IN PRIVATE
Appeal No.

C4/2010/0943

MONDAY 12 JULY 2010

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/8660/09

BEFORE THE MASTER OF THE ROLLS
LORD JUSTICE LAWS
And LORD JUSTICE SULLIVAN

BETWEEN

THE QUEEN ON THE APPLICATION OF NS

APPELLANT

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

- and -

1. AMNESTY INTERNATIONAL LIMITED AND THE AIRE CENTRE
(Advice on Individual Rights in Europe)
2. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
3. EQUALITY AND HUMAN RIGHTS COMMISSION

INTERVENERS

ON READING the Appellant's Notice sealed on 21 April 2010 filed on behalf of the Appellant on appeal against the order of Mr Justice Cranston dated 31 March 2010

AND ON HEARING Leading Counsel for the parties

AND finding that in order to enable the Court to give judgment in this case it is necessary to resolve questions concerning the interpretation of European law and that it is appropriate to request the Court of Justice of the European Union(ECJ) to give a preliminary ruling thereon

By the Court

IT IS ORDERED that

1. The questions set out at paragraph 40 of the First Schedule to this Order be referred to the Court of Justice of the European Communities ("ECJ") for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union, such reference to be accompanied by the Request for Acceleration contained in the Second Schedule hereto

2. The balance of these proceedings be stayed pending the preliminary ruling of the ECJ on the questions referred to it or until further order.

3. Costs be reserved.

FIRST SCHEDULE: REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

The parties

1. The Appellant is a national of Afghanistan who has claimed asylum in the United Kingdom. The First Respondent is the Secretary of State with responsibility for immigration and asylum in the United Kingdom. With permission of the Court, the Second, Third and Fourth Respondents intervened in the Administrative Court proceedings, and the Equality and Human Rights Commission intervened in the Court of Appeal.

Factual background and history of proceedings

2. On his journey from Afghanistan to the UK, the Appellant had travelled through, *inter alia*, Greece. He was arrested there, and fingerprinted on 24th September 2008, but did not claim asylum.

3. The Appellant's case is that the Greek authorities detained him in Greece for four days, and, on his release, gave him an order to leave Greece within 30 days. He claimed that when he tried to leave Greece, he was arrested by the police and was expelled to Turkey where he was detained in appalling conditions for two months. He escaped from detention in Turkey, and travelled from there to the United Kingdom, where he arrived on 12th January 2009, and claimed asylum on the same day.

4. On 1st April 2009, the Secretary of State made a request to Greece to take charge of the Appellant for the purposes of examining his asylum claim pursuant to Council Regulation (EC) 343/2003 ("the Regulation"). Greece failed to respond within the time limit stipulated by Article 18(7) of the Regulation, and, on 18th June 2009, Greece was accordingly deemed to have accepted responsibility under the Regulation for

consideration of the Appellant's claim.

5. On 30th July 2009, the Secretary of State notified the Appellant that directions had been set for his removal to Greece on 6th August 2009.

6. On 31st July 2009, the Secretary of State notified the Appellant of a decision to certify under paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act") that his claim that his removal to Greece would violate his rights under the European Convention on Human Rights ("the Convention") was clearly unfounded. The effect of this decision was that the Appellant did not have the right of appeal within the United Kingdom against the decision to remove him to Greece to which he would otherwise have been entitled.

7. On 31st July 2009, the Appellant requested that the Secretary of State should accept responsibility for determining his asylum claim under Article 3(2) of the Regulation, on the grounds that there was a risk that his fundamental rights under EU law, the Convention, and/or the Refugee Convention would be breached if he was returned to Greece.

8. By a letter dated 4th August 2009, the Secretary of State maintained his decision to remove the Appellant to Greece, and his certification of the Appellant's Convention claim as clearly unfounded.

9. On 6th August 2009, the Appellant issued a claim for judicial review of the decisions to certify his claim and to remove him to Greece. The Secretary of State thereupon cancelled the directions made for A's removal to Greece.

10. On 14th October 2009, the Appellant was granted permission to bring his claim for judicial review and it was ordered that his case should become the lead case in England and Wales on returns to Greece under the Regulation. There are approximately 300 cases currently stayed in the Administrative Court of England and Wales awaiting the outcome of this case.

