Case No: CO/13703/2013

Neutral Citation Number: [2015] EWHC 1641 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2015

Before :

THE RT HON LORD JUSTICE BURNETT
THE HON MRS JUSTICE THIRLWALL

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Between :

Musud Dudaev, Kamila Dudaev and Denil Dudaev	**Claimants**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Stephanie Harrison QC and Greg Ó Ceallaigh (instructed by **Messrs Birnberg Peirce**) for the **Claimants**
David Manknell (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 18 and 19 May 2015

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Judgment **Lord Justice Burnett :**

1. The claimants are Chechens whose applications for political asylum were refused by Sweden. Having exhausted their appeal rights in Sweden they chose not to make an application to the Strasbourg Court for interim measures under rule 39 of the Strasbourg Court Rules ["rule 39"] to prevent their removal to Russia pending determination of any application they might bring in Strasbourg under the European Convention of Human Rights ["the Convention"]. Instead, they stowed away in the back of a lorry and entered the United Kingdom illegally. They made an application for political asylum and humanitarian protection in this country. The Home Office declined to determine the applications. They asked the Swedish authorities to accept the return of the claimants pursuant to the common arrangements in the European Union for asylum claims under Council Regulation 343/2003 ["the Dublin II Regulation"]. The Swedish authorities have accepted their obligations under Dublin II. The claimants resist their return to Sweden on the grounds that there is a real risk that they will be refouled to Russia in breach of the 1951 Refugee Convention ["the Refugee Convention"], in breach of articles 2 and 3 of the Convention, and in breach of the equivalent rights found in the European Union's Charter of Fundamental Rights ["the Charter"].

2. The claimants' case proceeds under two broad headings. First, Miss Harrison QC argues that Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ["the 2004 Act"], in so far as it provides for an irrebuttable legal presumption that Sweden will not refoul returned asylum seekers in breach of the Refugee Convention or the Convention, is incompatible with European Union law and should thus be disapplied. Alternatively she invites this court to rewrite it within proper interpretative boundaries. Were either course followed, she submits that the statutory scheme for appeals should apply, with the result that the claimants would have an in-country right of appeal to the First-tier Tribunal where the substance of their claim that Sweden would refoul them in breach of its international obligations could be examined. She makes subsidiary arguments under European Union law to the effect that the statutory provisions offend the European Union principles of effectiveness and equivalence. Secondly, Miss Harrison submits that the material now available demonstrates that there are substantial grounds for believing that the Swedish authorities would return the claimants to Russia without providing them with an opportunity to present the totality of the material available to them, or to seek orders from either the Swedish courts or Strasbourg Court to suspend removal pending further consideration.

3. Mr Manknell, on behalf of the Secretary of State, submits that the statutory scheme is not incompatible with European Union law. It is silent on that matter. On the facts he submits that the evidence produced by the claimants fails by a wide margin to displace the presumption, recognised in domestic, Convention and European Union law, that Sweden can be relied upon to abide by its legal obligations.

The Background Facts

4. The first claimant, Masud Dudaev, is the son-in-law of the late President Dzochar Dudaev, who emerged as the leader of Chechnya following the collapse of the Soviet Union. Masud Dudaev is married to the President's daughter, Dana Dudaev. They bore the same surname before marriage, which is relatively common in Chechnya. President Dudaev was assassinated in April 1996. The second and third claimants are their eldest children born respectively in 1994 in Grozny and 1995 in Lithuania. They have two other children born in 1997 and 2009. The elder of the two was born in Lithuania. The Russian passport of the youngest says she was born in Russia but it is the first claimant's case that she was in fact born in Turkey. His wife and two younger children left Sweden after the family failed to secure political asylum there and now reside in Germany.

5. The first claimant says that he held senior positions in the government of his father-in-law and, after the assassination, was prominent in Chechen politics. The second Chechen war began in August 1999. The family left Russia in 2000 initially for Azerbaijan, but spent time in Lithuania and then Turkey, where they lived until 2010. They left Turkey because of assassinations of, and threats to, prominent Chechens. The first claimant says that he remained a prominent supporter of Chechen rebels and opposition groups. In particular, he had a close association with Ahmed Zakayev, who was granted political asylum in the United Kingdom in 2003. He is the leader of a Chechen government in exile. Mr Zakayev has been the subject of assassination plots since his arrival here. The claimants have been living with him in London after being granted bail pending the determination of these proceedings.

6. The first claimant says that he is just the sort of prominent Chechen opposition figure who would face serious risk if returned to Russia on account of his close connection to President Dudaev and Mr Zakayev. Others in a similar position have been granted asylum all over Europe.

The Swedish Proceedings

7. The claimants' family first sought asylum in Sweden in June 2010 but were returned to Lithuania under Dublin II. They appealed the decision to return them but it was upheld at two levels of appeal. It appears that the claimants did not remain for long in Lithuania but travelled back to Sweden via Belarus. They arrived in Sweden on 18 September 2011 and made applications for asylum on 28 September. The Lithuanian authorities say that the family were deported to Russia, but they deny this. In the ensuing consideration of the applications, the Swedish authorities said they had no reason to doubt what they had been told by their Lithuanian counterparts.

8. The European Union scheme under Dublin II does not oblige a member state to return asylum claimants to a safe third country within the European Union or European Economic Area. Article 3(2) enables any member state to choose to entertain the claim itself. On this occasion that is what the Swedish authorities did. The procedure adopted in Sweden enables applicants to place material before the decision maker, which is called the Migration Board, and includes multiple interviews on behalf of the

board. Legal assistance is provided at the expense of the state. An experienced immigration lawyer, Tore Ludwigs, acted on behalf of the claimants.

9. The decision of the Migration Board, of which there is a translation in the papers, considers the applicable law and deals in detail with the facts. It recounts the substance of the claim, including the first claimant's account of his involvement in Chechen politics, and refers to a number of documents he supplied in support. However, the Migration Board did not consider that the documents provided confirmation of the activities claimed. It regarded it as conceivable that he was involved in some political activity and referred to the submission put before them by Mr Ludwigs. It noted some contradictory evidence and referred to the absence of internet material supporting the claim. Given the prominence claimed by Mr Dudaev and the detail of his involvement in particular events they expected there to be such material. It is apparent that the Migration Board conducts its own researches and inquiries. For example, it noted an absence of information about alleged peace negotiations in which the first claimant said he was involved. It said:

> "As a result of the lack of credibility that the Migration Board has found in the family's case, the Board is of the opinion that the information that has emerged concerning Masud's political activities is unlikely to be true."

10. It then dealt with specific claims of threats, which it found unconvincing and also noted that various stamps in the family members' domestic Russian passports (which are loosely akin to identity documents) suggest that they were in Russia at times when they suggested they were elsewhere fearing for their safety. The international passports were issued at times which were inconsistent with the suggestion that they feared the Russian authorities. Masud's driving licence has similarly been issued when he said he was not in Russia. The Migration Board noted the explanations put forward by the family to explain what it considered to be significant oddities and inconsistencies in their accounts and documentation, including their denial that they were returned from Lithuania to Russia. It was the cumulative effect of a series of doubts about the veracity of the family's account which led to the refusal of their claims. The result was a decision to deport the family but with a period of grace for four weeks to allow voluntary departure.

11. The written decision informed the family of the right of appeal to the Administrative Migration Court in Stockholm. They exercised that right and once again were represented by Mr Ludwigs at public expense. The Migrant Court determined the matter without an oral hearing having rejected representations that there should be one. The court comprised a judge of the Administrative Court and three lay assessors. The appeal was unsuccessful. The written judgment makes it plain that the Migration Court considered the matter afresh, making its own assessment of the need for international protection on the basis of the materials available.

