Case No: CO/10187/2010

Neutral Citation Number: [2011] EWHC 2182 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2011

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

	The Queen (on the application of Saseendra Elayathamby)	**Claimant**
	- and -	
	The Secretary of State for the Home Department	**Defendant**

- -
- -

Ms Claire Physsas (instructed by **Satha & Co**) for the **Claimant**
Ms Lisa Giovanetti (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 29-30/6/2011

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Judgment**Mr Justice Sales :**

1. This is an application for judicial review to quash the Defendant's decision dated 13 September 2010 to certify the Claimant's asylum claim pursuant to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act"), on grounds that he may safely be removed to a third country, Cyprus, and to quash removal directions given to remove the Claimant to Cyprus. The Defendant has also indicated that the Claimant's asylum claim is to be treated as certified as "clearly unfounded" under paragraph 5(4) of Schedule 3 to the 2004 Act.

2. The Claimant is a Tamil who is a national of Sri Lanka. He claims that he left Sri Lanka in 2008 in circumstances which caused him to fear for his life there and travelled to Singapore. Shortly afterwards, he moved to Malaysia. While there, he approached the office of the United Nations High Commissioner for Refugees ("the UNHCR") who examined his case and formed the opinion that he had good grounds for claiming that he would face persecution if returned to Sri Lanka and should therefore, under the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ("the Refugee Convention"), be accorded protection against return to Sri Lanka. The UNHCR issued the Claimant with an identity card which provided that he should be given protection against removal to Sri Lanka ("the UNHCR card").

3. Under the Refugee Convention, it is for Contracting States to determine whether to accord refugee status in relation to persons claiming asylum in their territories. The issue of a UNHCR card by the UNHCR does not oblige any State to accord its bearer refugee status in its territory. However, the Refugee Convention recognises that the UNHCR has a general supervisory role in relation to conventions for the protection of refugees and provides that Contracting States are obliged to co-operate with him.

4. The Preamble to the Refugee Convention includes the following recital:

> "Noting that the United Nations High Commissioners for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognising that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner …"

5. Article 35(1) of the Refugee Convention provides:

> "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees … in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

6. In the light of this duty of co-operation, it appears that the holder of a UNHCR card who presents that card to the authorities of a Contracting State in whose territory he wishes to claim asylum can expect those authorities to give careful consideration to whether he should be accorded protection under the Refugee Convention against *refoulement* to his country of origin, in line with the opinion of the UNHCR. A UNHCR card may also be relevant to the position of its holder in other ways. In particular, if a person has been recognised by the UNHCR as deserving of protection under the Refugee Convention against *refoulement* (and so has been issued with a UNHCR card), but finds himself in a receiving State where he again faces a substantial risk to his life or of persecution, the UNHCR may request some other State which can offer him asylum and with which he has the most significant connection to accept him onto its territory and, once there, to provide him with protection under the Refugee Convention.

7. Where the UNHCR makes such a request, the person in relation to whom it is made is sometimes referred to as a "mandate refugee" (presumably on the basis that he is a person in respect of whom the UNHCR has given a mandate or instruction to the receiving State to consider receiving him onto its territory and according him protection there). In the policy of the Defendant to which this case relates ("the mandate refugee policy"), a rather wider definition of "mandate refugee" is given: "A mandate refugee is a person in a third country, who has been recognised as a refugee by, and given the protection of, the UNHCR". This definition covers anyone, such as the Claimant, who is the holder of a UNHCR card.

8. Although he obtained a UNHCR card while he was in Malaysia in 2009, the Claimant did not claim asylum from the Malaysian authorities. According to him, he did not feel secure there and so decided to leave in February 2010. There is no good objective evidence that the Claimant actually faced any serious risk of ill-treatment in Malaysia. He did not approach the UNHCR to complain that he did not feel secure there, nor did he ask the UNHCR to request any other State to accept him as a refugee.

9. The Claimant travelled through Thailand and Syria to Cyprus, without making a claim for asylum in any of those countries. In Cyprus, he used a forged passport to obtain a transit visa for travel to the United Kingdom. He travelled to the United Kingdom by air, and claimed asylum upon arrival in April 2010.