11. The Appellant's judicial review claim was heard in the Administrative Court from 24th to 26th February 2010. In a judgment dated 31st March 2010, Mr Justice Cranston dismissed the claim, but granted permission to appeal to the Court of Appeal, recognising the general importance of the issues raised.

12. At a hearing on 12th July 2010 the Court of Appeal decided that decisions on certain questions of EU law were necessary for it to give judgment on the appeal, and exercised its discretion to refer those questions to the Court of Justice, because they were not *acte clair*, and it would be in the public interest for the issues to be resolved by the CJEU as soon as possible, particularly given the large number of cases raising similar issues both in the United Kingdom and across the EU.

Findings of fact

13. Cranston J said as follows in respect of the evidence about asylum procedures in Greece:

> **105. The claimant's case is that if in Nasseri the procedures were "shaky" to say the least, the evidence now available shows that they are wholly unreliable and unsafe in that claimants may be improperly denied access even to these procedures. Contrary to assurances, it is unlikely that asylum claimants subjected to detention and destitution by the Greek authorities will enjoy a practical and effective opportunity to seek remedies in Greece either from national courts or from the Strasbourg Court. The UNHCR position report of April 2008 is invoked, along with the Human Rights Watch reports and that of Amnesty International in May 2009. In his report of 4 February 2009, the Commissioner for Human Rights of the Council of Europe commended the latest legislation aimed at providing a comprehensive protection regime for asylum seekers but "notes the persistence of grave, systemic deficiencies in the Greek asylum practice that put at risk the fundamental right to seek and to enjoy asylum". In Ms Angeli's statement she refers to asylum seekers often being unable to have the police accept an appeal without a letter in Greek giving notice of appeal. She also refers in her December 2009 statement to statistics for first instance decisions for Athens under the new system from September - October 2009. Out of 342 decisions made, 249 were rejected, 92 were adjourned, and one was granted subsidiary protection. There were no grants of asylum.**
>
> **106. There is trenchant criticism of the Secretary of State's evidence. Far from there being an asylum appeal to the Supreme Administrative Tribunal which is open to all asylum seekers, as asserted in one witness statement, the position is that asylum appeals have been abolished and the only remedy available to asylum seekers against an initial decision is a judicial review challenge, on limited grounds, to the Council of State. Most asylum seekers will not in practice be able to pursue that without legal representation, and it cannot make a decision on the claimant's entitlement to asylum. Both UNHCR and the Commissioner for Human Rights of**

the Council of Europe have stated that that is not an effective remedy.

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

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

109. In its 2009 Observations, UNHCR began by noting with appreciation the commitment of the Greek government to address shortcomings in asylum procedures and was encouraged by the process which has been initiated. However UNHCR observed what it described as consistent problems facing people transferred to Greece under the Dublin Regulation, including both those who have applied for asylum in Greece in the past and those who have not. The UNHCR 2009 Observations highlighted negative decisions issued in absentia, so that the applicant upon return was likely to have missed all deadlines for appealing. In such cases the transferee was served with a deportation order at the airport, without any access to the asylum procedure. According to the process in place since 2008, Dublin transferees are detained for up to 24 hours at Athens airport without a detention order. But no particular barriers were observed to the filing of asylum applications at Athens airport. The obligation to register or re-register a claim within a short period, given the practical obstacles to such registration, is said to prevent transferees from pursuing their claims.

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

111. In UNHCR's assessment Presidential Decree 81/2009, which entered into force in

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

(iii) Conclusion on procedures

112. Subsequent to the proceedings in Nasseri and KRS [v United Kingdom (Application no. 32733/08), 2 December 2008] the implementation of Presidential decree 81/2009 removed the right to appeal against a first instance decision leaving only a limited right of judicial review before the Council of the State. However, the new Greek government decided to amend the system introduced by Presidential decree 81/2009, with the assistance of NGOs, with a view to improving the asylum structures and procedures. As indicated the UNHCR has endorsed these proposal reforms, describing them as a welcome development. UNHCR has also commented that the specific procedure now at Athens airport for new asylum claims to be lodged did not create particular barriers. That is relevant for Dublin transferees.