12. The appeal was dismissed in a judgment handed down on 12 March 2013. The core of the reasoning is contained in the following paragraphs of the judgment:

> "The Dudaev family have argued that if they are returned to Russia they risk being killed by the Russian or Chechen authorities, partly because of Masud Dudaev's political activities for the Chechen republic at the end of the 1990's and during the years 2003-2006 and partly because the family is related to Chechnya's first president, Dzochar Dudaev. To confirm this political activity Masud Dudaev has submitted a number of different certificates.
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> The Migration Court considers that the protection reasons that the Dudaev family have adduced and the documents that they have submitted are insufficient to show that there is a need for international protection in their case. The court bases this assessment on the following circumstances:
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> Masud Dudaev states that he was threatened on a total of four occasions during the years 2006-2011 in Turkey. The threats were made partly by unknown persons on the telephone and on one home visit to the family and partly by a representative for the Russian side during negotiations in Turkey. The threats, according to Masud Dudaev, were veiled. The court has therefore established that this was a matter of a few threats over a period of several years. Nor have the family ever been subjected to any treatment requiring protection on the part of the Russian or Chechen authorities. They have been able to live under their own names.
>
> Despite the threatening picture which, according to the family, began as far back as 2006, the family never sought asylum in Turkey and nor did Masud Dudaev do so when he was in Sweden in September 2009. This in the court's opinion, means that there is reason to question how well-founded this fear really is.
>
> According to the information in her Russian international passport, Masud Dudaev's youngest daughter … was born … in the Russian republic of Chechnya. According to Masud Dudaev, his sister still lives in Chechnya and has not been the subject of interest to the authorities there. Masud Dudaev has also stated that he has not been politically active since 2007. As shown in the investigation, Dana Dudaev has never been involved in political activity. The Russian passports that the family have submitted to the court show that these were issued

> during the years 2008, 2010 and 2011. The court therefore establishes against this background that the objective circumstances show that there is no reason to assume that the Dudaev family would be of interest to Russian authorities if they returned.
>
> In summary, the Migration Court considers that there are no reasons to assume that there is an individual and real risk that the Dudaev family would be subjected to persecution or other treatment requiring protection if they returned to their homeland. They cannot therefore be granted residence permits as persons in need of protection. There is therefore no reason to grant them status declarations and travel documents."

13. Mr Ludwigs lodged an appeal with the Administrative Appeal Court in Stockholm but permission to appeal was refused on 18 June 2013. The claimants became liable to removal four weeks after that decision, although they were not in fact removed at the end of that period.

The United Kingdom Applications

14. The claimants entered the United Kingdom on 29 July 2013 and claimed asylum that same day by presenting themselves at the Asylum Screening Unit in Croydon. The first claimant explained the nature of his fears and also that asylum had been refused in Sweden. Further screening interviews were conducted in August, by which time the claimants had secured the assistance of their current solicitors. The solicitors requested that the United Kingdom exercise its discretion to determine the substance of the claim under article 3(2) of the Dublin II Regulation and asserted that to remove the claimants to Sweden would violate article 3 of the Convention because of the risk of refoulement from Sweden to Russia. There is no suggestion in this case of any deficiency in the reception conditions in Sweden or generally in the systems in place for dealing with asylum claims in Sweden. The Home Office refused to exercise that discretion and on 19 August made a decision under section 10 of the Immigration and Asylum Act 1999 to remove the claimants to Sweden. Sweden accepted responsibility under Dublin II.

15. The Home Office has made a series of decisions refusing to entertain the claim in the United Kingdom which responded to evidence and arguments provided by the claimants and also to developing jurisprudence in the Supreme Court, the Strasbourg Court and the Luxembourg Court.

The Domestic Legal Regime

16. Amongst the aims of the 2004 Act was to extend a regime introduced by the Immigration and Asylum Act 1999 to designate safe third countries for the purposes of asylum claims under the Refugee Convention, to include claims under the

Convention and to refine the domestic law system to reflect the Dublin II Regulation, as the Explanatory Notes make clear. The 1999 Act safe third country procedure was limited to asylum claims. If a claim were brought under the Convention in addition, which the Secretary of State considered to be clearly unfounded, she could certify to that effect with the consequence that there would be no in-country right of appeal. I reproduce the relevant provisions of the 2004 Act for the purposes of this claim as they were in force at the time of the last material decision in October 2014 (there have been amendments since):

> "33(1) Schedule 3 (which concerns the removal of persons claiming asylum to countries known to protect refugees and to respect human rights) shall have effect."

SCHEDULE 3

REMOVAL OF ASYLUM SEEKER TO SAFE COUNTRY

PART 1 INTRODUCTORY

1(1) In this Schedule—

"asylum claim" means a claim by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,

"Convention rights" means the rights identified as Convention rights by section 1 of the Human Rights Act 1998 (c. 42) (whether or not in relation to a State that is a party to the Convention),

"human rights claim" means a claim by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with his Convention rights,

"immigration appeal" means an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (appeal against immigration decision), and

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol.

(2) In this Schedule a reference to anything being done in accordance with the Refugee Convention is a reference to the thing being done in accordance with the principles of the Convention, whether or not by a signatory to it.

PART 2

FIRST LIST OF SAFE COUNTRIES (REFUGEE CONVENTION AND HUMAN RIGHTS (1))

2 This Part applies to—

[European Union Countries together with Norway and Iceland]

3(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,

(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.

4 Section 77 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (no removal while claim for asylum pending) shall not prevent a person who has made a claim for asylum from being removed—

(a) from the United Kingdom, and

(b) to a State to which this Part applies;

provided that the Secretary of State certifies that in his opinion the person is not a national or citizen of the State.

5 (1) This paragraph applies where the Secretary of State certifies that—

(a) it is proposed to remove a person to a State to which this Part applies, and

(b) in the Secretary of State's opinion the person is not a national or citizen of the State.

(2) The person may not bring an immigration appeal by virtue of section 92(2) or (3) of that Act (appeal from within United Kingdom: general).

(3) The person may not bring an immigration appeal by virtue of section 92(4)(a) of that Act (appeal from within United Kingdom: asylum or human rights) in reliance on—

(a) an asylum claim which asserts that to remove the person to a specified State to which this Part applies would breach the United Kingdom's obligations under the Refugee Convention, or

(b) a human rights claim in so far as it asserts that to remove the person to a specified State to which this Part applies would be unlawful under section 6 of the Human Rights Act 1998 because of the possibility of removal from that State to another State.

(4) The person may not bring an immigration appeal by virtue of section 92(4)(a) of that 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 applies unless satisfied that the claim is not clearly unfounded.

(5) Sub-paragraph (4) applies to a human rights claim if, or in so far as, it asserts a matter other than that specified in sub-paragraph (3)(b)."

17. The Schedule makes further provision to enable the Secretary of State to designate by statutory instrument (subject to positive resolution of both Houses of Parliament) further countries as safe third countries for the purposes of the Convention and the Refugee Convention which are not European Union member states, through second and third lists of safe countries. She may also add to the list in paragraph 3(2) as new states accede to the European Union.

18. The effect of Schedule 3 Paragraph 3(2) is to enact a legal presumption that is an irrebuttable or conclusive presumption, that the countries listed will not refoul a person in contravention of the Refugee Convention or remove that person to another country in breach of his Convention rights. Paragraph 4 requires the Secretary of State to certify as clearly unfounded a human rights claim based upon anticipated treatment in the safe third country itself unless she is satisfied to the contrary.