10. On 6 May 2010, the United Kingdom sent a formal request to Cyprus under Article 9 of Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") to accept responsibility for considering the Claimant's asylum claim. This was on the basis that Cyprus had issued the Claimant with a transit visa through its territory and therefore was the relevant EU Member State with responsibility to consider his claim for asylum (Article 9(2) of the Dublin Regulation). On 23 June 2010, however, that request was rejected by Cyprus. On 29 June 2010 the United Kingdom challenged that rejection, but on 13 July 2010 that challenge was again rejected by Cyprus. On 25 August 2010, the United Kingdom sent a further challenge to Cyprus. This time, on 13 September 2010, Cyprus accepted that responsibility lay with it under the Dublin Regulation to consider the Claimant's asylum claim.

11. On the basis of this acceptance of responsibility by Cyprus, the Defendant has not proceeded to examine the merits for the Claimant's asylum claim herself. Instead, she made the decision of 13 September 2010 now under challenge that the Claimant should be removed to Cyprus, where the Defendant maintains that his asylum claim would be considered and any protection due to be afforded to him under the Refugee Convention would be provided.

12. It is also relevant that Cyprus is a party to the European Convention on Human Rights ("the ECHR"). The Defendant maintains that Cyprus can also be expected to provide proper protection for the Claimant's rights under the ECHR, including any right he may be able to establish against *refoulement* to Sri Lanka relying on Article 2 (right to life) or Article 3 (prohibition of torture). The Defendant also maintains that Cyprus can be expected to respect any rights the Claimant may have under Article 3 in relation to the conditions of detention in Cyprus if he is sent there by the Defendant and any rights he may have under Article 3 with respect to the living conditions he may have to endure while he is present in Cyprus.

13. Against these contentions by the Defendant, the Claimant maintains that although it is supposed to provide these protections, Cyprus does not in fact do so. He submits that if he is sent to Cyprus, he will be at substantial risk of *refoulement* to Sri Lanka in breach of his right to protection under the Refugee Convention and Articles 2 and 3 of the ECHR; that he will be at substantial risk of detention in inhumane conditions in breach of his rights under Article 3 of the ECHR; and that, if he is not detained, he will not be provided with proper welfare support and appropriate living conditions, so that he will be at substantial risk of breach of his rights to be protected from inhumane treatment under Article 3 of the ECHR on that basis as well. On this basis, the Claimant submits

that if the Defendant sends him to Cyprus, that would involve a breach of his corresponding Convention rights under the Human Rights Act 1998 ("the HRA"). I refer to these different aspects of the Claimant's case as "the *refoulement* argument", "the conditions of detention argument" and "the living conditions argument", respectively. The Claimant relies in particular on *MSS v Belgium and Greece*, ECtHR Grand Chamber, judgment of 21 January 2011.

14. So far as concerns the Claimant's *refoulement* argument, the combined effect of paragraphs 2(c) and 3 of Part 2 in Schedule 3 to the 2004 Act (which contains provisions regarding removal of asylum seekers to safe countries, in particular as contemplated by the Dublin Regulation) is that the Defendant is required by primary legislation to treat Cyprus as a State which will properly safeguard the Claimant's rights under the Refugee Convention and under the ECHR not to be made subject to *refoulement* (if his claim to asylum under the Refugee Convention or the ECHR is made out). The effect of paragraph 5 of Part 2 in Schedule 3 to the 2004 Act is that, by certifying that the Claimant is to be removed to Cyprus, the Claimant has no in-country right of appeal based on a claim that he would face a risk of improper *refoulement* by Cyprus to Sri Lanka, in violation of his rights under the Refugee Convention or his Convention rights under the HRA.

15. The effect of certification of the Claimant's claim as "clearly unfounded" under paragraph 5(4) of Part 2 in Schedule 3 to the 2004 Act is that the Claimant has no in-country right of appeal in respect of his conditions of detention argument and his living conditions argument. So far as this is concerned, the decision of the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 provides guidance as to the approach to be adopted to judicial review of the certification. In my view, since this court has all the relevant material before it to assess whether the Claimant's human rights claims are well founded or not, that is what it should do when deciding whether to quash the certification or not.

