the FTT to find that they show either, that there are systemic deficiencies in Italy's asylum system (as explained in *EM (Eritrea)*, that is, omissions on a widespread or substantial scale, or substantial operational problems). I make it clear that this is not solely because the UNHCR has not called for returns to be suspended, but also, because of the overall picture which the 2012 and then the 2013 reports disclose.

88. By contrast, in a recent report on Bulgaria, the UNHCR did call on member states to suspend Dublin returns to Bulgaria, and it has done so in the past in relation to Greece.

The Braunschweig Report

89. Mr Knafler QC helpfully provided a summary of the passages from this report on which he relies. It is older than the 2013 UNHCR report, and paints a gloomier picture of reception conditions for asylum seekers. If and to the extent that it differs from the UNHCR reports, the FTT would be bound to prefer those. Much of the reasoning in the report is speculative, in that reliable figures are hard to come by, and in their absence, the author draws pessimistic conclusions about the availability of reception places. It is considerably less sanguine than the UNCHR report about the likelihood of Dublin returnees getting accommodation on their return (less than 20% chance if an asylum seeker, no chance if BIP); this is based on figures gathered from NGOs about some, but not all, Dublin returnees. In argument these conclusions were subjected to sophisticated criticism by Mr Payne, which was rebutted by Mr Knafler QC. I do not consider that it would be arguably necessary for the FTT to consider these issues, because they would be bound to prefer the analysis of the UNHCR in its 2013 report, which is both more up-to-date, and considerably more authoritative.

90. The Braunschweig report agrees with the UNHCR report about the situation of BIPs.

The SRC Report

91. This is based on trips to Rome and to Milan, the two main cities to which Dublin returnees are sent. Its focus is on what happens to Dublin returnees, as Switzerland is the country which returns the vast majority of those who are returned to Italy under

the Dublin Regulation. This focus means that the FTT would not be able to give the broader conclusions which the report draws about the Italian system as a whole (there is accommodation for asylum seekers all over Italy) as much weight as it would be bound to give the conclusions in the 2013 UNCHR report.

92. Quite apart from the weight to which the views of the UNHCR are, in any event, entitled, several factors cause me, and would cause the FTT, to doubt the objectivity and accuracy of this report, in so far as it departs from the views of the UNHCR. I mention three (Mr Payne gave other examples in oral argument):

    i) the assertion that the ECtHR decided *Hussein* on credibility grounds (it is clear that it did not), and the indication that this approach meant that the ECtHR could find a violation of article 3 in a different case; Mr Knafler QC had to accept, as to the assertion, that the SRC "got it completely wrong";

    ii) the authors' assumption, which pervades the report, that it goes without saying that BIPs are entitled to support as a matter of law, when they are not, except to a very limited extent, as I explain below; and

    iii) the conclusion of the report, which I say more about below.

93. The SRC report refers to the institution of infringement proceedings by the European Commission. Mr Knafler QC argues in his note on the evidence that various factors diminish the significance of the fact that the ECtHR in *Daytbegova* (and in *Halimi*) (see further below) held that the infringement proceedings did not change its view about the merits of that applicant's case. He is right that to some extent the ECtHR relied on the particular facts of that claim. But some of the factors he relies on (the 2013 UNHCR report, the SRC report, the 2014 statistics and *EM (Eritrea)* in the Supreme Court) cannot logically change the intrinsic significance of the institution of infringement proceedings, as those factors post-date their institution (in October 2012). The fact remains that the ECtHR knew about the infringement proceedings, and that knowledge did not cause it to change its mind. It is to that fact that the FTT would be bound to pay significant regard.

94. The SRC report says that it can take several months for an asylum seeker to become eligible for accommodation at the start of the process. But new instructions have been issued by the Ministry of the Interior, based on specifications by the European Commission, to speed up the process. It is hoped that this will lead to shorter waiting times.

95. Dublin returnees who claim asylum have access to accommodation but whether they get it depends on capacity. When they arrive at the airport, they are given procedural help by NGOs. Returning BIPs are not eligible for this help. Dublin returnees sometimes have to stay for a few days at the airport while accommodation is found for them. Asylum seekers who are returned under the Dublin Regulation "can generally find accommodation" in various different centres, which is temporary. They are then eligible for accommodation in a CARA centre if there is a space, or in the Morcone system if the responsible prefecture is Milan. The Ministry of the Interior said that they have to wait a few days at most, but AGSI (an association of Italian lawyers) considers this unlikely. Some will not get a place in a CARA, and may end up in municipal accommodation.

96. The position of BIPs is different, as the UNHCR report shows. Many returnees are BIPs, although the exact figures are unclear. BIPs, from the Italian standpoint, are people with a valid residence permit. They can enter Italy unaccompanied, and travel there freely. The UNHCR says that NGOs are told of the arrival of BIPs, but the NGOs say that BIPs are not brought to them. BIPs are not eligible for accommodation in FERs, or CARAs. The assumption in Italy is that once protection status has been granted, people are allowed to work and must therefore provide for themselves; "When it comes to social rights, [BIPs] have the same status as native Italians, for whom the social system is also insufficient".

97. BIPs have access to SPRAR, which run intensive integration projects. In 2011/12, 72% of those staying in SPRAR were BIPs. It remained to be seen how the extra 16,000 places which had been recently announced would be allocated. Few asylum seekers go on to be accommodated in a SPRAR. A total of 5000 people were on a waiting list for a SPRAR place in 2012. The maximum length of stay is 6 months, which can be extended for vulnerable people. This is insufficient to enable people to provide for themselves subsequently. 5% of those accommodated in the SPRAR system are Dublin returnees. Those who have left SPRAR accommodation and travelled to Europe rarely return to such accommodation. According to SPRAR's annual report, 37% of those who left in 2011 did so as a result of successful reintegration. This number was lower than usual because of the very difficult job market. When people leave, SPRAR can pay a one-off sum of 250 euros as exit money, to help pay rent on accommodation. The report concludes that SPRAR offer good support to those who get in. It remains to be seen whether the extra places will be successful in defusing accommodation problems in Italy.

98. The report also deals with the availability of municipal accommodation in Rome and in Milan. Places are limited, and there are not enough to meet demand. The length of stay (6 months) is not enough to enable BIPs to integrate. There are also some spaces in places run by churches and charities, but not enough to meet demand. Asylum seekers and BIPs end up living in slums and squats; between 1200-1700 in Rome, and about 120 -180 in Milan. Several interviewees said that some people would rather live in such places than in state-run accommodation in a remote region. Perhaps 2,330-2,800 people are homeless in Rome. It is difficult for native Italians, and for BIPs, to get jobs, but harder for BIPs as they cannot usually rely on family support.

99. The SRC report concedes that in terms of access to asylum procedures, Italy cannot be compared with Greece. However, it concludes that there are "systemic deficiencies" in relation to reception conditions for asylum seekers and BIPs. This implies that, in this respect, Italy can be compared with Greece. That is wrong. The SRC report says that Italy is in breach of its obligations arising out of the EU asylum acquis, particularly the Reception Conditions Directive and the Qualification Directive. The FTT would be bound to consider this conclusion problematic. The reference to "systemic deficiencies" is an apparently deliberate echo of the words used by the ECtHR and the CJEU (as is the implicit comparison with Greece in respect of reception conditions). But it is a conclusion which cannot, on any view, be justified by the material in the report, which discloses some failings, but nothing on the sort of scale which would entitle an objective observer to declare that Italy was breaching its obligations on a widespread scale.