19. The 2004 Act and Schedule make no mention of the Charter (or claims under European Union law). They are concerned only with claims under the Refugee Convention and Convention. In my judgment, the consequence is that to the extent that an individual seeks to rely upon the Charter to resist removal to a "safe third country" the irrebuttable presumption does not apply. That was the conclusion of the deputy judge in *R(AI) v Secretary of State for the Home Department* [2015] EWHC 244 (Admin) at para 59, with which I respectfully agree. It may be that Parliament did not consider that the Charter provided for any independent justiciable rights in the United Kingdom. Article 1(1) of Protocol 30 on the application of the Charter to the United Kingdom and Poland had appeared to suggest as much. However, in *NS (Afghanistan) v. Secretary of State for the Home Department* [2013] QB 102 (which I shall consider in more detail) the Luxembourg Court confirmed that the Protocol did not exempt the United Kingdom from ensuring compliance with the Charter without qualification.

Dublin II and the European Union Legislation

20. All member states of the European Union and European Economic Area are contracting parties to the Refugee Convention. The European Union itself is not a contracting party but article 78 of the Lisbon Treaty (and its predecessor) and article 18 of the Charter provide that the right to asylum is to be guaranteed. On 15 June 1990 the member states signed the Convention for Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities. That was the original Dublin Convention. It entered into force on 1 September 1997 for most member states. In October 1999 the European Council met in Tampere. Amongst its conclusions was that there should be a Common European Asylum System within the European Union. It was pursuant to that stated intention that the Dublin II Regulation was made and entered into force on 17 March 2003. The Dublin II Regulation establishes the circumstances in which one member state, rather than another, is obliged to entertain asylum applications. They have since been superseded to similar effect by Council Regulation (EC) No 604/2013. The regulation is directly applicable in the United Kingdom, requiring no legislation for implementation, but confer no rights on individuals: *R (Kheirollahi-*

Ahmmadroghani) v. Secretary of State for the Home Department [2013] EWHC 1314 (Admin) at paras 16 and 111; *R (MK Iran) v. Secretary of State for the Home Department* EWCA Civ 115 at para 42.

21. The Common European Asylum System has four legislative components. The Dublin II Regulation distributes responsibility for considering a claim for asylum. The Qualification Directive (2004/83/EC) provides minimum standards for qualification as refugees or persons or otherwise in need of international protection. The Reception Directive (2003/9/EC) is concerned with the treatment of applicants for asylum and international protection. The Procedures Directive (2005/85/EC) is concerned with procedures in member states for granting and withdrawing refugee status.

22. The reach of the Dublin II Regulation was recently considered by the Luxembourg Court in *Abdullahi v. Bundesasylampt* (Case C-394/12) [2014] 1 WLR 1895. The court referred to article 19 (1) and (2) which provide:

> "1. Where the requested Member State accepts that it should take charge of the applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.
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> 2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer … This decision may be subject to an appeal or review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this."

23. In England and Wales the supervisory jurisdiction of the High Court in judicial review proceedings provides the mechanism for a review. The Luxembourg Court made a number of important observations on the proper scope of challenge contemplated by article 19(2) to a decision under the Dublin II Regulation not to examine an asylum claim and to transfer an applicant to another Member State. First, it noted that the Procedures Directive does not deal with procedures governed by the Dublin II Regulation: para 50. Recital 29 of the Procedures Directive explains that. In para 52 it recorded that member states can have confidence in each other to observe the Refugee Convention and the Convention. It continued:

> "53. It is precisely because of that principle of mutual confidence that the EU Legislature adopted Regulation 343/2003 in order to rationalise the treatment of applications for asylum and to avoid blockages in the system as a result of the obligation on state authorities to examine multiple applications by the same applicant, and in order to increase

legal certainty with regard to the determination of the state responsible for examining the asylum application and thus avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests of both asylum seekers and the participating member states: see *NS (Afghanistan)* case, para 79.

…

55. It follows that the rules in accordance with which an asylum seeker's application will be examined will be broadly the same, irrespective of which member state is responsible …

57. ... article 3(2) of Regulation No 343/2003 (the sovereignty clause) and article 15(1) of that Regulation (the humanitarian clause) are designed to maintain the prerogatives of the member states in the exercise of the right to grant asylum… These are optional provisions which grant a wide discretionary power to member states. …

59. Lastly, one of the principal objectives of Regulation No 343/2003 is – as can be seen from recitals (3) and (4) in the Preamble thereto – the establishment of a clear and workable method of determining rapidly the member state responsible for the processing of an asylum application 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.

60. In the present case, the decision at issue is the decision of the member state in which Ms Abdullahi's asylum claim was lodged not to examine that claim and to transfer her to another member state. That second member state agreed to take charge of Ms Abdullahi on the basis of the criterion laid down in article 10(1) of Regulation No 343/2003, namely, as the member state of Ms Abdullahi's first entry into EU territory. In such a situation, in which the member state agrees to take charge of the applicant for asylum, and given the factors mentioned in paragraphs 52 and 53 above, the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of the applicants for asylum in the latter member state, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter: see the *NS (Afghanistan)* case, paras 94 and 106 …"

24. Article 4 of the Charter replicates article 3 of the Convention. As I have mentioned, Article 18 guarantees the right to asylum with due respect to the Refugee Convention and article 19(2) protects against removal to a state where there is a serious risk of treatment which would violate article 4.

Authority

25. Schedule 3 to the 2004 Act was considered by the House of Lords in *R (Nasseri) v. Secretary of State for the Home Department* [2010] 1 AC 1. In issue was the compatibility of the irrebuttable presumption with the Convention, in particular article 3. Lord Hoffmann gave a full substantive opinion. All other members of the committee agreed with him. Lord Scott added a short concurring opinion. Mr. Nasseri was an Afghan national who had earlier claimed asylum in Greece. Greece took responsibility for his claim for asylum under Dublin II. The irrebuttable presumption relating to unlawful refoulement applied. He sought a declaration of incompatibility. The Secretary of State readily admitted that if removal to Greece would infringe Mr. Nasseri's rights under article 3, the conclusive presumption in paragraph 3(2)(b) would be incompatible with the Convention. However, the facts did not support the contention that there were substantial grounds for believing that there was a real risk that Mr. Nasseri's article 3 rights would be infringed by his return Greece. In those circumstances a declaration of incompatibility was inappropriate.

26. No argument was advanced under the Charter. This case preceded the decision in *NS* indicating that the Charter applied to such decisions in the United Kingdom despite the wording of protocol 30.

27. In the course of his opinion Lord Hoffmann noted the decision of the Strasbourg Court in *KRS v United Kingdom* (App. No. 32733/08); [2009] 48 EHRR SE 129. An Iranian national entered the United Kingdom in 2006 and claimed asylum. He had travelled through Greece. The Greek authorities accepted responsibility for his claim under Dublin II. The removal directions were unsuccessfully challenged in judicial review proceedings on the ground that his removal to Greece would violate his article 3 rights. In the ensuing judgment on his application to Strasbourg, the Court reaffirmed its decision in *TI v United Kingdom* [2000] INLR 211 that despite Dublin II, states parties to the Convention were obliged to ensure that removal to a European Union member state did not violate a person's article 3 rights. That case was concerned with removal under Dublin II of a Sri Lankan national from the United Kingdom to Germany. The Strasbourg Court was satisfied that there was no real risk of refoulement contrary to article 3 and declared the application inadmissible. On the evidence available in *KRS*, the Strasbourg Court was not satisfied that removal to Greece gave rise to substantial grounds for believing there was a real risk of treatment contrary to article 3.