16. Paragraphs 2 to 5 of Part 2 of Schedule 3 to the 2004 Act provide, in relevant part, as follows:

> "*First List of Safe Countries (Refugee Convention and Human Rights (1))*
>
> **2** This Part applies to - …
>
> (c) Republic of Cyprus…
>
> **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. …"

17. If the Claimant succeeds in his *refoulement* argument, it is common ground that the only relief he could claim would be a declaration of incompatibility with Convention rights (as set out in the HRA) under section 4 of the HRA in respect of paragraph 2(c) in Part 2 of Schedule 3 to the 2004 Act: cf *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2010] 1 AC 1, [19]; *R (Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin), [139]. The Claimant's attack, on this part of his case, has to be directed against the provision of primary legislation which stipulates that Cyprus is included in the list of Safe Countries in Schedule 3 to the 2004 Act, rather than against the Defendant's decision to treat Cyprus as a safe country. The Defendant is obliged by the primary legislation to treat Cyprus as a safe country with regard to possible *refoulement* from it, and therefore, by virtue of section 6(2) of the HRA, does not act unlawfully in doing so.

18. Since Cyprus is deemed by the 2004 Act to be a safe country in relation to the risk of *refoulement* to any other country – to Sri Lanka, in the Claimant's case – the Claimant has no claim that his removal there would be unlawful by virtue of the Refugee Convention and the Immigration Rules (which, in usual circumstances, give effect to the Refugee Convention in domestic law). The Court has no power to make a declaration of incompatibility as between a provision of primary legislation (here, paragraph 2(c) in Part 2 of Schedule 3 to the 2004 Act) and the provisions of the Refugee Convention.

19. By contrast with the position regarding the *refoulement* argument, there is no defence available to the Defendant under section 6(2) of the HRA in relation to the Claimant's conditions of detention argument and his living conditions argument. The inclusion of a country in the list of Safe Countries in Schedule 3 to the 2004 Act does not have the effect that it is treated as "safe" for all purposes. The statutory provisions set out above make it clear that it is only required to be treated as "safe" in relation to any allegation that there is a risk that that country will not properly protect an individual with respect to his rights not to suffer *refoulement* to a country where he would face a real risk of relevant mistreatment. Therefore, if the Claimant succeeds in his conditions of detention argument or his living conditions argument, the conclusion would be that the Defendant is acting unlawfully, in breach of her duty under section 6(1) of the HRA to act compatibly with Convention rights, in seeking to remove the Claimant to Cyprus: cf *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368. On that basis, he would be entitled to an order quashing the decision of the Defendant to remove him to Cyprus and quashing the removal directions which have been set to give effect to that decision.

20. I should mention at this point that the Claimant also maintains that, for the same reasons that he says his removal to Cyprus would breach his Convention rights, his removal would also breach relevant provisions of EU law, in particular as contained in the EU Charter of Fundamental Rights. So far as a claim of this kind under EU law is concerned, the Court of Appeal has made a reference to the CJEU in *NS v Secretary of State for the Home Department* [2010] EWCA Civ 990. However, no stay was granted in the present proceedings to await the outcome in that case. In the event, on the outcome of the Claimant's judicial review claim, I do not consider that he would be assisted by reference to EU law.

21. In addition to his claims based on the ECHR and the HRA, the Claimant also makes a claim based on the Defendant's mandate refugee policy. He submits that, according to that policy, the Defendant has undertaken that where a mandate refugee such as the Claimant makes a claim for asylum after arriving in the United Kingdom, the merits of

that claim will be considered by the Defendant. This is a claim that the Claimant has the benefit of a legitimate expectation, based on the policy, to have his asylum claim considered in the United Kingdom. According to this argument, the Defendant's refusal to consider his asylum claim herself (and instead to send him to Cyprus, for his asylum claim to be considered there) is in breach of his legitimate expectation and falls to be quashed for that reason. I refer to this aspect of the Claimant's case as "the legitimate expectation argument".

22. By virtue of Article 3(2) of the Dublin Regulation, each Member State retains a discretion to examine an application lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. Article 3(2) goes on to provide: "In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility …" (i.e. where it decides to consider the application itself it becomes the Member State responsible for considering the merits of the asylum claim in question and for affording protection against *refoulement* to the individual if that claim is made out on the evidence).