B. The legal framework

100. The legal framework has 3 components. They are

a) the approach of the ECtHR to the issues which arise in this case;

b) the Common European Asylum System ("the System"); and

c) domestic law and the approach of the domestic courts.

1. The approach of the European Court of Human Rights
(1) MSS v Belgium

101. In *MSS v Belgium* 30696/09 (2011) 53 ECHRR 2 the applicant had claimed asylum in Greece and then Belgium. The Belgian authorities returned him to Greece. The ECtHR examined his claims that his article 3 rights had been breached, both by Greece, and by Belgium, under several discrete headings. In short, the ECtHR held that Greece had breached his article 3 rights because of the conditions of his detention, because of his living conditions, and his article 2 and article 3 rights, taken with his article 13 rights, because of shortcomings in its asylum procedure. The ECtHR held that Belgium had, first, breached his article 2 and article 3 rights by exposing him to the risks arising from the deficiencies in the asylum procedure in Greece, and, distinctly, by exposing him to detention and living conditions contrary to article 3.

102. The FTT would be concerned with the two distinct heads of claim against Belgium. Under the procedural head, the ECtHR explained that it had not found a breach of article 3 in an earlier decision, *KRS*, because on the information then before the ECtHR, it was possible to assume that Greece was complying with its obligations and was not sending anyone back to Iran. Nor was there any reason to believe that people who had been sent back to Greece under the Dublin Regulation had been or would be prevented from applying for a rule 39 indication. I note that in *KRS*, there was a substantial body of material before the ECtHR suggesting that the failures by Greece were, at that stage, substantial, including a paper from the UNHCR which advised member states to refrain from transferring asylum seekers to Greece under the Dublin Regulation. This material, and the conclusion in *MSS* that *KRS* was rightly decided, show the weight which the ECtHR gives to the presumption of compliance.

103. The applicant had an arguable claim that to return him to Afghanistan would breach his article 2 and 3 rights. The ECtHR then went on to consider whether Belgium "should have rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters" (judgment, paragraph 344). The ECtHR referred to a number of reports which showed that there were practical difficulties in the application of the Dublin system in Greece, deficiencies in the asylum procedure and a practice of direct or indirect refoulement. The ECtHR also attached "critical importance" to a letter sent by the UNHCR to the relevant Belgian minister, asking him to suspend transfers to Greece (judgment, paragraph 349). The ECtHR referred to the fact that the System had entered a "reform phase" and that the European Commission had made proposals to strengthen the protection of fundamental rights

for asylum seekers, including the temporary suspension of transfers under the Dublin Regulation.

104. The ECtHR held that "the general situation was known to the Belgium authorities" (judgment, paragraph 352). As for assurances given by Greece to Belgium, the mere existence of domestic laws and international obligations were not of themselves an adequate protection against the risk of ill treatment where "reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention". Diplomatic assurances were not enough (judgment, paragraphs 353 and 354). While the normal course of action might be for applicants to be required to issue applications only against Greece, applications lodged there were "illusory". The ECtHR concluded, on this limb of the case, that "the Belgian authorities knew, or ought to have known, that [the applicant] had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him" (judgment, paragraph 358). In that situation, it was for the Belgian authorities not to assume that Greece would comply with its obligations, but "on the contrary, to verify how the Greek authorities applied their legislation on asylum in practice". If they had done so, they would have seen that the risks faced by the applicant were "real and individual enough to fall within the scope of article 3" (judgment, paragraph 359). I have already noted that at the time of *MSS*, the refusal rate in Greece was extremely high.

105. The ECtHR then dealt with the article 3 risks arising from conditions of detention and living conditions. The ECtHR dealt shortly with this head of claim. It said that the test was whether "substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country". It referred to the fact that it had already found (when considering one of the applicant's article 3 claims against Greece) that the applicant's detention and living conditions in Greece were "degrading". These facts were "well known … and freely ascertainable from a wide number of sources". By transferring the applicant to Greece, the Belgian authorities "knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment" (judgment, paragraphs 365 and 366). At that stage, there were 1000 reception places for "tens of thousands" of asylum seekers, as I have already mentioned.

106. It is necessary to consider how the Court approached the article 3 claim against Greece based on living conditions. It said that article 3 cannot be interpreted as obliging the Contracting Parties to provide everyone with a home; nor does it entail a general obligation to give refugees help in order to enable them to maintain a particular standard of living (judgment, paragraph 249). However, "the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered positive law". The Greek authorities were bound by their own law which transposes obligations imposed by EU law. The applicant's case was that because of Greece's "deliberate acts or omissions" he had not in practice enjoyed those rights, nor had he had provided for him his essential needs. The Court attached great importance to the applicant's status as an asylum seeker and "as such, a member of a particularly underprivileged and vulnerable population group in need of special protection". It noted the broad consensus at the international level about the need for this (judgment, paragraph 250 and 251).

107. The Court had to consider whether "a situation of extreme material poverty can raise an issue under article 3. It said that for a number of months, the applicant's situation had been "particularly serious". He "allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene, and a place to live. Added to that was the ever-present fear of being attacked and robbed, and the total lack of any likelihood of his situation improving" (judgment, paragraphs 252-254). The Court said that according to the Council for Europe Commissioner for Human Rights, the UNCHR, and reports of NGOs, this situation "exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile". There was therefore no reason to question the truth of his account (judgment, paragraph 255).

108. There were only 1000 places in reception centres for tens of thousands of asylum seekers. During February to March 2010, all Dublin returnees questioned by the UNHCR were homeless. A large number lived in parks and disused buildings (judgment, paragraph 258). The Court also rejected an argument that access to a 'pink card', which in theory enabled the applicant to work made a difference, as the reports revealed that in practice access to the job market was "riddled with administrative obstacles". The applicant had other problems: he could not speak Greek, had no support network and the economic climate was unfavourable. His asylum application had still not been considered by the Greek authorities (judgment, paragraphs 261-2).

109. In the light of this, and of the Greek Government's obligations under the Reception Directive, the Court considered that Greece had not had due regard to the applicant's vulnerability as an asylum seeker, and must be held responsible for the fact that he was living in the street for several months, with no resources and no access to sanitary facilities, and with no means of providing for his essential living needs. He had been the victim of "humiliating treatment showing a lack of respect for his dignity". That would have aroused in him "feelings of fear, anguish, or inferiority, capable of inducing desperation". It held that "such living conditions, combined with ... prolonged uncertainty... and the total lack of any prospects of his situation improving" attained the "level of severity required to fall within article 3 of the Convention" (judgment, paragraph 263).

(2) The 2013 admissibility decisions

110. The Secretary of State refers to *Hussein v Netherlands* (27725/10, 2 April 2013), *Daytbegova v Austria* (6198/12, 4 June 2013), *Halimi v Austria* (53852/11, 18 June 2013, *Abubeker v Austria* (73874/11, 18 June 2013), *Mohammed Hasan v Netherlands* (40524/10, 27 August 2013, and *Miruts Hagos v Netherlands* (9053/10, 27 August 2013).