113. There can be no doubt that in practice the procedures continue to be shaky, as Laws LJ characterised them in Nasseri. Dublin transferees are at risk of not obtaining meaningful access to the asylum procedure. The upshot may be that they will be served with deportation orders without being able properly to pursue their claim. Looking at matters in the round, however, it is not evident to me that there is any material difference from the position considered in KRS and Nasseri. The position was quite unsatisfactory then and that continues to be the case, despite the aspirations for reform.

14. As to the evidence about conditions for asylum seekers in Greece, he said:

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

122. The note obtained at Athens airport indicates that a person has expressed the wish to claim asylum but it does not give any access to work, benefits or health care. A

returnee can only obtain the red/pink card giving him the status of registered asylum seeker from the Aliens Directorate. Without a red/pink card, returnees are therefore prohibited from working and the evidence is that they are overwhelmingly likely to be destitute and homeless, without access to medical care or any other form of support. Without a red/pink card, Ms Angeli observes that returnees are also vulnerable to detention, which can lead to transfer to the north and informal expulsion.

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

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

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

125. Even if they are able to obtain a red/pink card, the claimant's evidence is that Dublin returnees are nonetheless likely to face the same problems of destitution and homelessness as other asylum seekers. Ms Angeli states that the right to seek employment is in practice illusory without a tax number. A tax number will not be granted without an address. Thus homeless asylum seekers will not obtain one and an employer will not in practice grant legal employment. Moreover, asylum seekers can only be employed if there is no Greek or EU citizen to do the work. This is consistent with the conditions for employment set out in Article 4(1) of Presidential Decree 189/1998.

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

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

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

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

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

(iii) Conclusion on conditions

131. Dublin returnees are generally released within a maximum of 24 hours of arrival at Athens airport. There is a chance of later detention, along with other asylum seekers, but all I can say is that the risk is speculative. In practice it seems that Dublin returnees are not given their red/pink cards at the airport but are required to attend Petrou Ralli. The British Embassy in Athens confirmed the chaos at Petrou Ralli in July last year. Even if applicants obtain a red/pink card the chances of being granted asylum are very low. There are restrictions on employment opportunities for those with a red/pink card. The conditions facing those who remain in Greece without a red/pink card after having been served with a decision requiring them to leave are harsh. Only very limited accommodation or support is available for asylum seekers. Many asylum seekers continue to live on the street.

Coupled with poor living conditions there was the attempt by the Greek police in the summer of 2009 to remove asylum seekers from various derelict buildings in Athens. However appalling the conditions are, however, they are not materially worse than what was in evidence before the courts in KRS and Nasseri.

15. At paragraph 137 he concluded:

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

16. As regards the risk of refoulement from Greece, Cranston J found:

    a. At paragraph 93 of the Judgment, that the Greek Government had returned some Afghan asylum seekers to Afghanistan, but that, in the absence of direct evidence that the returns were not voluntary, the evidence did not establish any more than that a number of Afghans had "chosen" to return to Afghanistan;

    b. At paragraph 94 of the Judgment, that there was a risk of the refoulement of asylum seekers from Greece to Turkey, but that it was not established that this risk applied to Dublin returnees.

17. On appeal to the Court of Appeal, the Appellant challenged Cranston J's factual findings in respect of the risk of detention and of refoulement (whether directly to Afghanistan or indirectly to Turkey), as well as his conclusion that the Secretary of State had been entitled to conclude that his claim that his rights under Article 3 of the Convention would be violated by reason of the conditions he would face in Greece was clearly unfounded.

18. The appeal, including the appeal against the findings of fact in respect of the risk of detention and refoulement, has been stayed pending the outcome of this reference.

National legal provisions

19. Section 77 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") precludes a person's removal from the United Kingdom while his claim for asylum is pending. Under Part V of the 2002 Act, a person who has claimed asylum ordinarily has a suspensive right of appeal on facts and law from within the UK against a decision to remove him to another country (ss. 82 and 92(4)).

