Neutral Citation Number: [2008] EWCA Civ 464

Case No: C4/2007/1785

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISIONf
MR JUSTICE McCOMBE
CO/8303/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2008

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE CARNWATH

- -

Between :

The Secretary of State for the Home Department	**Appellant**
- and -	
J N	**Respondent**

- -
- -

Mr Robert Jay QC and Ms L Giovannetti (instructed by The Treasury Solicitor) for the The Secretary of State for the Home Department

Mr Andrew Nicol QC and Mr M Henderson (instructed by **Sonal Ghelani**) for the Refugee Legal Centre (RLC)

Hearing dates : 17 March 2008

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Judgment

Lord Justice Laws :

INTRODUCTION

1. This is the Secretary of State's appeal, with permission granted by Pill LJ on 3 December 2007, against a declaration of incompatibility granted by McCombe J on 2 July 2007 pursuant to s.4(2) of the Human Rights Act 1998 ("the HRA"). The judge thereby declared that paragraph 3(2)(b) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") is incompatible with Article 3 of the European Convention on Human Rights ("ECHR"). McCombe J's judgment is now reported at [2008] 1 AER 411.

2. Paragraph 3(2) of Part 2 of Schedule 3 to the 2004 Act applies in every case where the Secretary of State proposes to return an asylum or human rights claimant to any one of twenty-eight States listed in paragraph 2 of Part 2 of Schedule 3 on the footing that that State is a third country which is responsible for determining the merits of the applicant's asylum or human rights claim. The twenty-eight States so listed are all the other Member States of the European Union together with Norway and Iceland. It is to be noted that the Secretary of State is empowered to add States to the list, but not to delete any State from it: paragraph 20 of Schedule 2.

3. Paragraph 3 of Part 2 of the Schedule provides in part:

> "(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."

The reference to "Convention rights" in paragraph 3(2)(b) is to the rights guaranteed by the ECHR and identified as Convention rights by s.1 of the HRA.

4. ECHR Article 3, as is well known, prohibits torture and inhuman or degrading treatment or punishment. The right to be protected against such treatment is one of the principal Convention rights which it is the court's duty under the HRA to uphold

and to vindicate. The armoury for the duty's performance includes s.4(2), which provides:

> "If the court is satisfied that the provision [sc. of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility."

THE FACTS

5. The facts relating to the individual respondent (claimant in the court below) may be stated very shortly. He is a national of Afghanistan. He went to Greece, where on 16 December 2004 he made an asylum claim. That was refused, although we do not have the supporting documentation and the respondent was apparently not served with the decision. At length he left Greece and came to the United Kingdom which he entered unlawfully on 5 September 2005. When his presence was discovered he claimed asylum. The Secretary of State declined to deal with the substance of the claim and on 5 October 2005 set directions for his removal to Greece on the footing that Greece, whose authorities had failed to answer enquiries made of them by the Secretary of State, had by default accepted responsibility for examining the respondent's asylum claim pursuant to the Dublin II Regulations (whose detail I need not describe: essentially they preserve the rule that an asylum claim will be substantively decided by the first Convention State where the claimant arrives). On 8 October 2005, however, the Greek authorities gave formal notice of their acceptance of responsibility to examine the claim. On 12 October 2005 representations were made on the respondent's behalf to the effect that his removal to Greece would violate his rights under ECHR Article 3: not on the basis that he would suffer ill-treatment in Greece itself, but because of a claimed fear that the Greek authorities would return him to Afghanistan without properly considering his asylum and human rights case, and he would be ill-treated there. That was not accepted by the Secretary of State.

THE JUDICIAL REVIEW APPLICATION AND THE JUDGMENT BELOW

6. Judicial review papers were thereafter lodged and served, and the removal directions accordingly cancelled. Langstaff J granted permission to seek judicial review on 1 March 2006.