111. In *Hussein*, the applicant arrived in Italy and claimed asylum. She was given CARA accommodation in 2008. In 2009, she was given subsidiary protection. She left the asylum seekers' centre and went to the Netherlands, and claimed asylum there. She did not give a truthful account of her experiences in Italy.

112. The ECtHR set out the features of the System (see further, below), and referred to *NS v Secretary of State for the Home Department* (see, also, below). It referred to the relevant Italian law and practice in paragraphs 33-50, including recommendations

made by the UNHCR in July 2012, a report published on 18 September 2012 by the Council of Europe Commissioner for Human Rights, and the written comments of the Italian authorities on that report. In connection with Dublin returnees, it also referred to a report published in May 2011, by Juss-Buss, a joint Norwegian/Swiss NGO, the Dublin II Regulation National Report on Italy, and the European comparative report "Dublin II Regulation: Lives on hold" prepared by three bodies, including the European Council on Refugees and Exiles. It observed that in 2010 and 2011, several German administrative courts had granted interim relief. Apparently the German authorities had appealed all but a few of those decisions, and, at that stage, the German Constitutional Court had not suspended transfers to Italy. A Belgian alien appeals board had suspended a return to Italy. It also noted the state of play in the United Kingdom; and the material which had been considered by the Court of Appeal in *EM (Eritrea)* (see further, below), and that the Court of Appeal had not, on that material, found evidence of "systemic deficiencies".

113. The applicant argued, as against the Netherlands, that her transfer to Italy would breach article 3 because she and her children would not be provided with state-sponsored accommodation, sustenance, medical assistance or health insurance, and would have to live on the streets. She would risk refoulement to Somalia, and she would not have any remedy in Italy for her complaints.

114. The ECtHR noted the factual unreliability of the applicant's complaints. But it did not declare her application to be manifestly ill-founded on that account. The ECtHR said that the assessment of any risk of article 3 ill treatment had to be rigorous. Whether the threshold was reached was a relative question, and would depend on all the circumstances. That assessment must take into account the general situation and the applicant's personal circumstances (paragraphs 68 and 69). Return to a state where one's economic position will be worse does not breach article 3. Article 3 does not entail a general obligation to give refugees a certain standard of living (paragraph 70). Aliens cannot resist expulsion, generally, in order to continue to benefit from social and medical provision in the expelling country, unless there are exceptionally compelling circumstances (paragraph 71).

115. The ECtHR referred to the fact that the applicant had been housed in reception facilities for asylum seekers, from her arrival, until, apparently, her departure from Italy. She had been granted subsidiary protection for three years. This had entitled her to work and to the same social and medical benefits as Italians. Her treatment in Italy did not breach article 3.

116. Her residence permit had now expired, so the ECtHR went on to consider what would happen if she were returned to Italy as an asylum seeker, and, as such, a member of a particularly vulnerable group. The ECtHR considered that the reports on reception conditions for asylum seekers in Italy showed that while "the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings (see paragraphs 43, 44 46 and 49 above) ... it has not been shown to disclose systemic failure to provide support or facilities catering for asylum seekers ... as was the case in *MSS v Belgium* ...". The ECtHR mentioned that more recent reports referred to improvements, and all reports showed that there is a detailed structure of facilities and care for asylum seekers.

117. In the context of the applicant's past experiences in Italy, she had not shown that her future prospects "whether taken from a material, physical, or psychological perspective, disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of article 3 .... . There is no basis on which it can be assumed that the applicant will not be able to benefit from the available resoures in Italy or that, if she encountered difficulties, the Italian authorities would not respond in an appropriate manner to any request for further assistance."

118. In *Mirtus Hagos* ECtHR referred to its earlier admissibility decisions in 2013 for the relevant law. The applicant had applied for, and been granted, humanitarian protection in Italy. He had then gone to the Netherlands. When returned to Italy under the Dublin Regulation, he had not given the authorities accurate information. The ECtHR treated him as an asylum seeker, as, while he had been granted humanitarian protection in the past, that had expired (paragraph 36). He had not, however, filed a fresh request for international protection. The ECtHR said, referring to *Hussein*, that "although the general situation and living conditions in Italy of asylum seekers is certainly far from ideal and may disclose some shortcomings, there is no systemic failure when it concerns providing support for facilities catering for asylum seekers, as was the case in Greece ... in *MSS* ..." (paragraph 38). The application was manifestly ill-founded.

119. In *Hasan*, the ECtHR considered 9 applications. The applicants were from Somalia, Eritrea, and Russia. The ECtHR referred for the relevant law to its earlier decisions in, eg, *Hussein*. All the applicants claimed that their removal from the Netherlands to Italy would breach their rights under article 3. One set of applicants were recognised refugees, not asylum seekers. The others could be regarded as asylum seekers because, even if some had previously been granted subsidiary protection, none had a valid residence permit. The ECtHR repeated what it had said in *Mirtus Hagos* about living conditions for asylum seekers. In view of the way they were treated in Italy, none of the asylum seeker applicants had shown a real risk of article 3 ill treatment, and their claims were manifestly ill-founded. In paragraph 179 of its decision, ECtHR distinguished between asylum seekers and recognised refugees. The rights of the latter put them on a par with the general population in Italy. The fact of return to a country where one's economic situation will be worse than in the expelling state does not meet the article 3 threshold (paragraph 180). Those claims were manifestly ill-founded. No applicant had substantiated his claim that it had been, or would be, virtually impossible to challenge the actions or decisions of the Italian authorities about their asylum claims (paragraph 184).

120. In paragraph 70 of *Daytbegova* (see also *Halimi*), the ECtHR noted that the European Commission had given formal notice to the Italian authorities of the institution of infringement proceedings. This would give the Italian authorities an opportunity to comment, and could not change the conclusion of the ECtHR that the current application was manifestly ill-founded and inadmissible.

2. The Common European Asylum System

121. There are four relevant parts of the System as it applies to the United Kingdom. They are:

    i) Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an

asylum application lodged in one of the member states by a third-country national ("the Dublin Regulation").

ii) Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive").

iii) Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers ("the Reception Directive")

iv) Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status ("the Procedures Directive")

122. The System has now been revised, and new Directives issued. They were required to be in force in those member states bound by them by 21 December 2013. So, for example, the Qualification Directive has been replaced by Directive 2011/95/EU. I have had a very helpful and detailed note from Mr O'Cellaigh, who represents some of the Claimants, which summarises the main differences between the Qualification Directive and its replacement. The United Kingdom is still bound by the Qualification Directive, but Italy by its replacement. The main relevant difference for the purposes of the FTT is that the replacement Qualification Directive approximates the rights of those granted refugee status and those granted subsidiary protection, including in respect of integration.

123. The System (in its earlier form and as recast) makes detailed provision designed to ensure, throughout the European Union, basic common standards in every aspect of the treatment of asylum claimants. A primary aim (evident from the recitals to the relevant instruments) is to reduce secondary movements caused by disparities in the standards applied by different member states. The Dublin Regulation seeks to achieve this aim by ensuring that, in general, there is only one member state which can be responsible for deciding an application for asylum made by someone who is present in the territory of a member state, but has in the past been present in the territory of another.