28. That issue was revisited in *MSS v Belgium and Greece* (App. No. 30696/09) (2011) 53 EHRR 2. Judgment was given in January 2011. The background was that the UN

High Commissioner for Refugees had considered from early 2009 that there should be no returns to Greece because of deficiencies in Greek asylum procedures and poor reception conditions. The applicant was returned to Greece. His complaint that the conditions of his treatment in Greece violated his article 3 rights was upheld against Greece. So too was his complaint that there was a risk of refoulement from Greece to Afghanistan without proper consideration of his asylum claim. The Strasbourg Court also concluded that, in removing the applicant to Greece, the Belgian Government had violated his article 3 rights.

29. The complaint was summarised in para 323. In sending the applicant to Greece under Dublin II when they were aware of deficiencies in the Greek asylum procedure without assessing the risks he faced, the Belgian government had failed in their obligations under article 3. The Strasbourg Court reviewed, para 342, its decisions in *TI* and *KRS*, which it noted both concerned Dublin II. It the latter case the approach had been to presume, in the absence of proof to the contrary, that Greece complied with its obligations under European Union law which prescribed minimum standards for asylum procedures and the reception of asylum seekers.

30. In para 345 the issue was distilled to the question whether the "Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters". There followed a summary of the evidence of practical difficulties in Greece, including from the UNHCR. The court noted that the procedures in Belgium did not enable the applicant to explain the reasons which militated against removal to Greece. It continued:

> "352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that … the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.
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> …
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> 356. The respondent government, supported by the third-party intervening governments, lastly submitted that asylum seekers should lodge applications with the Court only against Greece, after having exhausted the domestic remedies in that country, if necessary requesting interim measures.
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> 357. Whilst considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers to Greece clearly shows that applications lodged there at this point in time are illusory. … Considering the number of asylum applications pending in Greece, no conclusions can be

> drawn from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of r.39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in other states."

31. The Belgian authorities should have realised that the risk to the applicant was "real and individual enough to fall within the scope of article 3". In short, the further information available since the decision in *KRS* led the Strasbourg Court to conclude that the presumption of compliance had been rebutted. The approach of the Strasbourg Court was to look at both systemic failings and the individual circumstances of an applicant in determining the question whether removal would give rise to the necessary risk.

32. In *Tarakhel v Switzerland* (App. No. 29217/12), in which judgment was given on 4 November 2014, the Strasbourg Court has recently considered the risks associated with reception conditions in Italy in particular for family groups with children. Whilst accepting that generally the situation in Italy was not comparable to Greece there were serious doubts about its capacity to cope. There was no general bar to removal to Italy but the possibility that a significant number of asylum seekers would suffer in conditions which violated article 3 could not be discounted, para 115. Having regard to the applicants' individual circumstances, particularly that there were five children, "it was incumbent on the Swiss authorities to obtain assurances … that on arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together." Para 120.

33. The Luxembourg Court was confronted with very similar concerns as arose in *MSS* relating to Greece in *NS*. It concerned an Afghan national whom the United Kingdom authorities wished to return to Greece under Dublin II. NS asked the Home Office to exercise the discretion under regulation 3(2) to determine his claim for asylum in this country on the grounds that his rights under European Union law and the Convention would be breached if he were returned to Greece. The case was heard with others from Ireland which raised common issues. The questions asked of the Luxembourg Court included whether a decision under regulation 3(2) fell within the scope of European Union law for the purposes of article 51 of the Charter (which prescribes the applicability of the Charter); the extent to which one Member State could rely upon the presumption of compliance by another with its obligations; and whether the protection afforded by the Charter was wider than by article 3 of the Convention. The Luxembourg Court held:

> (i) that a decision whether to examine an asylum claim under regulation 3(2) of the Dublin II Regulation was one which implemented European Union law for the purposes of article 51 of the Charter with the result that the decision was

obliged to observe the fundamental rights in the Charter when making its decision (paras 68 and 69);

(ii) that although the Common European Asylum System was based upon an assumption that all participating states observed fundamental rights, European Union law precluded the application of an irrebuttable presumption that the receiving state observed fundamental rights of the European Union; therefore, article 4 of the Charter precluded a transfer in circumstances where systemic deficiencies in the receiving state showed that there were substantial grounds for believing that there was a real risk the person concerned would face treatment contrary to article 4 on return (paras 86, 94, 99 – 106);

(iii) that the rights set out in the Charter in this regard were no wider than those guaranteed by article 3 of the Convention (paras 114 and 115).

The specific question relating to the applicability of the Charter to the United Kingdom, already referred to, was answered in the positive.

34. At para 75 the Luxembourg Court noted that the Common European Asylum System "is based upon the full and inclusive application of the [Refugee Convention] and the guarantee that nobody will be sent back to a place where they risk being persecuted". It noted the presumption that the treatment of asylum seekers in all members states would comply with the requirement of the Charter, the Convention and the Refugee Convention, para 80. At paras 84 and 85 the court made the point that if the mandatory consequence of the infringement of the various instruments comprising the Common European Asylum System was to preclude transfer, it would deprive the Dublin II Regulation of its substantive effect. It stated the principle applicable in para 86:

> "By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the member state responsible, resulting in inhuman and degrading treatment, within the meaning of article 4 of the Charter, of asylum seekers transferred to the territory of that member state, the transfer would be incompatible with that provision."

35. The Court continued:

> "99. It follows from all the foregoing considerations that … an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the member state primarily responsible for his application is incompatible with the duty of the member states to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights."

36. The Dublin II Regulation did not require an irrebuttable presumption. On the contrary, the Court drew a parallel with the Procedures Directive, article 36 of which is concerned with the concept of a safe third country as being one (a) that has ratified the Refugee Convention, (b) is a State party to the Convention; but (c) also observes the provisions of those instruments. That article, I note, is concerned with safe third countries which are not members of the European Union and enables the institutions to establish lists of such countries. Drawing on that wording, the Court indicated that "the same principle is applicable to member states and third countries". The presumptions underlying the relevant legislation were rebuttable, para 105:

> "105. In the light of those factors, the answer to the questions referred is that European Union Law precludes the application of a conclusive presumption that the member state which article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.
>
> 106. Article 4 of the Charter … must be interpreted as meaning that the member states, including the national courts, may not transfer an asylum seeker to the "member state responsible" … where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state 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 that provision."

37. *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] 2 WLR 409 was concerned with returns to Italy under the Dublin II Regulation and with conditions in Italy, rather than risks of refoulement contrary to the Refugee Convention or article 3 of the Convention. In each of the cases before the Supreme Court the Secretary of State had issued a certificate under schedule 3 paragraph 5(4) of the 2004 Act. The Court of Appeal [2013] 1 WLR 576, para 62 had concluded that the only basis on which a member state was *required* to entertain an application under regulation 3(2) of the Dublin II Regulation, and refrain from returning the applicant to the state of first arrival was when it knew of a systemic deficiency in the latter's asylum and reception procedures giving rise to the required risk. In doing so it sought to follow *NS,* in particular the conclusions just quoted. Lord Kerr, with whom all the other Justices of the Supreme Court agreed, gave the only judgment. It explained why the appeals would be allowed.

