High Court of Ireland Decisions

Judgment Title: J.M.O. -v- The Refugee Applications Commissioner & Ors

Neutral Citation: [2014] IEHC 467

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Neutral Citation: [2014] IEHC 467

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1033 J.R.]

BETWEEN

J.M.O.

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 22nd day of August, 2014

1. The applicant seeks judicial review by way of *certiorari* of a decision of the first named respondent ("the Commissioner") made under Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation") which establishes the criteria and mechanisms for determining which Member State of the European Union is responsible for examining an asylum application lodged in one of the Member States by a third country national.

2. The general principles designating the appropriate state for consideration of an application are set out in Chapter II of the Regulation. Article 3 provides:-

> "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…"

3. Chapter III of the Regulation provides that the Member State responsible must be determined on the basis of the circumstances existing when the asylum seeker first lodged his application with a Member State. Chapter V concerns "taking charge and taking back" asylum applicants. Article 17 provides that where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application it may as quickly as possible, and in any case within three months of the date upon which the application was lodged call upon the other Member State to take charge of the applicant. Article 18 provides that the requested Member State must make the necessary checks and give a decision on the request to take charge of an applicant within two months of the date on which the request was received. Article 19 provides that when the requested Member State accepts that it should take charge of an applicant, the requesting Member State in which the application for asylum was lodged must notify the applicant of the decision not to examine the application and of its obligation to transfer the applicant to the responsible Member State. This decision must set out the grounds upon which it is made and contain details of the time limits for carrying out the transfer. Article 19(2) provides that:-

> "This decision may be subject to an appeal or a 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."

4. The Dublin II Regulation is implemented in Ireland in accordance with the provisions of the Refugee Act 1996 (s. 22) Order 2003 (S.I. 423 of 2003) which designates the Commissioner as the authority under the Regulation for the determination of whether an application for refugee status should be examined in Ireland. Under Article 4, the Commissioner must take account of all relevant matters known to him or her, including any representations made by or on behalf of the applicants, before making a determination. Under Article 6, a notice in a prescribed form in which the applicant's

rights are clearly set out must be furnished. Article 8 provides for a right of appeal to the Refugee Appeals Tribunal.

Background

5. The applicant arrived in Ireland on 12th May, 2007. He claimed to be Chechen, though a Russian national. He was born on 20th March, 1963, a citizen of the then Union of Soviet Socialist Republics. He lived in Ingushetia for most, if not all his life. He has a third level education. He stated that he had qualifications as a lawyer and an engineer and had been teaching for many years in a school in his village until in or about 13th December, 2006. He served in the Soviet Army from 1981 to 1983, and trained as an officer in Grozny in 1985. He speaks Chechen, Ingushetian and Russian. His mother and four siblings continue to reside in his home village, as does his dependent child.

6. He applied for asylum in Ireland on 3rd August, 2007. In his application he claimed to have been unlawfully arrested on 10th December, 2006, at 6.00am in Ingushetia and beaten whilst detained. Attempts were made to compel him to confess to an attack on law enforcement officials. He was released at 5.00pm and forms were completed stating that he had not been involved in the offences under investigation. He subsequently learned from his mother that she had paid a sum of $1,500 to a senior police official to procure his release. He stated that he knew of other neighbours and acquaintances who had disappeared following arrest in similar circumstances. He fled Ingushetia because he feared for his life. He stated that he was also falsely accused of the murder of a teacher and her two children and the murder of a senior police officer and the attempted murder of another. He travelled to Moscow.

7. In his Irish application he stated falsely that he left Chechnya on 10th December, 2006, for Ukraine where he remained until May, 2007 and then travelled to Ireland, arriving at Dublin Airport on 12th May. Following his application for asylum on 3rd August, his fingerprints were taken and submitted to Eurodac.

8. Information provided by Eurodac revealed that the applicant made an application for asylum in Slovakia on 10th January, 2007, many months before his claimed arrival date in Ireland. His application had not been determined at the time of the Irish application because he left Slovakia before that could occur.

9. The applicant, when faced with this knowledge, changed his story and stated that he had fled Ingushetia because he feared for his life in the circumstances outlined above. He went to Moscow where he remained between 10th December, 2006 and 2nd January, 2007. He entered Ukraine on 2nd November, 2007, and travelled to Slovakia on 9th January, 2008 where he made the application for asylum. He did not claim asylum in Ukraine as he said that he was beaten by Ukrainian border guards in the presence of Slovak border guards. He explained that he delayed making an application for asylum in Ireland until May because of his fear of being returned to Slovakia and thence to Russia. He said he failed to mention his Slovakian application because he thought he could explain it at a later stage.

10. As a result of the information received, a recommendation was made on 13th August, 2007, that a request be made to the Slovak authorities to take the applicant back in accordance with Article 16 of the Dublin II Regulation and S.I. 423/2003.

11. On 22nd August, 2007, a submission was made on behalf of the applicant in which he acknowledged the previous Slovak application. He made a number of complaints about his experience as a Slovak asylum seeker. In particular, his solicitor claimed:-

> "Our client instructs that he was initially housed in an enclosed camp (prison) but was then moved to another open accommodation centre. He described the conditions there as being very harsh. Our (client) instructs

> that he could not stay in Slovakia because when he was transferred to the open camp, he befriended two Chechen men who were subsequently returned to Russia. Our client instructs that if he is returned to Russia, that he would be captured and "disappear". Our client instructs that he did not immediately apply for asylum following his arrival in Ireland as he was in a very poor mental state. Our client instructs that he is currently attending a psychiatrist. He will forward any report which becomes available subsequent to this consultation. Through the assistance of fellow Chechens he met at the mosque he managed to become reunited with his nephew who has residency (in Ireland) under (the) IBC scheme."

12. The applicant's solicitors requested that the respondents exercise their entitlement under Article 3.2 of the Regulation to examine the applicant's case for asylum. The applicant feared that if returned to Slovakia "he (would) automatically be returned to Russia where his life is in danger on the grounds of his nationality and religion and political opinion". This claim was based upon United Nations figures concerning asylum applications which stated that there was a 0% recognition rate in Slovakia for Russian asylum seekers and a report of chain deportations from Slovakia to Russia through Ukraine. It was claimed that Chechen refugees faced a real threat of refoulement from some EU Member States, including Slovakia. The applicant believed that his asylum application would not be given due and adequate consideration in Slovakia. It was also submitted that since the applicant had family in Ireland because his nephew had residency under the IBC scheme, his transfer to Slovakia would involve a break up of the family unit contrary to Article 8 of the European Convention on Human Rights.

13. An application was made to the Slovak authorities to take the applicant back under the Dublin II Regulation on 10th September, 2007. The Slovak Ministry of the Interior accepted the request by letter dated 24th September. A transfer order was made on 9th October.