7. The application for a declaration of incompatibility pursuant to s.4 of the HRA was pleaded by amendment to the claim form, as I understand it well after the grant of permission; but as the judge stated (paragraph 6 of the judgment), the argument as to incompatibility had been clearly set forth in an earlier amendment (paragraph 22) to the Grounds, as follows:

> "[The HRA] obliged [the Secretary of State] to make a proper and lawful decision on C's human rights claim. It would be incompatible with human rights for D to argue that the deeming provision mandated (or entitled) him to shut his eyes to any evidence that may emerge at any time to the effect that the removal of any particular claimant will place the United Kingdom in breach of the ECHR. The result of such a construction would be that Parliament had prohibited D from acting in accordance with Article 3, the most fundamental and

> absolute of the Convention Rights, by acting upon evidence that the proposed removal would lead to indirect *refoulement*."

8. A considerable portion of the judge's judgment is occupied by his discussion of the first point taken in the Secretary of State's defence, namely that the application for a declaration of incompatibility was and is academic, because there was no evidence of any real risk that the respondent would in fact be removed to Afghanistan by the Greek authorities without proper consideration of his claim to protection.

9. The judge described this argument as "circular and unsustainable" (paragraph 22). He stated (paragraph 23):

> "The argument for the Claimant is that the Defendant's reliance on the deeming provision in the face of that challenge is incompatible with Article 3. In my judgment, the distinction between a challenge to removal and an argument as to compatibility is wholly artificial in the context of the present proceedings, since the incompatibility argument only arises in the context of a question relating to the defendant's desire in the first place to remove the claimant from the country."

10. However the judge's rejection of the argument that the application was academic was closely linked with his conclusion on the substantive issue of incompatibility. As to that he held that paragraph 3(2)(b) of Part 2 of Schedule 3 to the 2004 Act altogether precluded the court, and the Secretary of State, from looking into the question whether in any given case a person's removal to one of the listed States would entail a real risk that his Article 3 rights would be violated; the ascertainment or investigation of such a risk was itself an obligation of the State under Article 3; and the preclusive effect of paragraph 3(2)(b) accordingly put the United Kingdom in breach of the Article. I should cite these passages from the judge's judgment:

> "24. The provision in question could not be in clearer terms. It requires 'any person, tribunal or court', that has to determine whether an asylum applicant or applicant for human rights protection may be removed from this country, to treat Greece (among other states) as a place 'from which a person will not be sent to another state in contravention of his Convention rights'. It seems to me that Parliament has precluded both the Secretary of State and this court from considering any such question as to the law and practice on *refoulement* in any of the listed countries. The exercise which the defendant urges that I should undertake to demonstrate that the claim is academic is, therefore, an impermissible one.
>
> ...
>
> 39. … [I]n, my judgment, it is the Act itself that compels the breach of Article 3. Unlawful *refoulement* is itself a breach of Article 3. Failure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading

> treatment is a breach of the substantive Article and it is that investigation that the deeming provision impedes.
>
> 40. In the present case, the deeming provision can only work to prevent an investigation of a potential breach of Article 3. It does so in absolute terms. In the words of the defendant's written argument it is 'mandatory' and '... the Secretary of State simply has no discretion to consider whether Greece will remove the claimant in breach of his human rights…'. This is not simply a denial of a remedy; it directs the defendant not to comply with the substantive obligation of investigation arising under Article 3."

11. In these circumstances the judge did not consider the evidence as to the law of Greece or the practice of the Greek authorities. On his approach to the substantive issue of incompatibility between paragraph 3(2)(b) and ECHR Article 3, that would have been an impermissible exercise. That being so it is little surprise that he was unimpressed with the suggestion that the application for a declaration was academic on the facts: on his view of the case the court could not examine the facts.

TWO PROPOSITIONS

12. There are two propositions as to the law relating to Article 3 which bear on the case, and I should briefly consider these before confronting the issues in the appeal.