38. Unusually, the parties and the interveners agreed that the Court of Appeal was wrong. It was common ground that the appropriate test in removals cases was that articulated in the Strasbourg Court in *Soering v United Kingdom* (1989) 11 EHRR 439 namely whether "substantial grounds have been shown for believing that the person

concerned … faces a real risk [in the country to which he or she is to be removed] of being subjected to [treatment contrary to article 3 of the Convention]." It was clear that in *MSS* the Strasbourg Court had recognised that the question whether return would breach article 3 engaged a combination of systemic and personal features. The Court of Appeal, para 43, noted a difference between the approach in Strasbourg from that in Luxembourg but was bound by the latter. It would otherwise have held differently. Lord Kerr analysed closely the language of the Luxembourg Court in *NS* and concluded that its judgment should not be understood narrowly, in the sense that European Union law was concerned only with systemic deficiencies. He said this of the presumption of compliance:

> "40. The need for a workable system to implement Dublin II is obvious. To allow asylum seekers the opportunity to move about various member states, applying successively in each of them for refugee status … could not be countenanced … the recognition of a presumption that members of an alliance of states such as those which comprise the European Union will comply with their international obligations reflects not only principle but pragmatic considerations. A system whereby a state which is asked to confer refugee status on someone who has already applied for that elsewhere should be obliged, in every instance, to conduct an intense investigation of avowed failings of the first state would lead to disarray.
>
> 41. It is entirely right, however, that the presumption that the first state will comply with its obligations should not extinguish the need to examine whether in fact those obligations will be fulfilled when evidence is presented that it is unlikely that they will be. There can be little doubt that the existence of the presumption is necessary to produce a workable system but it is the nature of a presumption that it can, in appropriate circumstances, be displaced. The debate must centre, therefore, on how the presumption should operate. Its essential purpose must be kept clearly in mind. It 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 to the listed country. The presumption 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 indispensible requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker.
>
> …

> 64. There is, however, what Sales J described in *R (Elayathamby) v Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) at [42(i)] as "a significant evidential presumption" that listed states will comply with their Convention obligations in relation to asylum procedures and reception conditions for asylum seekers within their territory. It is against the backdrop of that presumption that any claim that there is a real risk of breach of article 3 rights will fall to be considered.
>
> …
>
> 66 … In order to rebut the presumption a claimant will have to produce sufficient evidence to show that it would be unsafe for the court to rely on it. …
>
> 68. Although one starts with a significant evidential presumption that listed states will comply with their international obligations, a claim that such a risk if present is not to be halted in limine solely because it does not constitute systemic or systematic breach of the rights of refugees or asylum seekers. Moreover, practical realities lie at the heart of the inquiry; evidence of what happens on the ground must be capable of rebutting the presumption if it shows sufficiently clearly that there is a real risk of article 3 ill-treatment if there is an enforced return."

39. Although *EM (Eritrea)* was concerned with reception conditions in Italy, the approach articulated by Lord Kerr applies equally in cases where the risk being relied upon is of refoulement in circumstances which would violate Article 3 of the Convention.

40. The Luxembourg Court returned to the topic of systemic failings in *Abdullahi* and appeared unequivocally to state that only systemic deficiencies would do: para 60 (quoted above). Neither court had the benefit of the other's reasoning because of the timing of their respective hearings. The Luxembourg Court has not yet been faced with a case which is not squarely based upon systemic failings. It is unnecessary to explore in these proceedings whether there remains a tension between the approach in Luxembourg and the decision of the Supreme Court. The risk in play in this claim arises from the personal circumstances of the first claimant but his real complaint is that the systems in place in Sweden for dealing with fresh claims after an initial refusal are not sensitive enough to enable full arguments to be deployed before removal from Sweden.

The Applicant's Post Arrival Evidence

41. The claimants fear that Sweden will not entertain a fresh application for asylum from them, that they will not have an effective way of challenging any refusal to do so in the Swedish Courts and that recourse to Strasbourg is "illusory". They suggest that the decision of the Migration Board and Migration Court on appeal were contrary to the evidence. Indeed, Miss Harrison goes so far as to submit that the approach of the Swedish authorities, administrative and judicial, should be condemned as irrational.

42. There is only a selection of the material that was placed before the Swedish authorities in the bundles before us.

43. Much of the evidence placed before the Home Office and this court by the claimants is directed towards establishing that, contrary to the conclusion of the Swedish authorities, he and his family would indeed be at risk were they to be returned to Russia. The evidence also seeks to make good the submission that on return to Sweden the possibility of mounting a fresh claim is very limited, the judicial scrutiny ineffective and the prospect of an application to Strasbourg (including for interim measures under rule 39) unreal.

44. The first claimant reiterates the detail of his activities both in Chechnya and since he left. He provides explanations for many of the points taken against him in Sweden with a view to showing that the authorities were mistaken. He relies upon a decision of the Migration Board in respect of his sister-in-law, who is married to a son of the later President Dudaev. She was granted asylum in Sweden. The facts are of course different but he suggests that the essential risks are the same. There is a detailed statement from Mr. Zakayev elaborating upon the first claimant's activities since he left Chechnya and his current role in the Chechen diaspora. There is evidence that Mr. Zakayev provided a letter in support of the claimants' application in Sweden. We have not seen it and so do not know whether it was as comprehensive as his more recent statement in detailing the history. An independent expert report has been provided by Professor William Bowring. He is a professor of law at Birkbeck College, University of London with a deep knowledge of post-Soviet Russia. He has analysed the factual circumstances prayed in aid by the first claimant. His conclusion is that were he to be removed to Russia he would be "in grave danger". Amnesty International has prepared a report to the same effect.

45. The evidence in support of the contention that, on return to Sweden, the claimants are likely to be refouled without any effective opportunity to make a fresh claim or to seek interim measures from Strasbourg comes from Mr. Ludwigs, a second Swedish lawyer called Anders Sundquist and a report from the European Legal Network on Asylum ["ELENA"] of their research on rule 39 interim measures, drawn from responses from asylum lawyers across Europe.

46. The ELENA report provides no evidence to suggest that the Swedish authorities do not comply with rule 39 interim measures. Indeed, *I v Sweden* (App. No. 61204/09), decided on 5 September 2013, provides an illustration of such compliance in the context of Chechen applicants. They failed to persuade the Migration Board and Migration Court that they were at risk if returned to Russia. Leave to appeal to the

Appeal Court was refused. The applicants lodged a complaint with the Strasbourg Court which issued rule 39 interim measures. In the subsequent proceedings the Strasbourg Court concluded that the applicants' removal to Russia would violate article 3.

47. ELENA confirms that expulsion is suspended by Sweden pending resolution of the Strasbourg proceedings. It suggests that once the Strasbourg Court has indicated an interim measure the Migration Board sometimes reverses its earlier decision. It notes that article 34 ECHR requires States parties to the Convention not to hinder the exercise of the right to individual application to the Strasbourg Court. Practical obstacles to making an application under rule 39 generally across Europe included difficulty in obtaining legal assistance and the operation of accelerated procedures for dealing with asylum claims. As regards to the latter, there were reports from Swedish asylum lawyers that those in the accelerated procedure had difficulty in pursuing appeals and submitting applications to the ECHR without legal assistance. There was also a discrete criticism raised of Swedish domestic law "which arguably is not completely in accordance" with article 3 because it insists upon a good reason being provided for producing late evidence.

48. Mr. Sundquist is the Swedish co-ordinator for ELENA. The material parts of his statement of 18 July 2014 are paragraphs 5 and 6:

> "5. I can confirm that once the refusal of asylum has become final, it cannot normally be reopened within four years. There is a provision to re-open an asylum claim within four years where there has been a change of circumstances since the initial decision, but this provides very limited protection for the following reasons:
>
> the making of an application to reopen an asylum claim and any appeals against refusal do not, unlike the initial asylum process, prevent the lawful removal of the applicant to their country of nationality. The Swedish courts can order the authorities not to remove such an applicant on a case-by-case basis, but such orders are very rarely made;
>
> In my experience, the consideration given to applications to reopen an asylum claim are extremely cursory at every level.
>
> By virtue of Chapter 12, paragraph 19 of the Aliens Law, unless a "reasonable explanation" is provided for the late submission of new facts or circumstances in a case, the application will be refused *regardless* of whether a deportation would result in a violation of Article 3 ECHR. What constitutes a reasonable explanation" is interpreted very narrowly by the Swedish authorities in practice.