14. By letter dated 17th October, further submissions were made to the respondent that there were "grave and exceptional circumstances" why the applicant should not be transferred to Slovakia. It was stated that the applicant was suffering from a range of emotional and physical medical difficulties as evidenced by a medical report submitted which concluded that he had "experienced suicidal ideation". He was also said to be "moderately depressed and anxious". Medication had been prescribed. He had been advised to attend psychological services "for the foreseeable future". It was claimed that he also suffered symptoms of chest pain for which he attended at a hospital emergency department: the medical report submitted indicated that the diagnosis was "non-cardiac chest pain". It was claimed that he was unfit to travel and that any attempt to remove him constituted a serious threat to his health, safety and wellbeing. The alleged defects of the Slovakian asylum system were repeated and further documentation to support the applicant's case in that regard was submitted.

15. The transfer order was the subject of judicial review proceedings on the grounds, *inter alia*, that the Slovakian authorities did not grant asylum to persons in the position of the applicant, that he would be subject to unlawful discrimination in Slovakia, that there was a real risk to his physical and mental health if returned to Slovakia and that the respondent wrongly determined that the Slovak authorities would fully apply the provisions of the 1951 Geneva Convention and observe the principles of non-refoulement. It was also claimed that the respondent failed to consider and have due regard to country of origin information in respect of the treatment of Russian asylum seekers in Slovakia. Leave to apply for judicial review was granted on 28th April, 2008, and an interlocutory injunction restraining the removal of the applicant to Slovakia (Record No. 2007/1400 J.R.) was also granted. . These proceedings were settled on 1st July, 2008. In accordance with the terms of settlement, the applicant made a second application to the Commissioner that his application for asylum be considered in Ireland. Further submissions were made as to why he should not be returned to Slovakia. These relied upon the previous submissions made and materials furnished prior to the judicial review

proceedings. In addition, the applicant furnished an updated psychological assessment dated 10th July, 2008. This confirmed the recommendation that the applicant attend the Psychological Service for Refugee and Asylum Seekers for the foreseeable future and the fragile nature of his mental state.

The Decision

16. The applicant was notified on 9th August, 2008, of the Commissioner's decision that the Slovak Republic was responsible for dealing with the applicant's application for asylum under Articles 13 and 13.6(1)(c) of the Dublin II Regulation.

17. A consideration of the file by Mr. Richard Godfrey was carried out dated 29th August, 2008, under a number of headings:-

(1) Information submitted by the applicant;

(2) Submissions by the Refugee Legal Services concerning;

(a) Article 8 rights;

(b) The mental health of the applicant;

(c) The application for refugee status in Slovakia; and

(d) Refoulement.

18. The assessment contains an analysis of the history of the application, together with materials submitted on behalf of the applicant in respect of his asylum application to the Commissioner in Dublin. The documents submitted were considered only insofar as they might affect the operation of the Dublin II Regulation. It stated that the Commissioner was not in a position to verify that any of the documents submitted supported or related to a truthful account and the provenance of the documentation was not established. It was made clear that insofar as facts and materials were submitted in respect of the asylum claim, its assessment was a matter for the Slovakian authorities.

19. The potential affect of a return to Slovakia on the applicant's rights under Article 8 of the European Convention on Human Rights with particular regard to family rights was considered. The applicant had a nephew who had a right to reside in Ireland and a transfer to Slovakia would result in a break up of the family unit of which he is a part. The definition of "family member" under Article 2 of the Dublin Regulation does not include an uncle or nephew. The nephew's identity was not revealed.

20. The assessment notes that any issue in relation to the applicant's medical difficulties may be dealt with in Slovakia in deciding whether or not he should be repatriated to his home country, should that issue arise. Medical difficulties were not the only criteria to be considered under the Dublin II Regulation and it was considered that any relevant medical reports concerning the applicant could be forwarded by the Irish authorities to the health authorities in Slovakia.

21. A submission was made by the Refugee Legal Services that because the applicant's personal details which formed the basis of his claim remained unchanged, his honesty and consistency must be accepted and, therefore, he deserved to have his claim fairly and fully examined in Ireland. The assessment makes a number of observations in respect of clear untruths which occurred in the applicant's original application which are accepted by him in his affidavit.

22. The assessment also analyses the figures advanced in terms of the suggested low rate of success by Chechens in seeking asylum in Slovakia. It states:-

> "The RLS compare Austria with Slovakia by quoting the figures from the UNHCR Global Trends for 2007 as proof that Chechens have a better chance of success in Austria than Slovakia. However, an analysis of those figures states that the figures for both Austria and Slovakia relate to the Russian Federation and not Chechnya and there is no indication of the internal breakdown of such figures and if or how that breakdown may differ for both countries. Furthermore, those figures for Austria (assuming that for both Austria and Slovakia the "Russian Federation" means Chechnya only, as the RLS would appear to imply) state that 398 claims were rejected (as against 106 in Slovakia) so that, while the percentages may be different, Austria rejects, in absolute terms, almost four times as many applicants from Chechnya. This implies that many "Chechen" claims in Austria are not capable of being supported by the Chechen applicant and are rejected under RSD in Austria. Further analysis of the figures states that in Austria a further 458 were closed (as distinct from rejected). However, it is to be noted that for Slovakia the figure for otherwise closed is 367, only 100 short of Austria."

23. The final matter considered related to "chain refoulement". The assessment noted that the information concerning refoulement supplied on behalf of the applicant concerned two persons who were returned to Russia. It noted that no indication was given as to why these two individuals were returned. There was no link made between the circumstances of the two individuals and the applicant's circumstances, or what happened to them. The information provided by the applicant that he had been "advised" that if returned to Russia he will be detained and "disappeared" was clearly hearsay and the source of the information was not identified, nor was the context in which it was given. Furthermore, the applicant on his own evidence, travelled to Moscow and then to Ukraine where he claims to have been assaulted, not by Russian or Slovak but by Ukrainian border guards.

24. It was also noted that a US State Department Report of 6th March, 2007, submitted by the applicant stated that in respect of human rights practices in Slovakia in 2006, "the law provides for the granting of asylum or refugee status in accordance with the UN 1951 Convention…and the government had an established system for providing some protection to refugees. In practice the government provided protection against refoulement, the return of persons to a country where they feared persecution. However, the government did not routinely grant refugee status". It was concluded that Ireland could be satisfied from UNHCR statistics and various reports that Ireland would not be a party to refoulement in returning the applicant to Slovakia.

25. In addition, it was noted that the operation of the Dublin II Regulation was under constant monitoring by the European Commission in Brussels. It was open to any Member State to raise any question of interpretation or practice with the Commission.

> "Ireland is not aware of any such question regarding Slovak practices or procedures being circulated by the Commission to other Member States. To date there have been no instance(s) of unlawful refoulement being reported. In addition, Dublin Regulation contact committee meetings are held in Brussels every six months…attended by representatives of all Dublin offices and matters of interpretation procedure and practice and issues of concern are discussed. These meetings are also attended by representatives of the UNHCR office in Brussels who have the opportunity to comment on any issues discussed or to raise concerns of their own. No such issues have been raised as are now being mentioned by the RLS".