20. The certificates denying the Appellant's right of appeal prior to removal from the UK were issued under Schedule 3 of the 2004 Act. This provides for the removal of asylum seekers to third countries without substantive consideration of their asylum claims in the UK.

21. Part 2 of the Schedule ("Part 2") deals with the 'First List of Safe Countries'. The list is set out at paragraph 2 and includes Greece at para 2(j). The list includes all Member States of the European Union. The Secretary of State has no power to amend the First List, which can only be changed by primary legislation.

22. Paragraph 3 of Part 2 provides that:

> **(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—**
>
> **(a) from the United Kingdom, and**
>
> **(b) to a State of which he is not a national or citizen.**
>
> **(2) A State to which this Part applies shall be treated in so far as relevant to the question mentioned in sub-paragraph (1), as a place—**
>
> **(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and**
>
> **(b) from which a person will not be sent to another State in contravention of his Convention rights, and**

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

23. The combined effect of paragraphs 5 and 6 of Part 2 is to preclude the bringing of an immigration appeal on any ground which is inconsistent with paragraph 3 of Part 2, whether within or outside the UK. Paragraph 4 disapplies s. 77 of the 2002 Act in respect of removal to First List countries of persons who are not nationals of those countries, thereby permitting removal of an asylum seeker without substantive consideration of his asylum claim.

24. In *R (Nasseri) v SSHD* [2010] 1 AC 1, [2009] UKHL 23, the House of Lords held that the effect of paragraph 3 of Part 2 is to oblige the Secretary of State and the Court to treat Greece as a country from which there is no risk of refoulement contrary to Article 3 of the Convention, or the Refugee Convention, "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" to Greece. However, the House of Lords held that this does not apply to a court considering whether paragraph 3 of part 2 is itself compatible with the Convention under s. 4 of the Human Rights Act 1998,which provides for a non-binding declaration of incompatibility to be made in respect of a domestic statutory provision which is inconsistent with the UK's obligations under the Convention.

25. Paragraph 5 of Part 2 restricts the right to appeal from within the United Kingdom in reliance on s. 92(4)(a) of the 2002 Act to those claims which (a) assert that the appellant's Convention rights would be breached in Greece and (b) which the Secretary of State does not certify as clearly unfounded. Paragraph 5(4) imposes a duty on the Secretary of State to certify human rights claims in relation to First List countries as clearly unfounded unless satisfied that they are not clearly unfounded.

Relevant provisions of EU law

The Treaty on European Union

26. The following provision of the Treaty on European Union ("TEU") are relevant to this appeal: Articles 2, 3, 4(3) and 6.

The Treaty on the Functioning of European Union

27. The provisions of the Common European Asylum System (CEAS) were adopted pursuant to Article 63 of the Treaty Establishing the European Community. The equivalent provision is now Article 78 of the Treaty on the Functioning of the European Union. Article 80 TFEU may also be relevant to this appeal.

The Charter

28. The Court is referred in particular to the following provisions of the Charter of Fundamental Rights of the European Union ("the Charter"): Articles 1, 4, 18, 19(2), 47, 51, 52 and 53.

The Regulation

29. Article 3 of the Regulation (Council Regulation (EC) No 343/2003 of 18 February 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) provides (so far as material):

> **1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.**
>
> **2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within**

the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

30. Aside from the Dublin Regulation, the central components of the CEAS which are relevant to the issues raised by this reference are the three asylum Directives (together, "the Directives"): the Reception Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers); the Procedures Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status); and the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).

The relevant contentions of the parties

31. Cranston J held on the issues of EU law that:
    a. The Charter could not be "directly relied on as against the United Kingdom" by virtue of the Protocol on the application of the Charter to Poland and the United Kingdom (paragraph 155).
    b. Nonetheless, the Secretary of State was bound to exercise her discretion under Article 3(2) of the Regulation taking into account the rights set out in the Charter (paragraph 156).
    c. There was no evidence that the Secretary of State had considered the Appellant's EU fundamental rights, but, had he done so, it would have added nothing to the Appellant's case, since the effect on the relevant rights had "been considered as part of his Article 3 claim [i.e. the claim that to return him to Greece would violate his rights under Article 3 of the Convention]" (paragraph 158).