> The applicant has no right to legal assistance throughout this process. If, as is likely, such an applicant is detained; there would be very limited opportunities to consult even with a privately funded lawyer.
>
> 6. Although I am not familiar with the details of the family's case, if they have no new circumstances on which to rely, it is likely that the Swedish authorities would remove them immediately to Russia. It is unlikely that they would have sufficient time to seek to reopen their asylum claims before removal, and they would not be entitled to legal assistance. Even if they did make such an application, it would not automatically prevent their removal."

Mr. Sundquist's statement makes no reference to rule 39 interim measures.

49. Mr. Ludwigs' statement was made on 20 September 2013. Removal directions had been set for 24 September, but were cancelled on 23 September. It is fair to say that it was prepared at speed when removal was imminent. It is not an expert report as is understood in this jurisdiction. Mr. Ludwigs asserts that he was "astonished" by the outcome of the claimant's case in Sweden which, in his opinion, was against the weight of the evidence. He then focuses on the decision of the Migration Court because "the earlier decision contained several serious factual errors"; but he does not identify them. Mr. Ludwigs distils to six the factual conclusions which led to the refusal of the claim by the Migration Court and then explains why, in his opinion, each is wrong. At the end of that exercise he repeats his astonishment at the outcome and condemns the Swedish authorities for failing in their "central obligation to prevent the refoulement of those at risk". With respect to Mr. Ludwigs, beyond providing a useful summary of some of the issues it goes nowhere in supporting the contention that there is a risk of refoulement contrary to the Refugee Convention, the Convention or the Charter. Those matters are dealt with towards the end of the statement:

> "19. I have been asked what steps can be taken in the event that the family are returned to Sweden on 24 September 2013. The domestic proceedings in Sweden have been concluded. Without a change of circumstances the case cannot be reopened. Fresh claim applications do not give rise to effective non-suspensive remedies and they could be returned immediately to Russia.
>
> 20. Give that the Swedish authorities already have their passports (albeit obtained by bribery), I would expect that that the family will be immediately returned to Russia following

> their arrival at Arlanda airport. There are no domestic proceedings we could take to prevent that from happening.
>
> 21. Although of course there is the theoretical possibility of an application to the European Court, in practice this is likely to be an illusory remedy. If they are removed directly after arrival at Arlanda airport, there would be no chance of preventing their return to Russia.
>
> 22. Because there are no effective suspensive remedies in domestic Swedish law, there is nothing we can do to ensure that we have sufficient time to prepare such an application, and it is very likely that we would not have sufficient time. All of these practical impediments are well known, and have been the subject of criticism in the latest [ELENA Research]."

50. These paragraphs represent those parts of the statement which explain Swedish law and practice. However, they amount to little more than bare assertion, unsupported by any detail or explanation. The reference to an application to Strasbourg being an "illusory" remedy picks up and repeats a word found in the judgment of the Grand Chamber in *MSS* para 357 when considering the grave problems which had engulfed the Greek asylum system. Mr. Ludwigs' gloomy prognosis that, in effect, there would have been nothing that could have been done if the claimants had been returned to Sweden on 24 September 2013 does not accord with that of Mr. Sundquist that there are opportunities to reopen an asylum case. But, in any event, those time constraints are no longer in play.

The Decision Letters

51. The first decision letter of 5 September 2013 relied upon Schedule 3 paragraph 3(2) and the Swedish authorities' acceptance of responsibility under the Dublin II Regulation and certified under paragraphs 4 and 5. On 23 September 2013 the Dublin and Third Country Unit of the Home Office responded to the representations made on behalf of the claimants by their solicitors. It noted that they could have made an application under rule 39 before leaving Sweden. On the substance, the conclusion was that the Swedish authorities could be relied upon to honour their international obligations and provide a proper opportunity to the claimants to make their case. A request had been made for the United Kingdom, as a matter of discretion, to entertain the applications for asylum. The Home Office declined, in particular because it would undermine Dublin II to do so in circumstances where the claimants had left the country with responsibility and entered another illegally. In rejecting the contention that the Swedish government would return the claimants to Russia in breach of the Convention the letter referred to the judgment of the Strasbourg Court in *KRS v The United Kingdom*, of the Luxembourg Court in *NS* and of the Court of Appeal in *EM (Eritrea)*. In the light of those decisions the Home Office concluded that the evidence

provided by the claimants did "not come close to rebutting the presumption that Sweden will treat him in compliance with the requirements of the EU Charter, the [Refugee Convention] and the ECHR."

52. At the time that this letter was written *EM (Eritrea)* was pending for hearing in the Supreme Court. As we have seen, both *KRS* in Strasbourg and *NS* in Luxembourg had focused exclusively on systemic failings in Greece and Italy, the latter in particular seeming to limit the circumstances which would prevent return from one European Union member state to another under Dublin II to instances of proven systemic failings giving rise to the relevant risk.

53. The next decision letter is dated 17 June 2014, and so after the Supreme Court had given it decision in *EM (Eritrea)*. This letter superseded the earlier decision letter. The article 3 claim was reconsidered in the light of the decision of the Supreme Court. It reviewed the evidence that had been submitted but concluded that the presumption that Sweden would abide by its international obligations was not rebutted.

54. The final decision letter is dated 15 August 2014 and augments the earlier one. It considered all the evidence which had been submitted. That included a decision of the Special Immigration Appeals Commission *E1/(OS Russia) v Secretary of State for the Home Department* which made findings regarding assassination threats to Mr. Zakayev. There was also a reference to the Inquiry into the death of Alexander Litvinenko who was an associate of Mr. Zakayev. The Home Office maintained its stance that Sweden was a safe third country, that the presumption that it would abide by its international obligations had not been rebutted and that the claimants could make a further application when they returned there. The decision letter noted that the effect of Mr. Sundquist's evidence was to confirm that the Swedish courts can prevent removal where appropriate. It dealt with the question whether there would be time to engage with the Swedish authorities and (if necessary courts) by noting that the claimants had been on notice of their likely removal there. They could correspond with the Swedish authorities before removal. It reiterated the possibility of making an application to the Strasbourg Court under rule 39. The conclusion, once again, was that the evidence did not come close to rebutting the presumption that Sweden would treat the claimants "in compliance with the requirements of the EU Charter, the [Refugee] Convention and the ECHR".

Discussion and Conclusions

The 2004 Act and European Union law

55. Miss Harrison focused on the undoubted fact that the Common European Asylum System is based upon "the full and inclusive application of the [Refugee] Convention". That was at the heart of her submission that schedule 3 paragraph 3(2) is incompatible with European Union Law. That fact is undoubted because it features in the preambles to the Dublin II Regulation, the Qualification Directive and the Procedures Directive as well as being referred to in *NS*, para 75. That said, the first question that the Luxembourg Court needed to answer in *NS* was whether a decision under article 3(2) to accept or decline jurisdiction to determine an asylum claim

which the Dublin II Regulation otherwise allocated to another member state fell "within the scope of European Union law". That was because if it did not, such a decision would not be subject to the Charter, para 55 et seq. That, in turn, was important because it was the Charter which conferred rights on the individual claimants in European Law in the cases before the Court. Having concluded that an irrebuttable presumption was incompatible with European Union law, para 105, the court returned to identify the provision which would preclude transfer as article 4 of the Charter, para 106. That followed from its earlier treatment of the arguments in paras 85 and 86. It is the fundamental rights of the European Union with which the Luxembourg Court was concerned, see further at para 123. An individual cannot rely, as a matter of European Union law, on the Convention or the Refugee Convention. See, for example, the reasoning of the Luxembourg Court in its Opinion dated 18 December 2014 on the question whether it would be compatible with European Union law for the European Union to accede to the Convention at para 178 et seq.