26. It was also noted that the Regulation established a procedure based on objective and fair criteria for the Member States and the persons concerned to determine the state

responsible so as to guarantee effective access to procedures for the determination of refugee status. Member States were bound by obligations under Instruments of international law to which they were a party. The assessment concluded:-

> "The applicant left the Slovak Republic before a decision was made on his application for asylum. The Slovak Republic have confirmed that his application is under examination. As mentioned, it is not for ORAC to police the operation of Slovak law or the application by contracting states of the Geneva Convention and the New York Protocol. There is no basis in the representations submitted to decide that the Slovak Republic will not fulfil its obligations under the Convention or other Instruments of international law to which the Slovak Republic is party. If (the applicant) is of the opinion that his case will not be fully heard in the Slovak Republic or that his civil or human rights will be infringed… by the decision on his application for asylum or the manner in which it is made, then such argument should be brought before the Slovakian Courts or further, to the European Court of Human Rights should he so choose."

27. Following notification of this decision further representations were received on 9th September, 2008, prior to the making of the transfer order on 25th September. These concerned three matters. Firstly, it was submitted that the applicant's medical health remained unchanged and that there was a real risk to his life and health if returned to Slovakia. It was noted that the Minister undertook to carry out transfers in a humane and sympathetic way and that his medical health would be made known in advance to the receiving authorities in Slovakia who confirmed that he will receive any medical care required, if returned. Secondly, the applicant claimed a continuing association and emotional reliance upon his nephew and family which were essential to his health and wellbeing. It was noted that no details concerning the identity of the applicant's nephew or family in Ireland or any information about the nature of their relationship with him prior to his arrival in the state were furnished. There was no information concerning the exact nature and level of dependency by the applicant upon his nephew, other than the assertion that his relationship was essential to his health and wellbeing. It was not accepted that the provisions of Article 15(2) should be applied. Thirdly, submissions concerning the statistical information pertaining to recognition rates of asylum seekers from the Russian Federation by Slovakia were considered and, it was noted that the figures had been analysed by the Commissioner in the consideration of 29th August. The Commissioner accepted that the principle of non-refoulement was widely recognised in the European Union and that the Dublin II Regulation was based on a common policy respecting that principle. The Commissioner held that there was insufficient evidence in relation to this allegation to justify the conclusion that Slovakia's asylum procedures and practices were so fundamentally flawed and discriminatory as to require Ireland to refuse to return the applicant to Slovakia for the determination of his application.

The Grounds

28. The applicant initially sought leave to apply for judicial review on 9th September, 2008, in which he sought to quash the decision of the Commissioner made on the 29th August, transferring his claim for asylum to the Slovak Republic and refusing to accept the asylum claim for processing within the state. By consent order made on the 17th November, 2008, the applicant was granted leave to amend the grounds upon which leave was then granted as set out in the amended statement of grounds dated 19th November. An injunction which had been obtained restraining the transfer of the applicant to Slovakia on 30th September was continued until the determination of the proceedings.

Grounds (ii), (iii), (iv), (v) and (vi)

29. These grounds challenge the application of the Dublin II Regulation. Ground (ii) claims that the provisions of the Regulation were not applied "properly" by taking proper account of the discretion vested in the respondents to accept an application for asylum, notwithstanding the fact that another Member State of the European Union is mandated to do so pursuant to the Regulation. This ground is stated in very general and imprecise terms and is related to Ground (v) which claims that the second respondent failed to

consider that he had a discretion not to transfer the applicant. It is clear that the respondents understood that a discretion existed: if the discretion is said to have been improperly applied, it is incumbent upon the applicant to establish and identify precisely the relevant impropriety. The burden is on the applicant to identify with precision how it is said the decision is fundamentally flawed.

30. Grounds (iii) and (iv) are more focused and particularised. Ground (iii) contends that both respondents failed to take account of relevant matters or took into account irrelevant matters in making the transfer order, or in failing to revoke it in breach of fair procedures and natural and constitutional justice. It is claimed, in particular, that the Commissioner failed to consider that:-

> "(a) The Slovakian authorities do not grant asylum to persons in the position of the applicant or that he is in real danger of a refoulement to Russia, and in that regard is subject to unlawful discrimination in Slovakia;
>
> (b) There is a real risk to the applicant's life and/or health if he is transferred to Slovakia;
>
> (c) The Slovak authorities do not properly apply the provisions of the 1951 Geneva Convention on Refugees to applicant(s) identified as being from Russia;
>
> (d) That the applicant is ill and dependent on a relative and that Article 15(2) of the Regulation is thereby applicable;
>
> (e) That the most recent figures demonstrated a continuing pattern of discrimination against the persons in the position of the applicant in the Slovak Republic in asylum applications; and
>
> (f) The Slovak authorities did not apply the provisions of the Geneva Convention on Refugees and maintain the principles of non-refoulement."

It is also claimed that both respondents wrongly considered that:-

> "The Slovak authorities would fully and inclusively apply the provisions of the 1951 Geneva Convention on Refugees, as amended, and maintain the principles of non-refoulement."

31. Grounds 5(iii)(a), (b), (c) and (e), challenge the assessment by the respondents of the evidence submitted. Ground 5(iii)(d) largely relates to the assessment of facts made by the respondents concerning the evidence of private and family life in the context of the application of Article 15(2) of the Dublin II Regulation and Article 8 of the European Convention. This is related to ground (iv) and the alleged failure to consider or give due weight to the country of origin information or the medical reports submitted concerning the applicant and the humanitarian reasons as to why the claim should be determined in Ireland.

32. Ground (vi) is a generalised plea that the transfer would be a disproportionate interference with the applicant's rights (unspecified) under the provisions of the Constitution, European Union law and the European Convention on Human Rights, and a generalised claim that he would be the victim of unlawful discrimination. Extensive submissions were received from both parties in respect of each of these grounds.

33. The court notes the considerable emphasis placed in the submissions on an alleged failure to attach appropriate weight to items of evidence. This Court is not a court of appeal. It is only if the decision makers acted irrationally or unreasonably or disproportionately in the context of the well established principles in that regard as set out

in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, that this Court may interfere by way of judicial review.

Transfer and Article 3 of the European Convention

34. Council Regulation No. 343/2003, the Dublin II Regulation, sets out the criteria and mechanisms for determining the Member States' responsibilities for examining an asylum application lodged in one Member State by a third country national. The starting point is that each Member State must examine the application of any third country national who applies in that state's territory for asylum. There is no doubt that the Slovak republic bore responsibility for the examination of the original asylum application which remains undetermined because of the applicant's behaviour.