13. The first such proposition is that violations of Article 3 may extend not only to the infliction of torture or ill-treatment by or within the impugned State, and to cases where the impugned State removes a person to another territory where there is a real risk of his suffering such treatment, but also to cases where the person is sent to a State which may in turn remove him to a third State where he may face such a risk. As I have said the respondent's case is not that he would be ill-treated in Greece, but that the Greek authorities would return him to Afghanistan without properly considering his asylum and human rights case, and he would be ill-treated there.

14. It might seem surprising that a State may find itself in breach of ECHR Article 3 as it were at two removes. But the European Court of Human Rights has plainly held that that is so. In *T.I. v United Kingdom* 7 March 2000 Application No. 43844/98, [2000] INLR 211, cited by the judge at paragraph 34, the Court said this:

> "In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.
>
> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does

> not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v Germany judgment of 18 February 1999, *Reports* 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered."

As the Strasbourg court noted, this position is well recognised in English authority: see for example *R (Thangarasa) and (Yogathas) v Secretary of State for the Home Department* [2003] AC 920.

15. The second of my two propositions is that the duty imposed on the State by ECHR Article 3 includes an adjectival obligation to investigate a risk of substantive violation. In support of this proposition the learned judge cited *Assenov v Bulgaria* (1997) 28 EHRR 652 in which the Strasbourg court said this:

> "The court considers that in these circumstances, where an individual raises an arguable claim that he has been seriously ill treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in... [the] Convention', requires by implication that there should be an effective official investigation… If this were not the case the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

16. *Assenov*, however, was distinctly concerned to establish a duty to conduct "an effective official investigation" *after* a complaint of Article 3 ill-treatment had arisen. Such an adjectival duty is very well established in the context of ECHR Article 2 (the right to life). But *Assenov* is not authority for the very different proposition that ECHR Article 3 includes an obligation to investigate a *future* risk of substantive violation; and indeed Mr Jay QC for the Secretary of State submits that there are some indications to the contrary in the Strasbourg learning. In *Banks v UK* (21387/05, 6

February 2007) the application was declared manifestly ill-founded because, although reliance was placed on a procedural obligation arising under Article 3, there was no complaint of a substantive violation. As a matter of logic this reasoning treats the procedural obligation as in effect confined to a duty to investigate after the event.

17. However Mr Jay also acknowledges the force of Strasbourg authority to the effect that a claim that expulsion will expose an individual to Article 3 ill treatment has to be examined with "rigorous scrutiny": *Jabari v Turkey* 40035/98, paragraph 38; *Kandomabadi v Netherlands* (6276/03 & 6122/04).

18. At all events there appears to be no distinct authority for this second proposition as it was formulated by the judge at paragraph 39: "[f]ailure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading treatment is a breach of the substantive Article". Mr Jay's second ground of appeal was indeed to the effect that there is no such free-standing duty to investigate, and I may deal with that now. I would accept that there is no free-standing duty as such to investigate risk. Accordingly the judge's formulation at paragraph 39 with respect misstates the position. But that is not the end of the matter: the judge's formulation reflects, I think, an obvious and necessary truth. If the State is to avoid breach of Article 3 by removal of an individual to another territory where he might be ill treated or whence he might be sent elsewhere and ill treated there, the authorities of the first State plainly have to apprise themselves of the relevant law and practice of the place to which the removal will be effected. Otherwise they cannot know whether their actions will violate the ECHR or not. This is not a distinct, separate or adjectival duty, but a necessary incident of the substantive obligation to fulfil Article 3. It is underlined by the need of rigorous scrutiny where an individual claims that expulsion will expose him to Article 3 ill treatment.

19. In those circumstances the court should in my judgment proceed on the basis that if paragraph 3(2) of Part 2 of Schedule 3 to the 2004 Act in truth precludes the Secretary of State from examining the law and practice of any of the 28 listed States, or indeed the circumstances of individual cases, in order to decide whether to seek legislation to remove any State or States from the list, there would be a systematic violation of Article 3. The statute would blindfold the Secretary of State to Article 3 risks. Equally it must be open to the court to investigate such law and practice, and the circumstances of individual cases, in order to decide (where a proper application is made) whether to grant a declaration of incompatibility in relation to the inclusion of all or any of the States named in the list. If a statutory measure prevented the court from doing so, it would frustrate the court's duty under the HRA to vindicate the Convention rights; and the measure would for that reason be incompatible with Article 3.