124. These four instruments are the machinery by which, at an institutional level, the right to asylum guaranteed by article 18 of the European Charter of Fundamental Rights and Freedoms ("the Charter") is protected. The machinery works by imposing on member states a framework of express, related obligations in the areas covered by the four instruments. There is no dispute about the obligations which the System imposes, and I will not lengthen this judgment further by setting these out in any detail.

(1) The Dublin Regulation

125. Article 1 states that the Dublin Regulation lays down the criteria and mechanisms for determining the member state responsible for examining an application for asylum lodged in one of the member states. Article 3.1 provides that member states shall examine the application of any third-country national who applies for asylum at the border or in their territory. That application is to be examined by a single member

state which is the state which, according to the criteria in Chapter III, is the member state which is responsible.

126. Article 3.2 provides (by way of derogation) that member states are free to examine an asylum application even if they are not the state responsible for it under the Dublin Regulation.

(2) The Qualification Directive

127. The Qualification Directive provides for qualification for refugee status and for subsidiary protection, and for the consequences of the recognition of such claims. Chapter II contains provisions for the assessment of applications. Chapter III is headed 'Qualification for being a Refugee'. Chapter IV deals with refugee status, Chapter V with qualification for subsidiary protection, Chapter VI with subsidiary protection status, Chapter VII with the content of international protection, and Chapter VIII with administrative co-operation.

(3) The Procedures Directive

128. The Procedures Directive makes detailed provision for the procedural obligations of member states. These obligations are binding on the member state to which an applicant applies for refugee status or subsidiary protection.

(4) The Reception Directive

129. The Reception Directive provides for the minimum standards to be applied by member states in their reception arrangements for asylum seekers. Its provisions bind the member state to whom a particular applicant applies for asylum.

(5) The decision in NS

130. In *NS v Secretary of State for the Home Department* (joined cases C-411/10 and C-493/10; [2013] QB 102) the CJEU considered a reference by the Court of Appeal. It concerned a challenge by an Afghan national to his return to Greece under the Dublin Regulation. He relied on material about the general situation for asylum seekers in Greece. A list of questions was referred by the Court of Appeal to the CJEU. The key issue was in what circumstances a member state was obliged, by EU law, to exercise the discretion conferred by article 3(2) of the Dublin Regulation, so as to take responsibility for a person's asylum claim, and not return him to the first member state (which the second member state would otherwise be entitled to do under the Dublin Regulation). In other words, when was the second member state compelled by EU law not to return an asylum seeker to the first member state?

131. In sum, the headnote to *NS* records the relevant aspects of the decision of the CJEU as follows. First, when a member state makes a decision under article 3(2) of the Dublin Regulation, it is implementing EU law and is required to observe the fundamental rights in the Charter. Second, EU law precludes a conclusive presumption that the first member state observes the fundamental rights in the Charter. Third, article 4 of the Charter precludes member states and national courts from transferring asylum seekers to the first member state when they could not be unaware that systemic deficiencies in the asylum procedure and reception conditions for asylum seekers

there amounted to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter. Fourth, the protection conferred by articles 1, 18 and 47 of the Charter on a person to whom the Dublin Regulation applied was no wider than that conferred by article 3 of the ECHR.

132. Paragraph 80 of the decision of the CJEU says that "it must be assumed that the treatment of asylum seekers in all member states complies with" fundamental rights. The Court went on to recognise (paragraph 81) that "that system" may, "in practice, experience major operational problems in a given member state, meaning that there is a substantial risk that asylum seekers may, when transferred to that member state, be treated in a manner incompatible with their fundamental rights. But "it cannot be concluded from the above that any infringement of a fundamental right by the member state responsible will affect the obligations of other member states to comply with the provisions of [the Dublin Regulation]" (paragraph 82).

133. The CJEU went on to say that "At issue here is the raison d'être of" the EU, and of the System, which is based on assumptions of mutual confidence and compliance with, in particular fundamental rights (paragraph 83). At paragraph 84, it stated that it would not be compatible with the aims of the Dublin Regulation if the "slightest infringement" of the System were sufficient to prevent transfer under the Dublin Regulation. So "any infringement" of the provisions of the System cannot have the "mandatory consequence" that transfer is precluded. If that were so, it would add to the criteria in the Dublin Regulation a further criterion, "according to which minor infringements" of the System "committed in a certain Member State" could exempt that member state from the obligations imposed by the Dublin Regulation (paragraph 85). That would endanger the mechanism established by the Dublin Regulation.

134. "By contrast", in paragraph 86, the CJEU acknowledged that "if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants ... resulting in inhuman or degrading treatment within the meaning of article 4" of the Charter, the transfer would be incompatible with that provision.

135. The CJEU then referred to *MSS v Belgium*, paragraphs 358, 360 and 367. It noted that the ECtHR had held that Belgium had infringed article 3 both by exposing the applicant to the risks arising from deficiencies in asylum procedures in Greece and by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (judgment, paragraph 88).

136. At paragraph 89, it said that "The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant MSS, a systemic deficiency in the asylum procedure and in reception conditions of asylum seekers". The CJEU then described that evidence: "regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the [System] in Greece, the correspondence sent by the [UNHCR] to the Belgian minister responsible", and also the Commission reports on the evaluation of the Dublin system and the proposals for re-casting it.

137. This sort of information meant that member states could assess compliance by another member state with fundamental rights, and the risks to which a person would be exposed if he were transferred to another member state (judgment, paragraph 91). This in turn meant that member states, including national courts, may not transfer an asylum seeker to the member state responsible under the Dublin Regulation where "they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers ... amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of the Charter." (judgment, paragraph 94). This formula is repeated, in relation to article 4 of the Charter, at paragraph 106 of the judgment.

138. There was no conclusive presumption that member states would comply with their obligations (judgment, paragraph 99). Such a presumption could undermine safeguards which are designed to ensure compliance with fundamental rights. This would apply to any provision that there are 'safe countries', if such a provision is to be interpreted as excluding evidence to the contrary (judgment, paragraphs 100 and 101). Article 36 of Directive 2005/85 requires a country to "observe" the provisions of the Refugee Convention and of the European Convention on Human Rights (judgment, paragraph 102). Ratification of treaties alone cannot create a conclusive presumption of compliance (judgment, paragraph 103). So any presumption that asylum seekers will be treated in a way which is compatible with fundamental rights is rebuttable (judgment, paragraph 104).

(6) EM (Eritrea)

139. In *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, the Supreme Court had to consider the application of the CJEU's reasoning in *NS* to a claim by asylum seekers who challenged the certification by the Secretary of State of their human rights claims concerning return to Italy as clearly unfounded. The Court of Appeal had held that the claims of the appellants "fell well short of" the threshold which, it considered, the CJEU had established in *NS*. Yet the Court of Appeal also held that "If the question were ... whether each of the four claimants faces a real risk of inhuman and degrading treatment if returned to Italy, their claims would plainly be arguable and unable to be certified" (judgment, paragraph 61).