35. Under Article 3(2), the "Sovereignty Clause", a Member State may accept an application for asylum for examination even though another Member State is responsible. In particular, the Regulation expressly provides for a derogation in situations where family members require to be reunited or for humanitarian reasons. The Dublin II Regulation is part of a regulatory system being developed through a "Common European Asylum System". It is part of a matrix of secondary legislative provisions dealing with the fairness and effectiveness of asylum procedures for the implementation of the Geneva Convention and other forms of international protection. This includes the Procedures Directive (2005/85/EC), the Qualification Directive (2004/83/EC) and the Reception Conditions Directive (2003/9/EC). In *Mantay (Girmay) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 8th May, 2009), this Court accepted that the object and purpose of the Dublin II Regulation was to provide common principles designed to secure the rapid processing of asylum applications, and ensure the return of any asylum seeker who has already sought asylum in another Member State. The primary task of the Commissioner is to determine which country has responsibility for dealing with the asylum application. In this case, it is agreed that, in normal circumstances, the appropriate country is Slovakia, in accordance with the purpose of the scheme established under the Dublin II Regulation.

36. It was submitted that the Commissioner was entitled to direct the transfer of individuals only if the operation in another Member State of the Geneva Convention was consistent with the terms of the Dublin II Regulation. The Commissioner was not permitted to transfer the applicant when the relevant evidence established that there were substantial grounds for believing that the processes for the determination of asylum applications were fundamentally unfair and ineffective. It was submitted that if it is alleged that such grounds exist, that matter must be properly investigated. In that regard, it was claimed that the Commissioner erred in law in ruling that it was not part of his function to reach a conclusion on such evidence as might be available to him concerning the adequacy or otherwise of the asylum assessment process in Slovakia. However, it is clear that in the assessment of 29th August, 2008, the Commissioner addressed the complaint made by the applicant concerning the low success rate of applicants for asylum from Russia in Slovakia. The Commissioner did not refuse to consider the evidence produced on this matter and, in fact, analysed the figures from the UNHCR Global Trends for 2007, as quoted already in the judgment, and concluded that they could not be relied upon for the proposition advanced. The Commissioner was satisfied that local remedies were available before the Slovakian Courts and the European Court of Human Rights in respect of any violations of the Convention or breaches of European Union law.

37. It is clearly correct that the Commissioner has no function in instructing or monitoring the application by Slovakia of various Conventions to which Slovakia is a party. That is not to suggest that further evidence, if available, could not have been produced to the Commissioner relevant to a threat to the rights of the applicant under Article 3 of the European Convention on Human Rights, as provided under the case law of the European Court of Human Rights and the European Court of Justice, to which I will return. The

Commissioner observes, quite properly, that information available (which did not emanate from the applicant) from Ireland's involvement at European level in respect of the monitoring and assessment of the application of the various Directives applicable to asylum seekers, suggested that no such issues had been raised as were now canvassed with him. Therefore, it is clear that the Commissioner investigated and ascertained that no question regarding Slovak practices or procedures had been circulated by the European Commission to other Member States. It was noted that the Dublin Regulation Contact Committee (DRCC) held meetings in Brussels every six months attended by representatives from each of the states, which were also attended by representatives of the UNHCR office in Brussels, who have the opportunity to comment on any issues discussed or to raise concerns of their own. I am satisfied that the Commissioner reviewed the relevant evidence produced in respect of the supposed inadequacies of the Slovak system and also informed himself and was careful to ensure that no complaints and/or reports had been furnished from other Member States to the Commission, or from the UNHCR to the various interested parties. It was clear that there was little or no evidence to support the proposition that the Slovak authorities had failed fundamentally to apply European law in respect of asylum applications or discriminated against Chechens and/or Russians making such applications. The evidence available, in my view, fell well short of that which might give rise to the exercise of a derogation under Article 3(2) within the parameters of the then existing or later jurisprudence.

38. The same care was taken by the Commissioner in his consideration of the issue of non-refoulement. The Commissioner was satisfied, having consulted the same sources, that no instance of unlawful refoulement had been reported from Slovakia. There is no evidence to suggest that the Slovak Republic would not abide by the obligations of the Geneva Convention as applied under European Union law, or in respect of any of its other international obligations. In that regard, the Commissioner noted Ireland's obligation to ensure the protection of fundamental rights and, in particular, that it had a clear responsibility in respect of chain refoulement to consider whether an applicant returned to Slovakia would be refouled. The only information supplied in that regard concerned the encounter which the applicant was said to have had with two Chechens who were returned to Russia, the limitations of which have already been considered (see para. 23 *ante*).

39. This evidence was considered within the principles established in recent years on the obligations of Member States of the European Union to protect asylum applicants from exposure to breaches of Article 3 of the European Convention on Human Rights and Fundamental Freedoms. Article 3 is absolute in the terms of the obligation imposed on the parties to the Convention, including the Member States of the European Union.

M.S.S. v. Belgium and Greece

40. The European Court of Human Rights in *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, January, 21st 2011), found that both countries breached the applicant's Article 3 rights in the operation of the transfer provisions of the Dublin II Regulation because:-

> (a) The living conditions of returnees were inhuman and degrading;
>
> (b) The conditions of detention of asylum seekers were inhuman and degrading; and
>
> (c) The inefficiencies in the asylum procedure in Greece and the consequent result of expulsion without an appropriate examination of the merits of the asylum application or access to an effective remedy breached the applicant's rights under Articles 3 and 13 of the Convention.

41. Belgium, as the transferring country, was held to be responsible for ensuring that the

intermediary country in the asylum procedure affords sufficient guarantees to avoid the removal of an asylum seeker directly or indirectly to his country of origin which requires an evaluation of the risks faced by the applicant of treatment contrary to Article 3. The court stated in respect of the evidence adduced:-

> "358 …the court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.
>
> 359. The Government argued that the applicant did not sufficiently individualise, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The court considers, however, that it was in fact up to the Belgian authorities faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable."

The extensive evidence in respect of the deficiencies in procedures, living and detention facilities in Greece was well known and established by a wide number of sources set out at paras. 162 - 164 of the judgment: more than 23 reports published by national, international and non-governmental organisations deploring the conditions of asylum seekers in Greece, were cited by the court.

42. In addition, the court noted the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union Member States, the occurrence of forced returns by Greece to high risk countries detailed in a number of reports consulted by the court and the risk of refoulement which the applicant faced in practice before any decision was taken of the merits. A number of physical attempts had been made to deport the applicant prior to the examination of his claim. It was clear that the applicant in the case faced very real risk to his Article 3 rights if returned to Greece.

43. The principles applied in *M.S.S* were previously applied in *T.I. v. United Kingdom* (438844/08 Reports 2000-III) and reaffirmed in *K.R.S v. United Kingdom* (Application 32733/08).