20. Against that background I turn to consider the remaining issues in the appeal.

THE ISSUES CONFRONTED

21. I have already dealt with the Secretary of State's second ground of appeal, consisting in the contention that there exists no free-standing obligation to investigate a risk of violation of Article 3. There is no obligation expressed in those terms, but to sustain compliance with Article 3 the Secretary of State must be in a position to examine the

merits of a State's retention on or deletion from the statutory list. Whether or not she is in such a position depends upon the correctness of Mr Jay's first and principal argument.

The Appellant's Principal Submission

22. Mr Jay's first and principal argument is that, in contrast to the judge's conclusion, on its true construction paragraph 3(2) by no means inhibits or precludes the Secretary of State or the court from examining the law and practice on *refoulement* in any of the listed countries, or from considering the risk of ill-treatment in a particular case, with a view to deciding (in the Secretary of State's case) whether to seek a State's removal from the list or (in the court's case) whether to grant a declaration of incompatibility. This submission requires the court to construe the opening words of paragraph 3(1) of Part 2 Schedule 3 to the 2004 Act, which I repeat for convenience:

> "This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed…"

23. Paragraph 3(2) cross-refers to these words of limitation by use of the expression "in so far as relevant to the question mentioned in sub-paragraph (1)".

24. Mr Jay's argument on construction is perfectly straightforward. It is that the opening words of paragraph 3(1) limit the scope of the deeming provision of paragraph 3(2), and therefore the implicit prohibition of an examination of the factual merits in any given case, to a situation where the prospective removal of a particular individual to a particular State is being considered (by the Secretary of State or a court or tribunal) strictly in the course of making an executive or judicial decision, for which the decision-maker is then and there responsible, as to whether that removal should or may lawfully take place. The words in question do not, therefore, inhibit the Secretary of State or the court from considering the merits or demerits of an individual removal in particular, or the laws and practices of a listed State in general, in any other context. Specifically, the Secretary of State is entirely free to conduct as close or wide-ranging an examination as she chooses of the practices of listed States when considering whether the statutory list should be changed. The court is equally free to consider and examine such matters in deciding whether the maintenance of any State on the list is repugnant to ECHR Article 3, so as to give rise to a proper claim for a declaration of incompatibility. If there is, on a proper appreciation of the evidence, no risk of *refoulement* in breach of Article 3, there is no case for the discretionary remedy of such a declaration.

25. Mr Jay submits further that if the words of limitation are read any wider, the Secretary of State would be disabled from making enquiries to satisfy herself that the list as drawn remains appropriate; and it would be absurd to construe the statute as having that consequence.

26. Both parties have referred to authority, in particular *Re S* [2002] 2 AC 291 and *Lancashire County Council v Taylor* [2005] 1 WLR 2668. However in my judgment this part of the case turns on a pure question of statutory construction as to the scope of paragraph 3(2) of Part 2 of Schedule 3 to the 2004 Act. The question is whether

the provision is limited, as Mr Jay submits, by the opening words of paragraph 3(1). The authorities do not address this question and throw no light on it.

27. In my judgment Mr Jay's argument is correct. The opening words of paragraph 3(1) (cross-referred to in paragraph 3(2)) limit the application of paragraph 3(2) to the actual process of an executive or judicial determination of the question whether a person's removal would violate the relevant rights. Consideration of such a question (or, more generally, consideration of a listed State's laws and practices) for the purpose of (a) forming a view as to whether a State should remain on the list (the Secretary of State's function) or (b) deciding whether a declaration of incompatibility should be made *vis-à-vis* any particular State (the court's function) is not precluded or in any way inhibited. This result flows, as I see it, from the language of the statute.