140. Lord Kerr, SCJ, giving the judgment of the Supreme Court, referred to the need for a presumption that member states will comply with their obligations at paragraph 40. But, he continued, at paragraph 41, the presumption "should not extinguish the need to examine whether in fact those obligations will be fulfilled when evidence is presented that it is unlikely that it will be". The purpose of the presumption is to "set the context for consideration of whether an individual applicant will be subject to violation of his fundamental rights if he is returned ... [It] should not operate to stifle the presentation and consideration of evidence that this will be the consequence of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker." Violation of article 3 does not normally, or necessarily require that the conditions which are complained of are a result of systemic shortcomings.

141. Lord Kerr said (at paragraph 47) that the critical question was whether the CJEU had decided that an asylum seeker could only challenge his return to the first member state if there was a "systemic failure" in the asylum procedures and reception conditions in that state. The Supreme Court went on to decide that that was not what the CJEU had held. Lord Kerr had, earlier, noted, at paragraphs 2 and 3, that all the parties to the appeal had agreed that the Court of Appeal had been wrong to hold that the existence of systemic deficiencies in the asylum or reception procedures of a member state was the sole ground on which a member state was required to exercise the power conferred by article 3(2) of the Dublin Regulation. They had also agreed that the correct test was the test in *Soering v UK* (1989) 11 EHRR 439 (at paragraph 91).

142. The Supreme Court considered the important passages in *NS*. At paragraph 80, the CJEU held that it must be assumed that the treatment of all asylum seekers complies with the requirements of the Charter, the Refugee Convention and the ECHR. Lord Kerr described paragraph 81 of the judgment as "pivotal to the court's reasoning". The CJEU there said, "It is not inconceivable that that system may, in practice, experience major operational problems in a given member state, meaning that there is a substantial risk that asylum seekers may, when transferred to that state, be treated in a manner incompatible with their fundamental rights." Lord Kerr said (paragraph 52 of *EM*) that "The circumstance that the general system may experience major operational problems in specific settings is not the same as the system having intrinsic deficiencies". He disagreed with the Court of Appeal's interpretation of *NS* and held that the CJEU was here recognising that "any system, however free from intrinsic deficiency, might experience operational problems which would cause a substantial risk that asylum seekers would be treated in a manner incompatible with their fundamental rights". The source of the risk, he decided, was not systemic deficiencies caused by intrinsic weaknesses in [the System], but rather, "major operational problems in a given member state." See also paragraph 53.

143. He explained (in paragraphs 54 and 55) that this interpretation was not inconsistent with paragraph 86 of the CJEU's decision, as, in that paragraph, the CJEU was using the phrase "systemic flaws in the asylum procedure and reception conditions for asylum seekers in the member state responsible" to mean something different from 'systemic deficiencies'. That paragraph might otherwise be read as suggesting that an asylum seeker could only resist return to the first member state if he were able to show such systemic flaws.

144. In his view the focus in *NS* on systemic deficiencies was caused by the fact that there were such deficiencies in that case. The CJEU did not need to, and did not, consider whether systemic deficiencies had to be present in order to oblige a member state to refrain from returning an asylum seeker under the Dublin Regulation (judgment, paragraph 56). The question was whether the member state had "grounds for believing that the consequence for the person transferred will be inhuman or degrading treatment" (judgment, paragraph 57).

145. There was nothing in the decision of the CJEU, or in logic, to suggest the member state could not be deemed to have such knowledge absent a letter from the UNHCR (judgment, paragraph 57; see also paragraphs 71-74). The fact that the UNHCR had made no recommendation was "of obvious significance". The UNHCR material "should form part of the overall examination of the particular circumstances of each of the appellant's cases, no more and no less" (judgment paragraph 74). The

Claimants in this case accept that materials produced by local organisations may be entitled to less weight than materials produced by international organisations such as the UNCHR (Reply, paragraph 18).

146. The Supreme Court overturned the decision of the Court of Appeal that only systemic deficiencies in the member state's asylum procedures and reception conditions are a basis for resisting transfer to that member state. The correct approach was to apply the test in *Soering v UK* (1989) 11 EHRR 439. The obligations imposed by the System on member state "coalesce" with the obligations imposed by the ECHR. Where it can be shown that the conditions in which an asylum seeker will be required to live on return under the Dublin Regulation are "such that there is a real risk that he will be subjected to inhuman or degrading treatment, removal to that state is forbidden" (judgment, paragraphs 58-63).

147. Where the claim is that the state has failed to provide adequate living conditions for asylum seekers, the evidence "is more likely to partake of systemic failings, but the search for such failings is by way of a route to establish that there is real risk of article 3 breach, rather than a hurdle to be surmounted" (judgment, paragraph 63). The claim that there is such a risk has to be evaluated against the "significant evidential presumption" that states will abide by their obligations (judgment, paragraph 64).

148. Lord Kerr observed, at paragraph 66, when discussing the decision of Kenneth Parker J at first instance, that that Judge's view approximated to his own: that is, *NS* required it to be shown that there were "omissions on a widespread and substantial scale" or "substantial operational problems", rather than "inherent deficiencies in the system". He went on to say, "Practical realities lie at the heart of the inquiry" (judgment, paragraph 68; see also paragraphs 69-70).

149. Two of the appellants in *EM (Eritrea)* submitted that as they were refugees, their transfer to Italy was not governed by the Dublin Regulation and was not within the scope of EU law. The Secretary of State agreed that they were not returned to Italy under the Dublin Regulation. She argued that the ECtHR had consistently distinguished between asylum seekers and refugees (referring to *Hasan*, supra).

150. Lord Kerr held that what mattered was not whether the Dublin Regulation treated asylum seeker and refugees differently, but that the Dublin Regulation relates to anyone who has claimed asylum in the member state to which he might be transferred, whether or not he has been recognised there as a refugee. That reflected its nature as a "chiefly procedural instrument". All the appellants met the relevant definition in the Dublin Regulation, and were therefore susceptible to return under it. The assessment of claims from each class would depend on an examination of the particular circumstances of each. An argument that refugees would be less likely to suffer a violation of article 3 because they can assert their rights under the Qualification Directive could be anticipated (judgment, paragraphs 75-79).

(7) The relationship between the decisions of the CJEU, the Supreme Court and the ECtHR

151. I have already indicated that it is not arguable that the relevant decisions of the CJEU, of the Supreme Court and of the ECtHR are inconsistent with one another. It is inherently unlikely that the CJEU (in the light of the adoption of the Charter) and the ECtHR would adopt different approaches to the interpretation of article 3 in this very

specific context which involves the relationship between the ECHR and the Charter, and the role of the presumption of compliance. Indeed, as might be expected, there is a developing dialogue between the two courts. In *NS*, the CJEU made it clear that the protection conferred by the Charter in this context is coincident with the protection conferred by article 3. It paid very close attention to the decision of the ECtHR in *MSS* which involved several different allegations of breaches of article 3 by Greece and by Belgium, and drew certain conclusions from it. The ECtHR, in turn, in the admissibility decisions, referred in detail expressly, or by reference, to the approach of the CJEU in *NS* (see paragraph 28 of *Hussein*). It can be seen to have applied a similar approach to its assessment of whether the claims by Dublin returnees were manifestly ill-founded or not (see paragraph 78 of *Hussein*).