44. In *T.I.* a Sri Lankan national had been refused asylum in Germany. A deportation order was made against him. He travelled to the United Kingdom where he made a further application for asylum based on a fear of persecution by state and non-state agents. An order was made for his expulsion to Germany. The applicant claimed that the United Kingdom Government had an obligation under Article 3 to ensure he was not returned to Sri Lanka which was, he claimed, an inevitable consequence of his proposed expulsion to Germany. The court held that the indirect removal to an intermediary country, also a contracting state under the Convention, did not affect the responsibility of the United Kingdom to ensure that the applicant was not, as result of its decision to expel, exposed to treatment contrary to Article 3. The evidence presented to the court included medical evidence supporting his allegations of torture and reports by Amnesty International, the United Nations Special Rapporteur and the United States State Department, which gave rise to concerns as to the risks he faced if returned to Sri Lanka. The German Government at the time, excluded non-state agents from its consideration of asylum claims. The primary issue was whether there were effective procedural safeguards to protect the applicant against removal from Germany to Sri Lanka. The evidence established that on

his return to Germany the applicant could make a fresh claim for asylum as well as claims for protection under the Aliens Act. The court was satisfied by the German Government's assurances that the applicant would not face a risk of immediate or summary removal to Sri Lanka since removal could not take place without a fresh deportation order, which would be subject to review by the administrative court. It was accepted by the court that there was considerable doubt that a fresh asylum claim would be granted or that a claim under the Aliens Act would be successful. However, there was statutory protection in Germany available to persons facing risk from non-state agents. Though framed in discretionary terms, the court was satisfied on the basis of assurances given by the German Government on its domestic law and practice that the applicant's claims, if accepted by the authorities, could fall within the scope of the discretion and attract statutory protection. The authorities might still reject the applicant's claim after re-examination, but this was a matter of speculation and conjecture. The evidence of the risk was not "sufficiently concrete or determinate" (p. 458). Therefore, the United Kingdom had not failed in its obligation under Article 3 in directing the applicant's removal to Germany, nor had it been shown that the decision was taken without appropriate regard to the existence of adequate safeguards in Germany to avoid the risk of any inhuman or degrading treatment.

45. The assessment made by the Commissioner in this case makes specific reference to the *T.I.* decision and the state's responsibilities under Article 3 to ensure that its functions in transferring an applicant to an intermediary state such as Slovakia do not encroach on the applicant's Article 3 rights. It is clear from the terms of the decision that the principles of *T.I.* informed the assessment made by the respondents of the alleged risk faced by the applicant to his Article 3 rights if returned to Russia by the Slovakian authorities, and the adequacy of the examination of his claim for asylum or the threat of simple chain refoulement.

46. The court notes that the amended grounds dated 19th November, 2008, and the submissions now made to the court are based to a significant extent on an interpretation of subsequent case law of the European Court of Human Rights and the European Court of Justice.

47. The principles in *T.I.* were applied by the court in *K.R.S. v. United Kingdom*, with particular reference to the Dublin II Regulation. The decision was delivered in December, 2008. The applicant, an Iranian national, travelled through Greece to the United Kingdom where he claimed asylum. The United Kingdom authorities proposed to return the applicant to Greece, which was the appropriate country to consider the asylum application and through which the applicant had entered the European Union for the first time. A UNHCR report dated May, 2008 advised governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice and to exercise their powers under Article 3(2) of the Regulation to determine the claim for asylum. The applicant was granted interim relief under r. 39 of the Court Rules restraining his transfer to Greece: this was followed by similar relief in approximately 80 other cases.

48. A significant body of evidence was adduced concerning the shortcomings of the procedure available to asylum seekers in Greece and their living and detention conditions, notwithstanding the extensive protections applicable under European Union law to asylum applicants which Greece was obliged to respect and apply. Norway had stopped the return of asylum seekers to Greece under the Regulation. Reports from the UNHCR, Amnesty International, and a joint report of the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee and the Greek Helsinki Committee was highly critical of the deficiencies of the Greek system. It stated:-

> "In our opinion the deficiencies in the Greek asylum process, documented in this report, entail that there is a discord between the preconditions on which the Dublin II Regulation was founded and procedural practices

> followed in Greece. In our opinion the Greek system does not guarantee even minimum basic legal protection for the asylum seekers."

The Committee for the Protection of Torture and Inhuman and Degrading Treatment and Punishment published a report following a visit to Greece in 2007, which was highly critical of the Greek asylum process.

49. The court reaffirmed the general principles applicable under Articles 3 and 13 of the Convention, namely that where substantial grounds had been shown for believing that the person concerned faces a real risk of being subject to treatment contrary to Article 3, the state had an obligation not to expel him/her. There must be a meaningful assessment of that claim. An effective remedy under Article 13 requires "independent and rigorous scrutiny of a claim" that substantial grounds exist. The court was satisfied that the principles set out in *T.I.* applied "with equal force" to the Dublin II Regulation.

50. The court was not satisfied that the evidence adduced and the circumstances described in the reports submitted could be relied upon to prevent the United Kingdom from removing the applicant to Greece. It held that the evidence did not establish that Greece removed people to Iran or that the applicant would be expelled as a matter of course to Iran. It applied a presumption in favour of Greece that it would abide by its obligations under the European Union Directives 2005/85/EC and 2003/9/EC and noted that new legislative provisions had been introduced in Greece for that purpose. Furthermore, the court noted that the United Kingdom authorities could reconsider the issue if the Greek Government resumed expulsions to Iran. It also held, in addition, that there was nothing before the court to suggest that even if, on his return to Greece the applicant was the subject of a final negative decision, he would have been prevented from applying for interim relief to prevent his removal. The applicant was vested with a right to apply to the European Court of Human Rights for interim relief and to apply domestically in Greece in respect of any complaints concerning breaches of Article 3 arising from his conditions of confinement with further recourse to the European Court.

51. It *K.R.S.*, the applicant failed to establish "substantial grounds" for believing that the applicant faced a "real risk" of being subject to a breach of Article 3 rights, if returned. While this decision postdates the decision in this case, I am satisfied that the evidence adduced by the applicant was far less cogent and detailed than that which failed to establish a breach of Article 3 rights in *K.R.S.* I am also satisfied that the principles applied in the assessment by the Commissioner complied with those set out in *T.I.* and *K.R.S.*, and ultimately applied in *M.S.S.*

52. The applicant in *M.S.S.* succeeded in establishing the existence of substantial grounds that the applicant would be exposed to a real risk of a breach of Article 3 and Article 13 if returned to Greece in a decision delivered in December, 2010 by which time an extensive, if not an overwhelming, body of evidence had been adduced by the applicant.

53. Following a decision by the Belgian courts that the applicant should be transferred to Greece in accordance with the Dublin II Regulation, an interim application was made under r. 39 to prevent the applicant's return. This was refused on the basis that the Greek authorities would abide by the provisions of Articles 3 and 13 and the Dublin Regulation, together with the various instruments of European law by which Greece was bound. The court later considered a wide body of evidence which included evidence of the applicant's experience on his return to Greece, the failure of the Greek authorities to provide him with access to an adequate asylum claims procedure, poor living and detention conditions, a large number of detailed reports by international organisations and non-governmental organisations on the systemic failure of the Greek asylum system and numerous accounts from other asylum seekers and witnesses which corroborated the applicant's evidence concerning such matters as the ill treatment of detained asylum seekers. The court was satisfied that the abject living conditions suffered by the applicant and other asylum

seekers reached the level of severity required to establish a breach of Article 3.