32. On appeal to the Court of Appeal, the Secretary of State has accepted that "the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that [Cranston J] erred in holding otherwise", because the Charter simply restates

rights that already formed part of EU law, and does not create any new rights. However, the Secretary of State contended that Cranston J was wrong to find that she was bound to take into account EU fundamental rights when exercising the discretion under Article 3(2) of the Regulation on the basis that the exercise of that discretion does not fall within the scope of EU law. The Appellant does not accept that analysis and contends that decisions to transfer under Article 3(1) of the Regulation and/or under Article 3(2) to accept responsibility fall within the scope of the EU law.

33. Further and in the alternative, the Secretary of State contends on appeal that her obligation to observe EU fundamental rights did not require her, contrary to Cranston J's decision, to take into account the evidence that, if the Appellant were returned to Greece, there was a serious risk that his EU fundamental rights would be violated. This is because the Secretary of State contends that that obligation is effectively discharged where she proposes to return the Appellant to the Member State which is the responsible State in accordance with Article 3(1) of the Regulation. That is, the scheme of the Regulation entitles the Secretary of State to proceed on the conclusive presumption that Greece (or any other Member State) will comply with its EU obligations.

34. The Appellant does not accept that there is any such presumption of law and contends that, (1) in order to exercise her powers and functions under the Regulation compatibly with the fundamental rights guaranteed by the Charter, and (2) in order for the Regulation itself to be read and applied so as to be compatible with the Charter, the Secretary of State is obliged to take into account evidence that, if removed to Greece, there is a real risk that the Appellant's fundamental EU rights would be violated. If the removal of the Appellant to Greece would expose him to a real risk of the violation of his EU fundamental rights, EU law requires the Secretary of State to take responsibility for his asylum claim under Article 3(2), and precludes his removal to Greece.

35. The Appellant further submits that Cranston J erred in finding that the Appellant's EU fundamental rights "added nothing" to his claim under Article 3 of the Convention, and submits that the protection afforded by the relevant rights under the Charter is wider than that under Article 3 of the Convention. The Secretary of State contends that the Judge was

correct.

36. The Appellant also contends that paragraph 3 of Part 2 is incompatible with Article 47 of the Charter and must be disapplied. Cranston J made no findings on this part of the Appellant's case. The Secretary of State contends that paragraph 3 of Part 2 is not incompatible with Article 47, stating that "This is because if there is, in fact, no risk of onward refoulement, the Secretary of State would not, in sending [the Appellant] to Greece under the Dublin Regulation, fail to respect the Appellant's fundamental right to asylum, or his right not be sent (from Greece) to a place where his rights under article 3 of the ECHR would not be respected".

37. The case of AIRE Centre and Amnesty International as interveners before the national court is:

    a. A Member State is acting within the scope of EU law when deciding under which of paragraphs (1) and (2) of Article 3 of the Regulation it should act;
    b. Where the removal of an asylum-seeker from one Member State (the first Member State) to another Member State (the second Member State) would expose the asylum-seeker in question to a real risk of a violation of his fundamental rights, EU law precludes the first Member State from removing him to the second Member State and requires that it act under Article 3(2) of the Regulation to examine and assume responsibility for his asylum application;
    c. Where evidence suggests that the removal of an asylum-seeker by the first Member State would, in fact, expose that asylum-seeker to a real risk of a violation of his fundamental rights (including in the territory of the second Member State), there is no conclusive presumption to the contrary and the first Member State is obliged to determine the matter in the light of all the evidence before it;
    d. The denial to asylum-seekers of the minimum standards set out in the Directives is a denial of the fundamental rights guaranteed to those asylum-seekers by EU law.