56. In *Abdullahi,* para 60, the Luxembourg Court restated with conspicuous clarity that the only way an applicant for asylum could challenge the choice to decline to entertain his application and to transfer him under Dublin II would be by invoking article 4 of the Charter. The logic of the court's approach would suggest that articles 18 and 19(2) could also be invoked where the risk identified was of refoulement. For these purposes article 4 of the Charter has the same reach as article 3 of the Convention.

57. In my judgment, the question whether Schedule 3 paragraph 3(2) of the 2004 Act is incompatible with European Union law in creating an irrebuttable presumption that a member state would not refoul a person in breach of the Refugee Convention or the Convention depends upon whether it applies to rights guaranteed by European Union law. In considering the domestic legal regime I noted that Schedule 3 was silent about the Charter or European Union law and indicated the consequences of that silence: It does not apply to any claim founded in European Union law. For practical purposes that is a claim based on the Charter.

58. It follows that Schedule 3 paragraph 3(2) of the 2004 Act is not incompatible with European Union law. *Nasseri* established that the 2004 Act was vulnerable to a declaration of incompatibility with the Convention under section 4 of the Human Rights Act 1998 on the individual facts of a case. In a Convention claim it would be lawful to apply the irrebuttable presumption but if the facts showed that the presumption was in fact rebutted then the remedy would be a declaration of incompatibility. However, schedule 3 paragraph 3(2) does not operate to defeat a claim founded upon European Union law because it has no bearing on a European Union law claim. It might be thought that leaves the irrebuttable presumption rather threadbare. For practical purposes, in a case where the strong presumption identified in Convention and European Union jurisprudence was rebutted, the United Kingdom would be likely to determine an application for asylum under regulation 3(2) of Dublin II. As has happened in this case, a refusal to do so would be liable to challenge in judicial review proceedings relying upon the Charter; just as the application of the irrebuttable presumption in a Convention claim might be challenged in judicial

review proceedings, albeit that the best remedy available in those circumstances would be a declaration of incompatibility.

Effectiveness

59. Miss Harrison submits that the availability of judicial review to mount a claim based upon European Union law, rather than an appeal to the First-tier Tribunal, violates the European Union law principle of "effectiveness". Article 19(2) of the Dublin II Regulation, as noted above, requires an appeal or review of a decision to transfer.

60. Mr. Manknell reminds us that, the essence of the principle of effectiveness required by European Union law is that national law should not make it "practically impossible or excessively difficult" for a person aggrieved to exercise European Union law rights: Case C- 432/05 *Unibet,* 2007 1-2271, para 42. The broad approach by the Luxembourg Court to that concept is illustrated by Case C-583/11 P *Inuit*, para 104 and Case C-509/11 *ÖBB-Personenerkehr AG*, para 77 of the opinion of the Advocate General. To my mind it is clear beyond argument that judicial review provides an effective means of vindicating European Union law rights in this context.

Equivalence

61. Miss Harrison submits that the absence of a right of appeal on European Union law grounds to the First-tier Tribunal breaches the principle of equivalence. She relies upon the analysis of the Court of Appeal in *FA (Iraq) v Secretary of State for the Home Department* [2010] 1 WLR 2545. That case concerned a disparity in the appeal rights available to an individual who claimed asylum under the Refugee Convention and also subsidiary protection relying on the Qualification Directive. That was reflected in the Immigration Rules as humanitarian protection. He could appeal the refusal of asylum but, under the statutory scheme, was unable to appeal the refusal of humanitarian protection until a decision to remove him had been made. The principle of equivalence requires that rules governing the protection of European Union law rights should not be less favourable than those governing similar domestic actions. The Court of Appeal held that the availability of an immediate right of appeal in respect of an asylum claim but not of a claim for humanitarian protection under European Union law breached the principle of equivalence.

62. The Secretary of State appealed to the Supreme Court which decided to refer to the Luxembourg Court the question whether the asylum claim was a proper comparator for the purposes of the principle. Thereafter, the case settled so that the reference was never argued.

63. In my judgment there is an insuperable difficulty faced by the claimants in this case in relying on the principle of equivalence. Whether a claimant in a Dublin II case is relying upon the Refugee Convention, the Convention or the Charter, but the Secretary of State decides nonetheless to transfer him to another member state, the remedy is the same: judicial review. In truth, the claimants are better off relying upon European Union law than the Convention because, if they made good their case on

the facts, they could obtain substantive relief rather than a declaration of incompatibility.

Sweden's compliance with its obligations

64. Miss Harrison submits that the decisions of the Migration Board and appellate courts in Sweden were irrational in a *Wednesbury* sense. She drew our attention to the decisions of Collins J in *R v Secretary of State for the Home Department ex parte Dahmas Ionel* [1995] Imm AR 410 and of the Court of Appeal in *R v Secretary of State for the Home Department* CA (unrep 17 November 1999) as supporting the contention that in a transfer case, the court may explore and determine the issue whether the decision in another member state was irrational. I do not consider that these decisions bear on the questions before us. The first was concerned with a regime under the Immigration Rules long since superseded. The second was concerned with a second superseded regime and turned on whether the Secretary of State was entitled to certify the asylum claims made in the United Kingdom as clearly unfounded which had already been rejected in Denmark. The Court of Appeal determined that the Secretary of State was not entitled to certify because the Danish administrative decision was perverse on its face and "there was no reason to think that in [Denmark] the asylum seeker will be able to obtain any further review of the existing decision". In the last paragraph of his judgment (with which Mummery and Mantell LJJ agreed) Kennedy LJ made plain that if the decision were capable of challenge in the courts in Denmark, the conclusion would be different. There was a suggestion in the evidence that such a challenge was possible but the case on behalf of the Secretary of State did not rely upon it.

65. These cases concerned consideration of administrative decisions in a legal environment where the Secretary of State accepted that irrationality in the decision in the third country, or serious procedural irregularity which compromised the fairness of the proceedings in that country, might result in his not certifying the claim made in the United Kingdom. The law and practice in that other country would be important, for the reason identified by Kennedy LJ.

66. The question here is whether there are substantial grounds for believing that the Swedish authorities would refoul the claimants to Russia in breach of its legal obligations. On the facts of this case that, in turn, depends upon whether, if removed to Sweden, the claimants will be able to present for reconsideration their case as it has developed including the new evidence. Even were I persuaded that the decisions of the Migration Board, Migration Court and Court of Appeal in Sweden were "irrational", whist that conclusion might not be irrelevant to the question, it would carry very little weight. A single aberrant decision in a system that considers thousands of claims a year would be of almost no consequence for the question whether there is a future risk of refoulement in breach of the law. It would be different if there were evidence that decisions generally were not properly considered or, for example, if there were evidence that a member state were systematically refusing claims from a particular group of asylum seekers, contrary to general practice. That is not this case.

67. In any event, I am unpersuaded that the decisions of the Migration Board or the Swedish courts were "irrational".

68. I should perhaps enter a reservation about the exercise upon which we were asked to embark, albeit one on which we did not receive submissions. It is one thing for a court in the United Kingdom to submit an administrative decision made in a member state of the European Union to scrutiny of this sort, another to do the same to the decision of the courts of a member state. The approach of the claimant in effect seeks to set up this court as a forum for appealing the decisions of the Swedish Migration Court and Court of Appeal. That would be inimical to judicial comity between the courts of two advanced Western democracies and requires the utmost caution.