54. The court also concluded that there had been a violation of Articles 3 and 13 because of the deficiencies in the examination by the Greek authorities of the applicant's asylum request, the risk he faced of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application, and without having access to an effective remedy. In that regard, the court stated:-

> "300. The court observes, however, that for a number of years the UNHCR and the European Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin…
>
> 301. The court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum…; insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica Police Headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducing the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessive lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.
>
> 302. The court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given…in addition, the watchdog role played by the Refugee Advisory Committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure…
>
> 313. The court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case offering him no real and adequate opportunity to defend his application for asylum. What is more, the court takes note of the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union Member States…The importance to be attached to statistics varies, of course, according to the circumstances, but in the court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure.
>
> 314. …It cannot ignore the fact that the forced returns by Greece to high risk countries have regularly been denounced by the third party interveners and several of the reports consulted by the court…
>
> 315. Of at least equal concern to the court are the risks of refoulement the applicant faces in practice before any decision is taken on the merits of his case."

55. It is clear from the *M.S.S.* decision that the court was furnished with the same materials as in *K.R.S.,* but also additional materials and evidence of a much more cogent nature including direct evidence from the applicant of the shortcomings of the Greek system based on his own experience supported by the accounts of other asylum seekers gathered in the preparation of detailed reports referred to in the judgment. The nature and extent of that evidence far exceeds that which was presented to the Commissioner. In that regard, the court in *M.S.S.* was satisfied that the information available to the United Kingdom government in the *K.R.S.* decision made it possible to assume that Greece was complying with its obligations in not returning persons to the applicant's country of origin. Furthermore, it was satisfied that the court in *K.R.S.* was entitled to conclude that persons returned to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had not and could not be prevented from applying to the European Court for interim relief under rule 39. Thus, the court in *K.R.S.* considered that:-

> "In the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community Directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law and that it would comply with Article 3 of the Convention."

56. Belgium was found in *M.S.S.* to have an obligation to ensure that the intermediary country's asylum procedure accorded sufficient guarantees to ensure that an asylum seeker would not be removed directly or indirectly to his country of origin without any evaluation of the risks he faced under Article 3. The Belgian authorities were obliged to consider whether the presumption that the Greek authorities would respect their international obligations on asylum matters notwithstanding the *K.R.S.* decision had been rebutted. The court noted that a substantial body of information had become available from the UNHCR, and other agencies, as outlined above in 2008/2009 and had been published at the time the expulsion order was made against the applicant. The evidence suggested that the Belgian authorities systematically applied the Dublin II Regulation by transferring people to Greece without so much as considering the possibility of making an exception. The court held that:-

> "358. At the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.
>
> 359. …The court considers,…that it was in fact up to the Belgian authorities faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3…"

57. In this case there was very little evidence to support the proposition, whether based on the applicant's personal experience or on the reports furnished, to suggest that anything approaching the systemic deficiencies of the Greek system exist in Slovakia. The applicant's asylum application has not yet been determined in Slovakia. The presumption that the Slovakian authorities will apply European Union law and the provisions of the Convention were found, in effect, by the Commissioner, not to have been rebutted. The Commissioner's assessment was carried out not only on the basis of the materials furnished by the applicant, some of which supported his conclusion, but also having consulted the relevant Commission and other authorities in respect of the implementation of the Dublin II Regulation in Slovakia. There is no basis to conclude that any of the inferences drawn by the Commissioner were unreasonable or irrational.

58. Prior to the decision in *M.S.S*., in *Mirza v. Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 21st October,

2009), Clark J. considered the effect of the decisions of *T.I.* and *K.R.S.* and the extent of the state's obligation to derogate from the general principles of the Dublin II Regulation once cogent evidence is adduced that another Member State does not comply with its obligations under European Union asylum law. The court was satisfied that the decision in *K.R.S.* established that where substantial grounds had been shown for believing that the proposed transferee would, if transferred, face a real risk of being subjected to treatment contrary to Article 3, that person should not be transferred: in such circumstances Article 3 imposed an absolute prohibition on refoulement. The court noted that each Member State was responsible for its own asylum processes and if Ireland has issues with another Member State's asylum process, that was a matter for complaint to the Commission. Enforcement procedures are primarily a matter for the Commission (para. 86) as happened in *Commission v. Greece* (Case C-130/08) (judgment, 24th May, 2008), in which the European Court of Justice held that Greece had failed to adopt the necessary measures to ensure that its examination of the merits of applications for asylum seekers in respect of those whom a discontinuance decision had been issued on the grounds of arbitrary departure from the state, were in accordance with the Dublin II Regulation. Clark J. concluded that in the absence of substantial grounds for believing that there is a real and substantial risk of the transferee being subjected to treatment contrary to Article 3, there was no obligation to derogate under Article 3(2) of the Dublin II Regulation. The learned judge adopted the distinction drawn by Stanley Burton L.J. in *Zego (Eritrea) & Kadir (Iraq) v. Secretary of State for the Home Department* [2008] EWCA Civ. 985 (6th August, 2008) stating that:-

> "97. …it is important to distinguish between (i) cases where there is a real risk of breach of the European Convention on Human Rights and (ii) cases where there are concerns about the asylum determination process and reception conditions which fall short of breaches of Article 3 of the Convention. In case (i), there may be an obligation to derogate from the Regulation but there can be no obligation to derogate in case (ii)."

59. The court was, therefore, satisfied that the Commissioner was not under an obligation to derogate even if there was evidence that the Member State was in breach of obligations imposed by European Union law. The court found that there was no evidence of substantial grounds as required in respect of a breach of Article 3. (The evidence was substantially the same as that advanced in *K.R.S.* and found to be inadequate).

60. I am satisfied that, at the time the assessment was made in 2007, the facts of the case were fully considered by the Commissioner and the second respondent within the principles of *T.I.* as later applied in *K.R.S.* and *Mirza*.

The Obligation under Article 3(2)

61. The applicant in this case submits that the discretion to be exercised under Article 3(2) of the Regulation is more circumscribed than that contemplated in the assessment or defined in the *Mirza* judgment. It was submitted that there was an absolute obligation on Ireland not to return a claimant for asylum "where the information before the decision maker is that there are substantial grounds for believing that the processes of determining these very claims are fundamentally unfair and ineffective for the purpose". It was claimed that reliance upon the Commission for the enforcement of breaches of European Union asylum law and procedures was insufficient and that Ireland had an obligation to investigate and determine whether there was substantial compliance by Slovakia with European Union law. The statement by the Commissioner that it was not for Ireland to police and monitor the implementation and application of asylum law in Slovakia, was said to be an error of law. The applicant placed particular reliance on the judgment of the European Court of Justice in two joined cases, *N.S. v. Secretary of State for the Home Department* (C-411/10) and *M.E., A.S.M, M.T., K.P., and E.H., v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-493/10) (Grand Chamber) (21st December, 2011).