152. For its part, the Supreme Court has interpreted the decision in *NS*, for the benefit of litigants and courts in the United Kingdom. The Supreme Court can not depart from the decision in *NS*, or encourage the courts here to do so. For present purposes I must assume that the decision of the Supreme Court is consistent with the decision of the CJEU in *NS*. The approach of the ECtHR in the admissibility decisions is also to follow *NS*. I must, and the FTT would be bound to, assume that, all three courts, have adopted the same approach; and that is, the approach in *NS* as interpreted by the Supreme Court in *EM (Eritrea)*.

3. Relevant domestic law
(1) Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act)

153. Section 33 of the 2004 Act enacts Schedule 3 to the 2004 Act which "concerns the removal of persons claiming asylum to countries known to protect refugees and to respect human rights". Schedule 3 is headed "Removal of Asylum seeker to Safe Third Country".

154. Schedule 3 in part gives effect to the Dublin Regulation in the United Kingdom. Part 2 of Schedule 3 concerns a "first list of safe countries". The list is in paragraph 2 of Part 2. Paragraph 3(2) of Part 2 applies in every case where the Secretary of State proposes to return an asylum or human rights claimant to one of the states in that list, on the grounds that the state in question is a third country responsible for determining the merits of the claimant's asylum or human rights claim. The states listed (Italy is included) are to be treated as "safe countries".

155. So far as material paragraph 3 of Part 2 of the Schedule 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 human rights claim may be removed -
>
> (a) from the United Kingdom, and
>
> (b) to a State of which he is not a national or citizen.

> (2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place -
>
> (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
>
> (b) from which a person will not be sent to another State in contravention of his Convention rights, and
>
> (c) from which a person will not be sent to another State otherwise and in accordance with the Refugee Convention."

156. The reference to "Convention rights" in paragraph 3(2)(b) is to the rights guaranteed by the ECHR and identified as Convention rights by section 1 of the Human Rights Act 1998 (paragraph 1(1)). Where the Secretary of State certifies that a person is not a citizen of a state in the list, and he is to be removed to a state on the list, that person may not bring an in-country appeal to the FTT under section 92(2) or (3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Nor may he bring an in-country appeal under section 92(4)(a) of the 2002 Act in so far as it relies on onward removal from that state (paragraphs 5(1), (2) and (3)).

157. Paragraph 5(4) of Schedule 3 to the 2004 Act provides:

> "The person may not bring an immigration appeal by virtue of section 92(4)(a) of the Act in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies1 unless satisfied that the claim is not clearly unfounded."

158. In summary the effect of the statutory scheme is that:

i) When any person, court, or tribunal decides whether a person may be removed from the United Kingdom, a member state, such as Italy, is to be treated as a country from which a person will not be sent elsewhere in breach of his rights under the Refugee Convention or under the ECHR ("the deeming provision").

ii) The deeming provision and paragraph 5 prevent a person from appealing to the FTT on the grounds that he faces a real risk of being refouled by the receiving state in breach of his rights under the Refugee Convention or under the ECHR.

iii) If the Secretary of State certifies as "clearly unfounded" a claim by an applicant that his human rights will be breached within a member state, such

[1]Ie, a human rights claim in so far as it relies on a matter other than those specified in paragraph 3(2) (paragraph 5(5)).

as Italy, the applicant has no statutory right of appeal to the FTT against the Secretary of State's decision that there is no real risk of article 3 being breached.

iv) The Secretary of State will certify as "clearly unfounded" a claim alleging a real risk of breach of human rights in Italy, or in any other member state, unless she is satisfied that it is not clearly unfounded.

(2) The role of the Secretary of State in making, and of the court in reviewing, a certificate

159. The nature of the Secretary of State's role when issuing a certificate similar to a certificate under paragraph 5(4) of the 2004 Act was considered by the House of Lords in *R (Yogathas and Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36; [2003] 1 AC 920. These appeals concerned the removal of asylum seekers to Germany under the Dublin Convention[2]. The certificate at issue in that case was a certificate under section 72(2)(a) of the Immigration and Asylum Act 1999 that an applicant's human rights claim was manifestly unfounded. That test of course, and significantly, is very similar to the ECtHR's "manifestly ill-founded" test.

160. The House of Lords held that the Secretary of State has to give careful consideration to the allegations, the grounds on which they are made, and any material adduced in support of them. The question for the Secretary of State is whether the allegation is so clearly without substance that it must clearly, or is bound to, fail. This is a screening process rather than a full merits review, and its extent depended on the nature and detail of the case presented by the applicant[3].

161. The court's role on a challenge to such a certificate was also considered. The court should subject the Secretary of State's decision to the most anxious scrutiny. This issue was revisited by the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department*[4]. This appeal concerned a certificate under section 94(2)(a) of the 2002 Act that asylum and human rights claims were 'clearly unfounded'. Again this test is very similar to that applied by the ECtHR.

162. Lord Phillips concluded that "In this context there was some debate as to the approach that should be adopted by the court when reviewing the Secretary of State's decision. Must the court substitute its own view of whether the claim is clearly unfounded, or has no realistic prospect of success, for that of the Secretary of State or is the approach the now familiar one of judicial review that involves the anxious scrutiny that is required where human rights are in issue. ZT is seeking judicial review and thus I would accept that, as a matter of principle the latter is the correct approach".

(3) How does a claimant show that there is a real risk of a breach of article 3?

---

[2]The background to the adoption of the Dublin Convention, and to the use of the phrase 'manifestly unfounded' is set out at paragraphs 24-34 of Lord Hope's speech.

[3]Per Lord Bingham at paragraph 14. Lord Hope, at paragraph 34, said, "The question [for the Secretary of State] is whether the allegation is so clearly without substance that the appeal is bound to fail".

[4][2009] UKHL 6, [2009] 1WLR 348.

163. An allegation that a claimant will suffer a breach of his article 3 rights if returned to a second state is an allegation which requires him to show that there are substantial grounds for believing that his removal would expose him to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment[5]. The assessment must focus on the foreseeable consequences of removal in the light of the circumstances of the country to which removal will take place, and of the applicant's personal circumstances[6].

164. There is a difference between an article 3 claim made ex post facto, on the basis of events which have already happened, and an article 3 claim based on future risk. In the former case, the fact of the breach is enough, and whether it is the result of wider problems may not matter at all. In the latter case, it is by definition easier to show a risk the more widespread a problem can be shown to be in the receiving country; compare the approach of the ECtHR in *MSS* to the article 3 claims against Greece and against Belgium. It can be seen that the presumption of compliance was not considered relevant to the assessment of those claims against Greece, which depended only on an evaluation of what had happened to the applicant in fact.

165. The question in these cases is whether any of the Claimants might arguably satisfy the FTT that return to Italy would expose him to an article 3 risk. There are two generic issues here: whether

    i) the argument, by those Claimants who are, or might be, asylum seekers on their return, that the evidential presumption is displaced, is bound to fail before the FTT; and

    ii) the argument by those Claimants who are, or would on any view, very shortly after their return become, BIPs, or receive humanitarian protection, that they are at real risk of article 3 ill treatment is bound to fail before the FTT.