23. Therefore, the effect of the Claimant's legitimate expectation argument, if it is correct, would be that the Defendant would herself have to consider his asylum claim on its merits (there is no suggestion that there is any overriding public interest which might defeat any legitimate expectation arising under the mandate refugee policy); and this would mean that, under Article 3(2) of the Dublin Regulation, the United Kingdom would be the Member State responsible for considering the Claimant's asylum claim against his *refoulement* to Sri Lanka and that Cyprus would be relieved of the obligation (which currently rests upon it under the Dublin Regulation) to accept the Claimant back onto its territory to consider his asylum claim. If, as a result of application of the doctrine of legitimate expectations in English domestic public law, the Defendant is required to consider the Claimant's asylum claim, the result would be that the Defendant could not remove him from the United Kingdom by sending him to Cyprus – there is no suggestion that Cyprus would agree to accept the Claimant back onto its territory, absent an obligation upon it to do so under the Dublin Regulation.

24. It is convenient to address the Claimant's legitimate expectation argument first, since if it is correct the Defendant's decision not to consider the substance of his asylum claim, but rather to remove him to Cyprus, will have to be quashed. It would also be practically impossible for the Defendant to send him to Cyprus.

The legitimate expectation argument

25. The Defendant's mandate refugees policy is contained in a set of instructions for immigration officials issued by the Defendant, and made available to the public. As noted above, the policy employs a wide definition of "mandate refugee", which covers someone holding a UNHCR card (as the Claimant does in this case) even though (as here) the UNHCR has not in fact made a request to the United Kingdom to accept the card holder onto its territory as a refugee.

26. The mandate refugee policy includes the following statements:

> "*Applications*

Although there are no provisions in the Immigration Rules for a person who is overseas to be granted entry clearance to come to the UK as a refugee, we do exceptionally look at individual applications made by mandate refugees, to see whether there is a case for admitting such a refugee to the UK outside the Rules.

It should be noted that mandate refugees are normally nominated for resettlement by the UNHCR. The administration of such referrals is undertaken by the British Red Cross (BRC) on behalf of UNHCR. However applications from mandate refugees may also be made at a post abroad.

BRC refer resettlement applications to Refugee Resettlement Programmes Unit (RRPU). This unit includes the specific casework team that deals with all such applications. RRPU also maintain a central record of these cases and must be informed, for record purposes, of the outcome of resettlement applications.

Priority

Because these cases normally involve refugees facing some threat to their safety or well-being in their present country of refuge, the general presumption should be that they attract some priority and should not be placed at the back of a queue of applications. …

Assessing the Claim of Those Mandate Refugees Referred by the BRC, or Who Claim in Person at a Post Abroad

Caseworkers should not need to assess the refugee status of a mandate refugee whose application is made abroad via UNHCR/BRC (for in-country applications see below). However, if the case has not been referred via UNHCR/British Red Cross, but has instead been referred by a British Post abroad as a result of an entry clearance application, caseworkers should confirm with UNHCR in London that the applicant has been recognised as a mandate refugee as claimed.

Consideration of the case should usually be limited to an assessment of:

- the applicant's circumstances in the present country of refuge;

and

- whether the UK is the most appropriate country for resettlement.

It may be that there is a case to be made for applicants to remain where they are or, alternatively, that there is a case for resettlement outside the present country of refuge to another safe third country.

The applicant must have close ties with the UK – usually close family, but also possible history (e.g. periods spent here as a student). …

> *Assessing the Claim of a Mandate Refugee Who Applies in-Country*
>
> If a mandate refugee makes an application for resettlement, after arriving in the UK, then they must be considered under the 1951 Convention, as opposed to the criteria above which relate solely to applications from abroad. …"

27. The Claimant relies on the last paragraph quoted above. He says that he is a mandate refugee (as defined in the policy) who has made an application for resettlement after arriving in the United Kingdom, so he must be considered by the Defendant under the Refugee Convention. That is to say, the Claimant maintains that he is entitled to have his claim for asylum under that convention considered by the Defendant, and that the Defendant is not entitled to seek to remove him to another country under the Dublin Regulation for that other country to consider his claim for asylum.