69. I have set out the substance of the decisions of both the Migration Board and Migration Court. We have not been provided with all the material which was placed before either, or with the detail of the arguments advanced or explanations given for the difficulties in the evidence which each referred to. That is not a criticism of the claimants. I recognise the practical problems in presenting and translating what we understand to be a very large volume of material. But it is very difficult to entertain an argument that a decision maker was irrational in his conclusions without a full understanding of the basis upon which the decision was made. There are cases which can be condemned on their face because of some manifest error, but I do not consider this to be one of them. In almost all claims for asylum there is a need to look at the generic picture and also how the claimants fit into that picture. The decisions of both the Migration Board and Migration Court, criticised though they are by Mr. Ludwigs, focus upon whether these claimants would be at risk. There was plainly much in the evidence of the first claimant which was unsatisfactory, contradictory and implausible. Both the administrative decision of the Migration Board and, with respect, the judicial decision of the Migration Court appear entirely coherent. That was plainly the view of the Swedish Court of Appeal too, despite the argument advanced by Mr. Ludwigs that the conclusion was not open to either on the facts.

70. Miss Harrison submits that the evidence now before this court demonstrates without qualification that the first claimant (and his family) would be vulnerable to ill-treatment were they returned to Russia. She is critical of the Secretary of State for not having addressed that evidence in the decision letters. Mr. Manknell has not sought to argue that the evidence shows no such risk; rather he submits that in the Dublin II scheme it is not for the United Kingdom to assess that evidence but for the country to which the claimants would be transferred. In my judgment, that approach is correct. Any other would undermine the purpose of the Dublin II Regulation. The Secretary of State has been content to approach this case on the basis that if the evidence rebutted the presumption that Sweden would give the claimants an opportunity to present their fresh or enhanced case, with protection from removal whilst it was being considered, she would not transfer them.

71. It is fair to observe that if the material placed before this court had been the basis for a fresh claim in the United Kingdom (assuming the earlier decision had been made here

but for some reason the claimants had not been removed) it would be difficult to imagine its being dismissed out of hand.

72. Basing herself on observations made by the Strasbourg Court in *MSS*, para 352, Miss Harrison submits that there was a duty upon the Secretary of State to investigate what would happen in Sweden on the claimants' return; and on *Tarakhel*, para 120 that the Secretary of State should have sought an assurance from the Swedish authorities that the claimants would not be removed to Russia, perhaps even for a little as seven days, to enable a fresh claim to be made. In my judgment neither observation of the Strasbourg Court supports the general submissions made. Both were entirely fact specific and arose out of the very troubling evidence of what was happening respectively in Greece and Italy. The circumstances in Sweden do not justify reading either over into this case.

73. Miss Harrison also suggests that a reason why the Secretary of State should have entertained the applications here, exercising her discretion under article 3(2) of the Dublin II Regulation, is the experience of the United Kingdom in dealing with high profile Chechen refuges, informed by secret intelligence. She points to the decision of SIAC in *EI v Secretary of State for the Home Department* SC/98/2010 which concerned the proposed removal of a Chechen and involved closed hearings, together with press reports suggesting MI5 interest in the vulnerability of prominent Chechen refugees. She emphasised the position of Mr. Zakeyev. I did not understand Miss Harrison to submit that the refusal to entertain the claims here was irrational on account of the supposed availability of intelligence relating to Chechen matters generally. In any event, there is no proper evidential basis beyond assertion for suggesting that the Swedish authorities are any less well placed, to the extent that such material is of any relevance to these claims.

74. The Secretary of State concluded that the evidence available fell far short of demonstrating the Swedish authorities would fail to abide by their legal obligations with regard to the claimants. I agree with that assessment.

75. The starting point is the strong presumption of compliance described in varying language by the Strasbourg Court, the Luxembourg Court and the Supreme Court. The evidence of Mr. Sundquist recognises in Swedish law and procedure an opportunity for asylum seekers whose claims have been refused, to make fresh applications. He accepts that if the administrative arm refuses to suspend onward removal, the Swedish courts will order suspensive relief if they consider it justified, even though it is not automatic in such circumstances. The suggestion that such orders are "rarely made" tells us nothing about the basis upon which they are made and, in particular, fails to illustrate at all instances where, in Mr. Sundquist's opinion, a failure to make an order was incompatible with Sweden's international obligations. His opinion that applications to reopen earlier claims are given cursory attention is similarly unsupported by any examples; and it does not tell us what happens when such a claim is re-opened. In truth what he describes, despite his personal criticisms of it as an asylum lawyer, bears similarities with the process followed in this

jurisdiction when a claimant has exhausted his appeal rights and then seeks to make a fresh claim.

76. I am wholly unpersuaded by the suggestion that the Swedish authorities would receive the claimants at Stockholm airport and metaphorically bundle them onto the next plane to Moscow or St. Petersburg. The indications of that possibility are supported by no examples whatsoever by Mr. Ludwigs. Furthermore, I agree with the sentiment found in the decision letters that one can expect the claimants to forewarn the relevant Swedish authorities of their arrival, that they wish to make a fresh claim and to send the material upon which they rely in advance of their arrival. We were told that the claimants have not given the Swedish authorities any indication of the course they would follow if transferred to Stockholm. There is no reason why they should not do so.

77. Whilst there may be no public finding available to secure legal assistance in a fresh claim in Sweden, such a circumstance does not disable these claimants from making their claim. In any event, it seems improbable in the extreme that Mr. Ludwigs (if asked) would deny some assistance given the obvious strength of his feelings; and anyway we have no information about the ability of the claimants to fund, or raise funds, to secure representation.

78. The suggestion that, if all else failed, the claimants would be unable to avail themselves of the rule 39 procedure in Strasbourg is to my mind fanciful. Contrary to the claimants' submission, the ELENA report does not suggest that there are general difficulties for those in Sweden gaining access to the Strasbourg Court. It highlights perceived difficulties in limited circumstances. It is striking that Mr. Sundquist, the Swedish ELENA representative, makes no mention of rule 39 in his statement in this case in a context where he suggests that a provision of Swedish law might result in removal regardless of whether removal would violate article 3. That is precisely the type of case which one would expect to generate a claim in Strasbourg with rule 39 interim measures if necessary. Mr. Ludwigs' reference to the rule 39 procedure as being "illusory" was in the context of his fear that the claimants would be returned to Sweden within three days of his statement in September 2013 and the risk he asserted of their swift onward removal to Russia. To the extent that he may have been suggesting a broader difficulty, save for a reference to ELENA, he provides no support for it at all from his personal experience as a lawyer, nor does he give any examples. His real concern appeared to be a lack of time to make the necessary preparations, something which has long since ceased to be a problem.

Conclusion

79. Sweden is a highly developed democracy governed by the rule of law. This case demonstrates that it has a well functioning system for determining asylum claims with, for example, a more formalised, almost judicialised, first decision stage than exists in the United Kingdom. The appeals system enables the first court in the hierarchy of appeals to come to its own decision on the facts. There is a system which allows fresh applications supported if necessary with court orders preventing removal

pending their resolution. Should it be necessary, there is access to Strasbourg with every expectation that Sweden would abide by any interim measures indicated by the Strasbourg Court. The Home Office was, in these circumstances, entitled to come to the conclusion that the presumption that Sweden would honour its legal obligations to the claimants was far from being rebutted. In my judgment, these claims for judicial review should be dismissed.

Mrs Justice Thirlwall

80. I agree.