38. UNHCR's case before the national courts was:

a. In light of its mandate, in particular its supervisory responsibility, and access to the situation in Greece, the UNHCR is institutionally well-positioned and has a unique expertise to comment both on the interpretation of the Dublin Regulation and EU law in the context of protection and safeguarding rights, and also to provide independent, objective and up-to-date information as to the situation of asylum-seekers in Greece.

b. The present conditions in Greece are such that they are not in line with international standards, including prohibitions of inhuman (and/or degrading) treatment. Moreover, in certain cases, the real risk of indirect refoulement after transfer to Greece engages inter alia Article 33 of the 1951 Convention and Article 3 of the ECHR. Further, the asylum system in Greece is not functioning to the required standard under EU law as well as international standards. In such cases, it is the responsibility of other Member States, viz. the United Kingdom, to take responsibility for the examination of an asylum application by applying Article 3(2) of the Dublin II Regulation.

39. The position of the Equality and Human Rights Commission, as intervener before the Court of Appeal, is:

a. The Equality and Human Rights Commission has a statutory duty to protect and promote human rights in the UK. It has been accredited with an 'A' status by the UN as the National Human Rights Institution (NHRI) for the UK. The EU Charter of Fundamental Rights is central to the work of the Commission as well as human rights protection within the UK when EU law is being implemented. Given its mandate, the Commission is well placed to comment on the application of the Charter in the UK and the effect of the Protocol.

b. There has been considerable misunderstanding, as well as misinformation, about the effect of the Protocol and the role of the Charter in the UK following the entry into force of the Lisbon Treaty. This has been compounded by Cranston J's judgment in this case at first instance, which the Court of Appeal has now remedied in its judgment recording the Secretary of State's concession that the fundamental rights relied on by the Appellant can be relied on, noted at paragraph

32 above.

c. The Commission's principal concern in the appeal has been to seek clarification of the scope and purpose of the Protocol and the role that the Charter is intended to have within the scope of EU law. This includes clarifying the nature of human rights protection within EU law and the way that the Charter gives effect to those rights and fundamental principles. The Commission acknowledges that the Charter does not create new rights within the EU, subject to any teleological interpretation. However the Commission does consider that EU human rights protection is more wide-ranging than UK human rights protection. The Commission is also of the view that the Charter and the European Convention on Human Rights are not co-extensive.

d. At first instance, Cranston J misunderstood the status and function of the Charter. Furthermore, the Commission contends that the Charter, properly applied, should be central to the determination of the case, and that the additional human rights protection provided for by the Charter, above and beyond that guaranteed by UK law and/or the ECHR, could lead to a different outcome in this case. In the Commission's view, the Protocol has no material bearing on that determination.

40. THE QUESTIONS REFERRED

1. Does a decision made by a Member State under Article 3(2) of Council Regulation 343/2003 ("the Regulation") whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 of the Treaty of European Union and/or Article 51 of the Charter of Fundamental Rights of the European Union ("the Charter")?

If the answer to Question 1 is "yes":

2. Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) designates as

the responsible State in accordance with the criteria set out in Chapter III of the Regulation ("the Responsible State"), regardless of the situation in the Responsible State?

3. In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the Responsible State will observe (i) the claimant's fundamental rights under EU law; and/ or (ii) the minimum standards imposed by Directives 2003/9/EC ("the Reception Directive"); 2004/83/EC ("the Qualification Directive") and/or 2005/85/EC ("the Procedures Directive") (together referred to as "the Directives")?

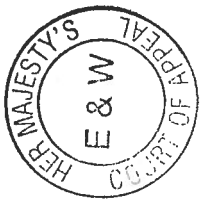
4. Alternatively, is a Member State obliged by EU law, and if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the Responsible State would expose the claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2), and/or 47 of the Charter, and/or to a risk that the minimum standards set out in the Directives will not be applied to him?

5. Is the scope of the protection conferred upon a person to whom the Regulation applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, 18, and 47 of the Charter wider than the protection conferred by Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention")?

6. Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a Court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to the Regulation, to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the Convention or his rights pursuant to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees?

7. Insofar as the preceding questions arise in respect of the obligations of the United

Kingdom, are the answers to Questions 2 – 4 qualified in any respect so as to take account of the Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom?



By the Court

SECOND SCHEDULE:
REQUEST FOR ACCELERATION
UNDER ARTICLE 104A OF THE RULES OF PROCEDURE
OF THE COURT OF JUSTICE

1. In this case the Appellant resists his return to Greece from the United Kingdom under the Dublin Regulation (Council Regulation (343/2003/EC) on the grounds that the Respondent is precluded from returning him to Greece, because to do so would breach his EU fundamental rights.