Article 3(2), N.S. and M.E., and the Charter of Fundamental Rights

62. In *N.S*. and *M.E*., a number of questions were referred to the European Court of Justice. Each of the cases concerned the proposed transfer of an asylum seeker to Greece under the Dublin II Regulation. The applicant in the United Kingdom referral submitted to the Referral Court that the protection conferred by the Charter of Fundamental Rights was higher than and went beyond that guaranteed by Article 3 of the European Convention on Human Rights. The European Court of Justice was asked to consider, *inter alia*, whether the obligation to observe European Union fundamental rights precluded the operation of a conclusive presumption that the receiving state will observe (i), the claimant's rights under European Union law, (ii) the minimum standards imposed by the relevant European Union Directives concerning asylum law and procedure. The court was also asked whether a Member State must under Article 3(2) of the Dublin II Regulation examine and take responsibility for a claim where transfer of a claimant to the receiving state would expose the asylum seeker to a risk of a violation of fundamental rights, including those guaranteed by Article 1 (Human Dignity), 2 (Life), 4 (Protection from Inhuman and Degrading Treatment), 18 (Right to Asylum) and 47 (Right to a Fair Hearing before an Impartial Tribunal) and to a risk that the minimum standards of the Directives would not be applied to him/her. In the Irish cases it was not contended that the transfer of the applicant to Greece would violate Article 3 because of a risk of refoulement or chain refoulement, nor was it alleged that the transfer involved any breach of rights assured under the European Convention on Human Rights. However, the court was asked to consider whether the transferring state was obliged to assess compliance by the receiving state with Article 18 of the Charter and the various Directives applicable to asylum seekers under European Union law and, if so, if the receiving Member State is found not to be compliant with one or more of those provisions, whether the transferring state was obliged to accept the application for asylum and process it under Article 3(2). It did not so find.

63. The court was satisfied that the provisions of European Union law precluded the application of a conclusive presumption that the Member State to which an applicant may be returned under Article 3(1) observes the fundamental rights of the European Union. The court acknowledged the context in which the laws governing the Common European Asylum System were formulated which allowed the assumption that all participating states observed fundamental rights, including rights based on the Geneva Convention and the 1967 Protocol, and on the European Convention on Human Rights and that the Member States could have confidence in each other in that respect. It was to be assumed that the treatment of asylum seekers in all Member States complied with the requirements of the Charter, the Geneva Convention and the European Convention on Human Rights, but that presumption was rebuttable. The court was not satisfied that any infringement of the various Directives precluded the transfer of an applicant. It stated:-

> "84. …It would not be compatible with the aims of Regulation No. 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No. 343/2003 aims - on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application - to establish, as is apparent *inter alia* from points 124 and 125 of the opinion in Case C-411/10, a clear and effective method for dealing with an asylum application in order to achieve that objective. Regulation No. 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.
>
> 85. If the mandatory consequences of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member States responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first

> mentioned state, that would add to the criteria for determining the Member State responsible set out in Chapter 3 of Regulation No. 343/2003 another exclusionary criterion according to which minor infringements of the above mentioned Directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No. 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.
>
> 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 or 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."

64. In *Mirza*, Clark J. anticipated much of what is set out in the judgment in *N.S.* and *M.E.* (at paras. 73 -99). Though the court emphasised the enforcement role of the Commission, that each Member State is responsible for its own asylum process and any issues (outside the Article 3 issues) were a matter for complaint to the Commission, the court was also satisfied that it was not appropriate in circumstances which fell outside Article 3 issues for the Member State to examine another Member State's processes. A Member State could, therefore, assume or apply a presumption that the other Member State acted in compliance with its obligations under community law (adopting and applying the *dicta* of Lord Hoffman in *R. (Nasseri) v. Secretary of State for the Home Department* [2009] 2 W.L.R. 7190 (6th May, 2009). The proposition advanced in *Mirza* by the applicant that Ireland was obliged to derogate and refuse to transfer Dublin II applicants when there is evidence that the responsible state is not complying with its obligation in respect of asylum claims or international law, was rejected by the court because "if that argument were correct for Ireland then it would be correct for each Member State of the European Union and the Regulation would lose its cohesive effect" (para. 79).

65. The court in *N.S.* and *M.E.* noted that the extent of the infringement of fundamental rights described in the *M.S.S.* case demonstrated that there existed in Greece at the time of the transfer of the applicant in that case a systemic deficiency in the asylum procedure and the reception conditions of asylum seekers. It noted the extensive evidence taken into account in reaching that decision. It accepted that the relevance of such reports must be known to a Member State which has to carry out the transfer given its participation in the work of the Council of the European Union which is one of the addressees of such reports. The court was, therefore, satisfied that:-

> "94. …The Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No. 343/2003 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 Article 4 of the Charter."

66. The court notes that the Charter of Fundamental Rights came into force on 1st December, 2009, following the Commissioner's assessment, though it is clear that general principles of European law required a respect for fundamental human rights and the case law of the European Court of Human Rights was regarded as highly persuasive authority in respect of the rights to be protected. The quoted paragraphs from the judgment in *N.S.* & *M.E.* reject the proposition that minor infringements of Directives by the proposed receiving state could operate to prevent the transfer of an asylum seeker under Article

3(1). The judgment concentrates on the core reality of the case which concerned whether the Greek authorities complied with their obligations under Article 4, not to subject proposed transferees to inhuman or degrading treatment on their return. The evidential backdrop to the decision is provided by the findings of the European Court of Human Rights in *M.S.S.* Under Article 52(3), Article 4 of the Charter must be given the same meaning and scope as that of Article 3 of the Convention, including the absolute nature of the obligation imposed. The court notes that the questions posed in the Irish reference in *N.S.* & *M.E.* related to the non-compliance by the Greek authorities with the relevant EU provisions as set out in the Directives. In that context, the court concluded that reliance on Articles 1, 18 and 47 of the Charter would not have provided any different answers to the questions posed. The court was concerned with whether systemic flaws in the asylum procedure and reception conditions resulted in inhuman and degrading treatment within the meaning of Article 4 of the Charter not with breaches of secondary legislation which did not lead to a breach of fundamental rights. Thus, minor or slight infringements of the secondary legislation or Directives would not prevent the transfer of an asylum seeker to the responsible state.