28. It also accords with common sense. It seems to me entirely fanciful to suppose that Parliament can actually have intended to preclude the Secretary of State from keeping a careful and well informed eye on the contents of the paragraph 3(1) list, and no less fanciful to suppose that it can have been intended to preclude the court from considering whether the inclusion in the list of any particular State or States might be repugnant to any of the Convention rights.

29. In the context of Mr Jay's first and principal argument I should deal with certain points advanced by Mr Nicol QC for the respondent. As regards the argument on absurdity, he submits (and the judge appears to have accepted – paragraph 31) that even on the wider construction of the opening words of paragraph 3(1) the Secretary of State is not after all prevented from "monitoring" the laws and practices of a listed State for the purpose of deciding whether it should remain on the list. That seems to me to be a very difficult argument. Such a monitoring process would necessarily be undertaken with a view to deciding whether under the relevant State's laws and practices persons removed there might be sent forward to another territory where their rights might be violated. But that is the very question covered by the material words of paragraph 3(1). Unless the provision's scope is, as I would hold, limited to the actual process of executive decision or adjudication in a particular case, it must I think operate so as to preclude the investigation of such a question "by any person, tribunal or court" for any purpose.

30. In this context I should also notice the judge's view that such "monitoring" by the Secretary of State would have no value. He said (paragraph 31):

> "This 'monitoring' facility is in reality illusory in the light of paragraph 20 as enacted. It amounts to no more than a facility to monitor for the purposes of deciding whether to promote primary legislation to remove any particular state from the list."

This point goes not so much to the construction of paragraph 3(1) as to the question whether, even if Mr Jay's construction is right, the statutory list nevertheless falls foul of Article 3 on the footing that the Secretary of State's capacity to oversee the list and thus ascertain the risk of violations in the case of any of the listed States is in truth nugatory.

31. Here I respectfully disagree with McCombe J. It is true (as the judge also states in paragraph 31) that it was originally proposed that the list could be amended by order

made by the Minister. That was changed by a government amendment to the Bill so that main legislation was required to take a State off the list. No doubt that was done to ensure that the Secretary of State enjoyed no reviewable discretion to delete any State. It is not difficult to imagine the shape of a judicial review application seeking a mandatory order that on particular facts the Secretary of State should make such a deletion. While no doubt the government desired to avoid such a contingency, it remains in my judgment an important function of the Secretary of State to monitor the list. The 2004 Act does not require her to do so; but in my judgment the State's general duty under the HRA to act conformably with the Convention rights does. I have foreshadowed this in paragraph 19, dealing with Mr Jay's second ground of appeal. If the list system is not to fall foul of the ECHR the Secretary of State must satisfy herself, by positive and regular enquiry, that the listed States comply and continue to comply with their own Article 3 obligations. Though she cannot herself delete States from the list I have no doubt but that, were she to discover that a listed State was falling short of the Convention standards, she would as necessary halt removals there and seek urgent legislation to take the State off the list. That is required of her if the list system is to remain compliant with the Convention. Thus the monitoring process is very far from being nugatory.

32. Another point raised against Mr Jay's principal argument is its implication that the terms of the statute may be compatible with Article 3 one day and incompatible the next: if the law and/or practice of a listed State suddenly changes, so that in contrast to previous practice it begins to *refoule* persons to places where their Article 3 rights may be violated and without proper consideration of their claims, that State's inclusion in the list will (upon those events happening) be repugnant to Article 3. The judge saw this as an objection to Mr Jay's case: see paragraph 36 of the judgment. He said "That, to my mind, is an impossible contention. The legislation is either compatible with Convention rights or it is not." I do not agree. A statutory provision may be incompatible with a Convention right *per se*, because its terms necessarily procure violations of the right. Or it may be incompatible *sub modo*, because its application may or may not violate the Convention right, depending on a changing factual state of affairs.