28. I do not accept this submission. This part of the Claimant's claim is to have the benefit of what, on proper analysis, would be an expectation that he be provided with a substantive benefit (consideration of his asylum claim by the Defendant in the United Kingdom). In order to found a substantive legitimate expectation claim, the Claimant has to be able to show that the relevant statement relied upon is "clear, unambiguous and devoid of relevant qualification": *R v IRC, ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569G (Bingham LJ); *R (Bancoult)v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2009] AC 453, at [60] (Lord Hoffmann); *Paponette v AG of Trinidad and Tobago* [2010] UKPC 32, [28]-[30]. In my judgment, the Claimant cannot satisfy this test in inviting the Court to interpret this part of the mandate refugee policy in his favour.

29. The question is how, on a fair reading of the statement in its context, it would have been reasonably understood by those to whom it was made: cf *Paponette* at [30]. The context in which the statement relied upon by the Claimant appears is given by the mandate refugee policy, read as a whole. In my view, it is clear that the main point of the policy is to explain to UK Border Agency officials - who may not be familiar with the mandate refugee system – how that system works, including that (contrary to the usual position) it may be necessary to consider applications for asylum under the Refugee Convention made by persons from outside the United Kingdom. In that context, I think the relevant statement is properly to be read as a reminder to officials that, if a claim for asylum is made by a mandate refugee who is present in the United Kingdom, the usual rules regarding consideration of their claim will apply. That is the significance of the words at the end of the sentence, "… as opposed to the criteria above which relate solely to applications from abroad". The sentence relied upon cannot fairly be read (as the Claimant seeks to read it) as a clear and unambiguous statement that the Defendant will herself consider the asylum claim in the United Kingdom, and will not seek to operate the Dublin Regulation procedures even in a case in which she would be entitled to do so.

30. Moreover, the fair reading to be given to a statement in a policy which is intended to operate against the background of the general and well-known structure of decision-making in immigration cases should also take account of that background. As regards the mandate refugee policy, it would be surprising if the Defendant had intended to state that she would, in the case of mandate refugees, not operate the Dublin

Regulation procedures which might permit her to remove an applicant for asylum to another Member State for their application to be considered by that State. It would require very clear and distinct wording explaining that before it could fairly be concluded that the mandate refugee policy was intended to be read as having that effect. There is no such clear and distinct wording used in the policy. The Dublin Regulation is not referred to.

31. On the contrary, it appears from the section of the policy which gives guidance on assessing claims made by mandate refugees applying from overseas that the Defendant is concerned that applicants only be admitted if "the UK is the most appropriate country for resettlement". That concern, apparent on the face of the policy, makes it even more difficult to construe the sentence in the policy relied upon by the Claimant as a clear and unambiguous statement that the Dublin Regulation procedures (which also govern the question of which country is to be regarded as the most appropriate country to provide protection for persons claiming asylum) will not be applied in the case of mandate refugees.

32. It can certainly be objected that this part of the policy could be better expressed, to clarify the meaning it is intended to convey; and I think it would be desirable for the Defendant to give consideration to amending the wording. But the mere fact that criticism can be made of the way in which a policy is expressed is not sufficient to found a legitimate expectation claim.

33. For these reasons, I reject the Claimant's legitimate expectation argument. It is therefore necessary to consider the other grounds of claim put forward on his behalf.

The refoulement *argument*

34. Ms Physsas, for the Claimant, submits that he cannot safely be sent to Cyprus, because there is a real risk that the Cypriot authorities will not give proper consideration to his claim for asylum and may simply deport him back to Sri Lanka. A similar argument was upheld by the Grand Chamber of the ECtHR in *M.S.S. v Belgium and Greece* in relation to the removal of an asylum-seeker by Belgium to Greece, where on the facts found by the Grand Chamber the procedures in Greece for assessment of asylum claims were seriously inadequate and could not be relied upon to provide proper protection against removal of the applicant to a third country where he would face a real risk of death, torture or inhumane treatment (in that case, Afghanistan).