67. In considering the effect of the *N.S.* and *M.E.* judgment in England and Wales, Parker J. in *Medhanye v. Secretary of State for the Home Department (No.2)* [2012] E.W.H.C. 1799 (Admin) considered the particular reference made to Articles 1, 18 and 47 of the Charter of Fundamental Rights in that judgment and stated:-

> "12. As to Articles 1, 18 and 47 of the Charter of Fundamental Rights, the CJEU considered that they "do not lead to a different answer" (paragraphs 109-115). That conclusion must be considered in the context of the CJEU's overall findings. The CJEU held that the assumption of compliance with international obligations was rebutted by the "regular and unanimous" reports from international NGOs recording systemic breaches resulting in inhuman and degrading treatment (paragraph 90). The CJEU expressly stated that not every infringement of fundamental rights was sufficient to preclude removal. Against that background, the Court's brief conclusion on Articles 1, 18 and 47 cannot be read as suggesting that some lower standard applies if those Articles are relied upon."

Parker J. considered the legal position if there had been no violation of Article 4 and the person to be putatively returned under Dublin II relied upon Article 1 of the Charter. He rejected the proposition that the CJEU held that Article 1 still had a role to play and that the transferring state would need in particular to satisfy itself that the arrangements for receiving and treating asylum seekers complied with, *inter alia*, Article 1 of the Charter: that would run counter to the principle of mutual trust and confidence. However, Parker J. was satisfied that the court in *N.S.* and *M.E.*:-

> "15. …having recognised both the importance of asylum law and practice and of respect for fundamental human rights, decided that in this context (emphasis of Parker J.) Member States did have such an obligation. Nonetheless with due regard to the "*raison d'etre"* of the EU, the CJEU very carefully and with great precision delineated precisely the nature and scope of the legal duty of the transferring Member State. The nature and scope of the duty is set out in paragraph 86 of the judgment of the CJEU. In my view, given in particular this important constitutional issue at stake in *NS*, that duty simply excludes the independent operation of Article 1 of the Charter. When read in the correct context, that is what the Court is saying at paragraphs 114-5 when it states that Articles 1, 18 and 47 of the Charter do not lead to a different answer, namely, that the only question that the transferring State need address and answer is the one identified at paragraph 86 of the judgment of the CJEU, which makes no allusion to Article 1 of the Charter."

68. Furthermore, it is clear from the history of the case law before the European Court of Human Rights and its consideration by the CJEU that in rebutting the presumption of compliance with European Union law and Article 4 by the responsible receiving Member

State, cogent evidence is required. The onus is on the applicant to rebut the presumption and to establish on the balance of probabilities the facts from which the inference may be drawn that substantial grounds were established for concluding that the applicant faced a "real risk" of being subject to a breach of Article 4 (or Article 3) rights, if returned. In contrast to the overwhelming body of evidence concerning the Greek cases, the nature and extent of the evidence available to the Commissioner adduced by the applicant and from the inquiries made by the Commissioner, was minimal in support of the applicant's contention. It was of a lesser order than that which failed to convince the European Court of Human Rights in *I.T.* and *K.R.S.* and was in no way comparable to that accepted in *M.S.S.* and *N.S.* and *M.E.* I am satisfied that the assessment by the Commissioner and the transfer order were made in accordance with law and the principles established from the judgments to which I have referred.

Grounds 5(iii)(d) and 5(iv)

69. The applicant claims that he was suffering from a serious illness and was dependent on the assistance of his nephew who was present in Ireland under the IBC scheme. It was submitted that the respondents failed to consider adequately or at all the provisions of Article 15 of the Dublin II Regulation which deals with humanitarian issues and provides in part that:-

> "(1) Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.
>
> (2) In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin."

70. A family member is defined in Article 2 of the Regulation as follows:-

> " "family members" means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:
>
> > (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
> >
> > (ii) the minor children of couples referred to in point (i) or of the applicant…
> >
> > (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried."

71. It is clear that the applicant did not qualify as a family member within this definition. His association with his unidentified nephew appears to have occurred only after his arrival in Ireland. There is no evidence to suggest that they constituted a family in the country of origin and no evidence was adduced of any relationship between them, whether by way of dependency or otherwise there. There is no evidence that the applicant was "dependent on the assistance" of his nephew within the meaning of Article 15(2).

72. The Commissioner considered the application of the European Convention on Human Rights and was satisfied that the provisions of Article 15 of the Dublin II Regulation were not at variance with the provisions of Article 8 which save for limited circumstances (which do not apply in this case on the evidence) does not generally accept the relationship of uncle and nephew as giving rise to its protection. I am satisfied that the Commissioner's consideration of the application of Article 8 was correct in the absence of evidence of dependency and the existence of family ties in the country of origin.

73. The court is also satisfied that the respondents under Article 15, considered appropriately the evidence concerning the mental state of the applicant at the time of and following his arrival in Ireland including the reports submitted, and that the conclusion reached in that regard was not unreasonable or irrational.

Ground 5(1)
74. It is submitted that the respondents failed to adhere to fair procedures in making findings adverse to the applicant's credibility without raising these with the applicant or giving him an opportunity to address them. I do not consider that there is any basis for this submission. The Commissioner was careful to limit the assessment of the documents submitted in the case to the issues concerning the Dublin II Regulation. The applicant's solicitors submitted that the documents indicated his honesty and consistency in relation to the elements of his claim for asylum. The Commissioner was clear that that was a decision for the Slovakian authorities. Insofar as the applicant told untruths in respect of his application for asylum in Ireland, these were considered by the Commissioner appropriately in that context and the observation that he had not been honest with the Irish authorities was accepted by the applicant in his own affidavit.

Conclusions
75. The court is not satisfied that the applicant has established that the decision to return him to Slovakia is fundamentally flawed on the grounds advanced. The court is satisfied that the Commissioner, in considering and applying the relevant principles did not commit any error of law or apply principles that are fundamentally at variance with the case law then applicable or which subsequently emerged from this Court, the European Court of Human Rights or the Court of Justice of the European Union, for the reasons set out above. The court is not satisfied that the conclusions of the Commissioner on issues of fact could in any sense be regarded as unreasonable or irrational. It is clear from a review of the evidence that the presumption said to apply in favour of the lawful and proper application of European Union law in Slovakia, could not possibly have been rebutted to the standard required on the basis of the evidence and materials adduced. It is also clear that the Commissioner carefully considered all of the materials and submissions made and carried out further inquiries to satisfy himself that no issues of the kind raised by the applicant had been raised or advanced with other Member States, the Commission, or the UNHCR at an appropriate level. Though the Commissioner reached his conclusion prior to *K.R.S.*, *M.S.S.* and *N.S.* and *M.E.*, the approach adopted was entirely consistent with the principles recognised and applied in those judgments. The court is, therefore, satisfied that the respondents properly considered all relevant matters in accordance with the Dublin II Regulation and the provisions of the European Convention on Human Rights and the Charter of Fundamental Freedoms, and the decision to return the applicant to Slovakia under Article 3 was correct in law.

76. The court is also satisfied that the applicant's challenge to the decision based on Article 15 of the Dublin II Regulation and Article 8 of the European Convention on Human Rights must be rejected.

77. The application is, therefore, dismissed.