33. On the basis that Mr Jay's principal argument is correct the judge was wrong to grant the declaration he did, which was of a general incompatibility between paragraph 3(2)(b) and Article 3 and thus condemned the deeming provision as it applied to all twenty-eight countries on the list. Given that the Secretary of State is entitled (and, as I would hold, obliged) to monitor the States on the list to ensure individual compliance, and the court is entitled (on an application for a declaration of incompatibility) to investigate by evidence whether any particular State falls foul of Article 3 in a specific case or generally, the list system is not in principle incompatible with Article 3.

34. However there remains the question whether on the facts Greece is prone to non-compliance, giving rise to a real risk of the respondent's *refoulement* to Afghanistan and ill treatment there. Mr Jay accepted that if that were so, there might properly be a declaration of incompatibility in relation to Greece's inclusion in the list, but not otherwise; this was the fall-back position articulated in his third ground of appeal. Whether there should be such a declaration depends upon the evidence as to the laws

and practices of the Greek State in relation to persons returned to Greece under the Dublin II Regulation.

Greece: the Evidence

35. That evidence, it must be said, is somewhat exiguous; but I have concluded, with some hesitation, that it will suffice for the purposes of the appeal. There is first a witness statement of 20 April 2007 from Mr Pulham, a Senior Caseworker in the Home Office Unit responsible for the certification of asylum cases on third country grounds. He refers to certain past concerns as to Greek procedures relating to asylum claimants who had sought asylum in Greece but then travelled to a third country from which they were duly returned to Greece. These concerns were echoed in a UNHCR document dated November 2004. However Mr Pulham produced official documentation to show that changes had been made by which, if the changes were fulfilled in practice, the Dublin II provisions would operate properly and (my gloss) consistently with Article 3. Moreover the Greek authorities had confirmed (see paragraph 11 of the statement) that upon his return the respondent would have 30 days in which to appeal the earlier adverse asylum decision. Up to the date of Mr Pulham's statement there had been no reports of any instance of unlawful *refoulement.*

36. Mr Nicol drew attention to a press release of 7 February 2008 issued by the Immigration Appeal Board of Norway which states:

> "On the basis of the latest information about the possible violations of the rights of asylum seekers in Greece, and on the basis of the need for more information about the conditions of asylum seekers in this country, the Immigration Appeal Board has halted until further notice the transfers to Greece according to the Dublin II Regulation."

I should also cite at this point a "Public Statement" from Amnesty International dated 27 February 2008, in which the decision of the Norwegian Board to suspend Dublin II removals to Greece is noted. It stated:

> "Asylum-seekers [sc. in Greece] are often interviewed about their claim in the absence of an interpreter and lawyer. Lawyers report that in practice, individuals can expect to have their claim rejected at first instance. Amnesty International has repeatedly called on the Greek authorities to take concrete measures to improve the conditions for asylum-seekers including by resolving the legal limbo in which they are left – without documents and without access to any social services in practice... Greece does not return people to Afghanistan and yet does not process their asylum application in a prompt, fair way, leaving them in limbo without legal status and therefore without rights."

37. Mr Nicol referred also to two US State Department Reports on Greece, for 2006 and 2007 respectively. The former states (under the heading "Protection of Refugees"):

> "The law provides for the granting of asylum or refugee status in accordance with the 1951 UN Convention relating to the Status of Refugees and its 1967 protocol. However, the government largely has not implemented a 1999 presidential decree that brought the law into compliance with the standards of the UNHCR with regard to asylum procedures. In practice the government provided some protection against *refoulement*, the return of persons to a country where there was reason to believe they feared persecution."

The 2007 Report replicated this passage, but with the substitution of the phrase "very limited protection" for "some protection".

38. Mr Pulham referred to the Norwegian position, and added further comments, in a letter of 11 March 2008 to solicitors acting in another case:

> "... I have contacted the Dublin office at the [Norwegian Directorate of Immigration], and have been advised that the material before the Immigration Appeal Board consisted of the reports from Amnesty International, UNHCR and other organisations which have already been placed before the Secretary of State in the case of *N* and others. These reports have already been considered very carefully and it has been concluded that, despite the concerns over certain procedures in the Greek asylum process which they describe, there is absolutely no evidence to suggest that any asylum seeker returned to Greece under the Dublin Regulation would experience the severe and continual ill-treatment needed to show a breach of Article 3 ECHR...
>
> This office has also been informed by the Head of the Greek Dublin Unit that Greece does not at present *refoule* asylum applicants to such countries as Afghanistan, Iraq, Iran, Somalia or Sudan, even if their asylum claims have been rejected. They may receive a letter instructing them to leave Greece but no action is taken to enforce their departure."