2. The referring Court asks the Court of Justice to apply the accelerated procedure under Article 104a of the Rules of Procedure to this reference on the grounds that a ruling on the questions referred to the Court of Justice is a matter of exceptional urgency, for the following reasons.

3. There are currently approximately 300 cases concerning returns to Greece stayed in the High Court (England and Wales) awaiting a decision in the present case. There is also a large number of cases, also concerning returns to Greece, pending before the courts of other Member States.

4. Furthermore, the Appellant's contention, if correct, has implications for returns under the Dublin Regulation to any other Member State where there is a serious issue about whether the fundamental rights of Dublin returnees will be breached. While this reference is pending, therefore, it will give rise to uncertainty about the lawfulness of returns to Greece, and may give rise to uncertainty about the lawfulness of returns to other Member States, whether from the United Kingdom, or from any other Member State.

5. The stated aims of the Dublin Regulation include at recital (4) to the Dublin Regulation applying objective, fair criteria both for the Member States and for the persons concerned to make it possible to determine rapidly the Member State

responsible for the examination of the asylum claim, so as to guarantee effective access to the procedures for determining refugee status, and not to compromise the objective of the rapid processing of asylum applications. It is therefore important to have clarity as soon as possible as to the approach to be applied so as to ensure the effective operation of the Dublin Regulation across the European Union in accordance with fundamental rights, both in the interests of Member States and in the interests of asylum seekers', including the appellant's, ability to have access to an asylum determination procedure..

6. Moreover, as UNHCR's Information Note of 16th June 2010[1] demonstrates, there is currently no consensus between the institutions or courts of the Member States as to the proper approach to be adopted pursuant to Article 3(2) of the Dublin Regulation in respect of returns to Greece. This has resulted in inconsistent practice between different Member States. UNHCR intervened in the presented case and stated that it overwhelmingly supported the present reference.

7. The scale of the problem across Europe, in relation to returns to Greece, is indicated by the fact that the European Court of Human Rights has stated that as at 23rd June 2010 it had granted interim measures preventing the return of asylum seekers to Greece under the Regulation in approximately 361 cases in 2009 and 262 cases in 2010.

8. These matters are causing acute administrative problems for the courts and the authorities of the Member States concerned, and for the European Court of Human Rights. Moreover, while the litigation continues, Member States may either defer consideration of the asylum claims of the individuals concerned, or may return these individuals to Greece, in circumstances in which the Administrative Court in this case has held (a finding which is not subject to appeal) that returnees are "at risk of not obtaining meaningful access to the asylum procedure. The upshot may be that they will be served with deportation orders without being able properly to pursue their claim."

[1] http://www.unhcr.org/refworld/docid/4c18e6f92.html

9. The referring Court's decision to make a reference makes it likely that the courts of all Member States will stay proceedings in respect of asylum-seekers who contend that removal to Greece would violate their fundamental rights.

10. Should the Court of Justice apply its normal procedure to this reference, the number of asylum-seekers affected in this way is very likely to increase and to do so continually and substantially. This increased number of asylum-seekers whose proceedings have been stayed will not receive determinations of their asylum claims in the Member States concerned. Those affected would be likely to remain in this position for the duration of the normal reference procedure. They include the Appellant who is anxious to obtain effective access to the asylum determination procedure.

11. Given these matters and the fundamental rights in issue, the Court of Appeal requests the Court of Justice to apply the accelerated procedure under Article 104a of the Rules of Procedure on the grounds of exceptional urgency.

MONDAY 12 JULY 2010
IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

THE QUEEN ON THE APPLICATION OF NS

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
AMNESTY INTERNATIONAL LIMITED
THE AIRE CENTRE (Advice on Individual Rights in Europe)
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

- and -

EQUALITY AND HUMAN RIGHTS COMMISSION

ORDER

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*

* This order was drawn by Mr P Wilkins (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Mr P Wilkins, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7947 7381