(a) asylum claimants: the evidential presumption

166. Mr Knafler QC accepted that the approach of Kenneth Parker J, as described by Lord Kerr in *EM*, is the correct approach. Could the FTT, applying that approach to the relevant evidence, arguably find that the evidential presumption of compliance has been displaced? I consider that it could not. I have already summarised the evidence at some length, so I can give my reasons briefly. I agree that this presumption is, as Mr Payne put it for the Secretary of State, not a hurdle; but it is a very important part of the inquiry when the allegation is that there is a generalised risk of article 3 ill treatment in Italy which arises regardless of the returnee's profile.

167. Though it is not decisive, the starting point for the FTT would have to be that the UNHCR has not asked any member state to suspend removals to Italy. Not only that, but in its two most recent reports on Italy, the UNHCR, while making robust and objective criticisms, has not painted a picture which begins to meet the relevant test. It says in its 2013 report that there have been significant improvements. It is true that

[5]See *Cruz Varas v Sweden* 14 EHRR I, 37, paragraph 82, cited by Lord Hope at paragraph 51 of *Yogathas*.

[6]See paragraph 108 of *Vilvarajah v the United Kingdom* 14 EHRR 248, 289, also cited by Lord Hope at paragraph 51 of *Yogathas.*

there has been a steep increase in arrivals in 2014, but against the backdrop of Italy's response to the NAE, and the substantial recent increase in accommodation places I do not consider that the FTT could possibly conclude, on the current material, that the presumption is displaced.

168. Mr Knafler QC may well be right that, as things stand, all the new accommodation is either full, or very nearly so. But that, taken with evidence of gaps in provision, and some failings, would not enable the FTT to displace the presumption of compliance in circumstances where Italy has, to date, made impressively sincere efforts to cope with surges in arrivals.

169. The issue is not, contrary to the submission of Mr Knafler QC, whether the SRC and Braunschweig reports are "capable of belief" such that, if they are, the evidential presumption is displaced. There are two questions. First, what weight could the FTT rationally give those reports, if and to the extent that they differ from the UNHCR's "pre-eminent and possibly decisive" assessment? The answer to that question is "Very little". Second, could the FTT find that (where they do not differ from the UNHCR report) they show "omissions on a widespread and substantial scale" or "substantial operational problems" sufficient to displace the significant evidential presumption of compliance? That is, substantial operational problems with the whole asylum acquis, not just operational problems with some aspects of it. The answer to that question is, "No".

(b) beneficiaries of BIP

170. There are three issues here: whether the FTT could conclude that

a) *EM (Eritrea)* requires BIPs and asylum claimants to be treated similarly;

b) the approach of the House of Lords to article 3 claims based on destitution is different from that of the ECtHR;

c) a breach or likely breach of Italy's obligations under the revised Reception Directive to provide integration facilities is a breach of article 3.

(i) Does EM (Eritrea) require BIPs and asylum claimants to be treated similarly?

171. I have summarised the relevant passage from *EM (Eritrea)* above. The FTT could not possibly conclude from that passage that the Supreme Court were saying that BIPs and asylum claimants must be treated in the same way as regards the assessment of their article 3 claims. What Lord Kerr was considering in that passage was whether the Dublin Regulation applies in the same way to both categories. All the indications about how the article 3 claims should be assessed point away from Mr Knafler QC's submission. Lord Kerr made clear, first, that such claims depend on the factors particular to each individual, and second, he flagged up the very argument on which the Secretary of State now, correctly, relies.

172. It is clear that the ECtHR does regard asylum claimants and BIPs differently, if, as in the case of Italy, BIPs are entitled to work and are on a par with Italian citizens. BIPs are not vulnerable to the same degree as asylum claimants, and are owed different obligations under the relevant Directives. I do not consider that the FTT could rationally approach these claims in any other way. That conclusion is not altered by any arguable failure to provide integration facilities, which I consider separately, below.

(ii) Is the approach of the House of Lords to article 3 claims based on destitution different from that of the ECtHR?

173. Mr Knafler QC argued that the House of Lords has held that article 3 may be breached if a state does not take positive steps to alleviate destitution for which it is responsible. He relied on *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 6; [2006] 1 AC 396. *Limbuela* was a not a case in which the United Kingdom sought to return a claimant to another state, but a case in which the United Kingdom was itself directly responsible for the situation of the appellants. Mr Knafler QC's argument was that the ability to work to relieve that destitution does not absolve the state of its positive duty to relieve it, if the state is responsible for that destitution. The criterion for liability was the state's responsibility for that destitution. He pointed to an obiter statement by Lord Brown, at paragraph 91 of his speech. He may be right that the approach of two other members of the Appellate Committee was also to ask whether the state was responsible for a condition in which the article 3 threshold is crossed.

174. But the critical question is what exactly the state is responsible for. In my judgment, on the facts of that case, it is clear that all the other members of the Committee decided that a breach of article 3 was imminent because the state was responsible for creating a regime in which late asylum claimants were barred from all forms of state support, including asylum support, and from working, while their claims were decided. Whether or not Lord Brown considered that the bar on working was material to his own reasoning, is, therefore, irrelevant. Lord Kerr referred to, and summarised, paragraph 7 of Lord Bingham's speech *Limbuela* in paragraph 62 of his judgment in *EM (Eritrea)*. It is not arguable that this reference can do anything other than to confirm that the correct approach is as I have described it in this paragraph. The key point is that the regime which led to an imminent direct breach (by the Secretary of State) of article 3 in *Limbuela* included a bar on working.

175. It is clear that the ECtHR has decided, in more than one of the admissibility decisions, that a BIP, who, once he has status, and can work, and is on a par with Italian citizens, cannot rely on article 3 to resist return to Italy. Any attempt, based on *Limbuela*, to persuade the FTT that the approach of the ECtHR to such cases is wrong (as a matter of domestic law) and should not be followed by the FTT, is bound to fail. The main complaint is that the Italian social security system is limited; but this is the same for Italians as it is for BIPs. The ECtHR has repeatedly said, however, that a difference between a person's economic circumstances in the sending and receiving state, based on differences of resources between the two states, does not raise an issue under article 3 (see, for example, the admissibility decisions and *SSH v UK* (2013) 57 EHRR 18; and in the domestic context, see *R (MB) v Secretary of State for the Home Department* [2013] EWHC 123 (Admin), per Mitting J, dealing with Dublin returns to

Malta). I also reject Mr Knafler QC's argument that article 3 read with article 14 somehow requires Italy to introduce some kind of social security system for BIPs of a kind which it does not have for its own citizens.

(iii) is a potential breach of Italy's obligations to provide integration facilities a breach of article 3?

176. The first point is that, on the evidence, Italy very substantially complies with the recast the Qualification Directive (and in one respect, goes further than it requires). Italy grants status in a relatively high proportion of cases, and when applicants are given status, they are treated in the same way as Italian citizens. Article 34 provides:

> "In order to facilitate the integration of [BIPs] into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes".