39. That is a sufficient description of the state of the evidence at the hearing of the appeal. After we had reserved judgment on 17 March 2008, the court received a witness statement dated 23 April 2008 made by Ms Anne Singh of the appellant's solicitors. She exhibits, and in part quotes, a UNHCR Position Paper of 15 April 2008 "On the Return of Asylum-Seekers to Greece under the 'Dublin Regulation'". The Paper advises governments "to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice" (paragraph 4). There follows a description of a number of difficulties and constraints facing "Dublin returnees" in Greece, in particular those with "interrupted" claims, that is where the claimant had left Greece without informing the authorities and before his claim was decided or notified. In such cases it is said (paragraph 9) that despite some improvements there remained ambiguities in the Greek legal arrangements: "[t]his situation calls into question whether 'Dublin returnees' will have access to an effective remedy…" Some other matters, including statistical points, are canvassed, and then this:

> "17. In light of the above, UNHCR remains concerned that as a result of structural shortcomings in the Greek asylum procedure, asylum-seekers continue to remain effectively in limbo, unable to exercise their rights, for prolonged periods of time. UNHCR further notes that the procedure does not guarantee a fair evaluation of asylum claims at first and second instances. Finally, essential procedural safeguards are not guaranteed throughout the refugee status determination process to the detriment of asylum-seekers who often lack the most basic entitlements, such as interpreters and legal aid to ensure that their claims receive adequate scrutiny from the asylum authorities. UNHCR calls upon the Government of Greece to promptly review its asylum procedure at first and second instances and in so doing take in due consideration UNHCR's advice."

Finally:

> "24. … [A]sylum-seekers, including 'Dublin returnees', continue to face undue hardships in having their claims heard and adequately adjudicated. UNHCR is concerned that all these factors taken together may give rise to a risk of *refoulement*."

40. There are clearly concerns about the conditions in which asylum-seekers may be detained in Greece. It is not however shown that they give rise to systemic violations of Article 3. As regards *refoulement*, Mr Nicol in a note dated 2 May 2008 submits that the earlier evidence taken together with the new UNHCR material shows "at the very least, a serious cause for concern as to whether the Greek authorities would onwardly remove the respondent to Afghanistan in breach of Article 3".

41. I certainly accept that such evidence as there is, and in particular the recent UNHCR Paper, shows that the relevant legal procedures are to say the least shaky, although there has been some improvement. I have considered whether the right course would be to send the case back to the High Court for a fuller examination of the factual position. But in truth there are currently no deportations or removals to Afghanistan, Iraq, Iran, Somalia or Sudan, and as I understand it no reports of unlawful *refoulement* to any destination. That seems to me to be critical. I would accordingly hold, on the evidence before us, that as matters stand Greece's continued presence on the list does not offend the United Kingdom's Convention obligations. It follows that there is no case for a limited declaration of incompatibility relating only to Greece.

CONCLUSION

42. For all the reasons I have given I would allow the Secretary of State's appeal and discharge the declaration granted by McCombe J. But I will not leave the case without making clear my view that the list system renders the United Kingdom's compliance with ECHR Article 3 fragile. In the absence of individual examinations of the merits of individual cases by those responsible for specific executive and judicial decisions in those cases, the whole weight of compliance falls on the measures and systems in place for monitoring law and practice in the listed States,

and does so in circumstances where government has no discretion to take a State off the list, but must seek main legislation. Those measures and systems will need to be muscular.

Lord Justice Carnwath:

43. I agree.

The Master of the Rolls:

44. I also agree.