177. Integration facilities are provided in SPRAR accommodation. The numbers of SPRAR places have been increased substantially. The CRS report suggests that a large proportion of those in SPRAR accommodation are BIPs. It is clear, however, that the UNHCR was concerned, both in 2012 and in 2013, with the prospects of BIPs receiving integration facilities in SPRAR accommodation. Only one third of BIPs had access to SPRAR accommodation in 2011. Nonetheless, there are two points to make about this argument. First, it is as vulnerable to the presumption of compliance as the arguments I have considered above, as it is an argument based on a possible future breach by Italy of its obligations under one of the Directives. The UNHCR did not, either in 2012, or 2013, consider that these problems meant that states should not return BIPs to Italy. Even if it were not vulnerable to that argument, I do not consider that it would be open to the FTT to conclude that a risk of a breach of this obligation gave rise to an issue under article 3. This obligation is imposed in order to facilitate integration, not in order to provide material support for BIPs (even if the way that Italy chooses to comply with it is by providing accommodation in which help with integration is given). The risk of a failure to comply with this obligation would not give rise to a real risk of ill treatment under article 3.

D. Should the certificates be quashed?

178. The question is whether appeals based on the article 3 claims which are advanced by the Claimants would be bound to fail before the FTT. The Secretary of State has decided, on up-to-date material, and directing herself correctly in law, that they would be. I must review these decisions anxiously. So I turn now to the case of each of the Claimants. My decision that the evidential presumption is not arguably displaced is not decisive, as I must also consider whether the FTT could find individual risk factors relevant to article 3, and allow an appeal on that basis, by applying the *Soering* test to the evidence.

The Claimants's claims
T

179. Like the other claimants, T is a young, single, man. His medical condition does not arguably reach the threshold in *N v UK* (2008) 47 EHRR 39. There are no other individual factors in T's case which could arguably create any risk, let alone a real risk, that the article 3 threshold would be reached if he were returned to Italy. The FTT could not properly conclude otherwise. There is nothing in T's claimed experiences in Italy to change this conclusion. On his own account, he was only in Italy for 2 days. He did not claim asylum, and cannot point, from his personal experience, to any failings in Italy's compliance with the System.

180. Is there anything in the general arguments which would mean that, on the current evidence about the Italian asylum system, T's claim before the FTT could succeed? The first point is that it is not clear that T would claim asylum were he returned to Italy. But on the assumption that he would, the undisplaced presumption of compliance is a complete answer to his claim.

S

181. S made an asylum claim in Italy in 2012. He was given a permit of stay for 6 months. His claim was decided within a matter of months, before the expiry of the permit, and refused. He was accommodated in CARA accommodation, from which he absconded. On his return to Italy, in December 2013, he was given a further permit of stay, for an asylum request. It has now expired, but its issue suggests that S would be able to claim asylum again were he returned to Italy. He absconded from Italy again, went to Belgium and then to the United Kingdom. Mr Knafler QC was not able to submit that S would make an asylum claim if he returned to Italy. He would be eligible for SPRAR accommodation if he were to make an asylum claim; but Mr Knafler realistically accepts that, as a failed asylum seeker, he would be owed no duties by Italy on return.

182. In those circumstances, there are no particular article 3 risk factors in his case, and it cannot be suggested that he would claim asylum on his return. There is nothing in his personal experiences in Italy which begins to suggest any article 3 risk. He said in interview that he had been provided with all necessities in the CARA accommodation, for example. The FTT could not properly conclude that there is any such risk. Because there is no evidence that he would claim asylum on return, it is unnecessary for me to consider how the general arguments would fare before the FTT in his case. They are irrelevant to it.

A

183. A's accounts in his two witness statements are not consistent with each other. On his account he was accommodated by the Italian authorities while his claim was considered, and the conditions in that accommodation were not ideal. He left the camp on 19 April 2012, and was not permitted to return. Shortly after that, he was granted humanitarian protection, for a year, which enabled him to work, and put him on a par with Italian citizens. He would be eligible for SPRAR accommodation on his return.

184. A would have to apply to renew his humanitarian protection if he were returned to Italy, but the FTT could not properly conclude on the evidence that he would be prevented from doing this. Nor could it properly conclude that he would be exposed to any article 3 risk either while he waited for it to be renewed, or once it had been renewed. There is nothing in his individual circumstances which creates an enhanced article 3 risk, as his medical condition does not reach the threshold in *N v UK*.

M

185. M's account is inconsistent with information provided by the Italian authorities. He has not drawn attention to any material which shows that their account is wrong. Assuming, in his favour, nonetheless, that it would be open to the FTT to accept his account rather than that of the Italian authorities, it discloses no breaches of their obligations by the Italian authorities, during his first stay in Italy, as he maintains that he did not claim asylum in Italy. If the FTT were to reject that account, it would disclose no breach either, as M's asylum claim was decided very quickly, and he was granted subsidiary protection for three years. Taking his claim at its highest, it does reveal breaches of their obligations by the Italian authorities on his return to Italy from Scandinavia in 2011 or thereabouts, as he was only in Italy on that occasion for a matter of days.

186. There are no individual features which would create an enhanced article 3 risk if M were returned to Italy. He would be able to apply to renew his subsidiary protection, and would be eligible for SPRAR accommodation. While his account of what happened to him on his second stay in Italy, which I must assume, is true, reveals deplorable conduct by the Italian authorities, the FTT could not properly conclude that it creates a risk of article 3 ill treatment on return.

K

187. K was in Italy, on his account, for 5 days. He did not claim asylum, and did not ask for help from the authorities. The FTT could not properly conclude that his fear of his three cousins, who live Italy and are itinerant agricultural workers, creates a real risk of article 3 ill treatment if he were returned. There are no other risk factors in his case. It is far from clear that he would claim asylum if returned to Italy, but if he did so, he would be eligible both for CARA, and, in due course, for SPRAR accommodation. There is nothing in his individual account of his experiences which would enable the FTT to find that he is at a real risk of article 3 ill treatment on return.

B

188. B's account is also inconsistent with material from the Italian authorities. Taken at its highest, it reveals that the authorities interviewed him about his protection claim, did not give him a decision on it, and provided him with no support. That would disclose a serious individual breach by Italy of its obligations. But he has drawn attention to no material which casts doubt on the account of the Italian authorities. The FTT would, in that situation, be bound to reject his account and find that his asylum claim was decided promptly and that he was given refugee status.

189. This means that, on his return, he would be able to renew his refugee status. He has not been accommodated in SPRAR accommodation and so would be eligible for that

on his return. There is no evidence on which the FTT could properly find that he would be at a real risk of article 3 ill treatment on his return to Italy. I do not consider that even if his account were accepted by the FTT, it could properly hold that the evidential presumption is displaced.

Conclusion

190. I have no hesitation in concluding that on the basis of the material very recently considered by the Secretary of State, which is the material which I have considered, these claims would be bound to fail in the FTT. The Secretary of State lawfully certified these claims. I dismiss these applications for judicial review.

191. I must thank all the lawyers involved on both sides for the considerable help which they have given me, against the difficulties caused by an evolving factual background, and by tight deadlines. This has enabled me to consider the arguments on the most up-to-date basis possible.