35. The Grand Chamber's findings and assessment in relation to the relevant law and practice in Greece regarding the risk of *refoulement* appear at paras. [88]-[127], [159]-[160], [173]-[195] and [265]-[322] of the judgment. At para. [322] the Grand Chamber concluded that there was a violation by Greece of Article 13 of the ECHR (right to an effective remedy) taken in conjunction with Article 3, "because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk [the applicant] faces 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". On the basis of its assessment of the deficiencies in the asylum procedures in Greece, the ECtHR held that Belgium had also breached the applicant's rights under Article 3 of the ECHR by sending him to Greece under the Dublin Regulation, when it was aware of the deficiencies in the asylum procedures there and that there was a real risk that he might be returned to face

ill-treatment in his country of origin without proper consideration of his asylum claim (in the light of that ruling it was not necessary for the ECtHR to reach a conclusion on the parallel argument based on Article 2): paras. [323]-[361].

36. The opposing submissions in relation to this part of the Claimant's case turned on whether alleged deficiencies in the procedures in Cyprus for considering applications for asylum were so serious (as in the case of Greece in *M.S.S.*) as to found a case against the Defendant (similar to that against Belgium in *M.S.S.*), relying on Articles 2 and 3, on the basis that sending the Claimant to Cyprus would expose him to a real risk of being returned to Sri Lanka without his claim for asylum and protection against such return receiving proper and effective consideration. In that regard, it is necessary to consider the approach to be applied to assessment of such a claim, as explained by the Grand Chamber, and to say something about the nature of the evidence relied upon by each party.

37. Since Cyprus is a party to the Refugee Convention and to the ECHR, one would ordinarily expect it to take steps properly to comply with its obligations under those treaties. In usual circumstances, another country could reasonably expect that that would be done, without having any obligation to inquire in detail to test whether that was indeed the case. However, Greece is similarly a party to the Refugee Convention and the ECHR, and it is clear from *M.S.S.* that circumstances can arise in which the usual expectation of compliance of such a country with its obligations under international law cannot be relied upon by a State which is proposing to send an applicant for asylum to that country.

38. In *M.S.S.*, at paras. [341]-[343], the Grand Chamber referred with approval to earlier decisions of Chambers of the ECtHR in relation to removal of applicants for asylum to other countries under the Dublin Regulation or equivalent procedures: *T.I. v United Kingdom* (dec.), no. 43844/98, *Reports* 2000-III (concerning removal from the United Kingdom to Germany) and *K.R.S. v United Kingdom*, ECtHR, decision of 2 December 2008 (concerning removal from the United Kingdom to Greece). At para. [342], the Grand Chamber observed:

> "Although in the *T.I.* case the Court rejected the argument that the fact that Germany was a party to the [ECHR] absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the [ECHR], and in particular Article 3, enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the [ECHR] and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country."

39. At para. [343], the Grand Chamber noted that that approach was confirmed and

developed in the *K.R.S.* decision. In view of the information about asylum procedures in Greece available at the time relevant in that case, the Grand Chamber observed that:

> "… it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin.
>
> Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court."

40. It is worth emphasising this last point at this stage. Where a Contracting State under the ECHR proposes to take measures which an individual maintains, on arguable grounds, would involve a violation of his rights under the ECHR he can make an urgent application to the ECtHR for an interim protective order from that Court, issued under Rule 39. Individuals frequently make such applications to the ECtHR where they face imminent removal from a Contracting State to another country where they say they will face a real risk of ill-treatment, and the ECtHR can issue an interim order preventing such a removal until after it has considered the individual's case on its merits. The availability of interim relief from the ECtHR under Rule 39 provides a fail-safe protection against removal to a country where the individual may be at risk of ill-treatment, even if the Contracting State's authorities have failed properly to consider a claim for asylum or have reached an erroneous conclusion in relation to it.

41. Paras. [344]-[359] contain the most important part of the Grand Chamber's reasoning for present purposes, so I set them out in full:

> "*(b) Application of these principles to the present case*
>
> 344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296-297 above).
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> 345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the *K.R.S.* case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.
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> 346. The Court disagrees with the Belgian Government's argument that, because he failed to voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.
>
> 347. The Court observes first of all that numerous reports and materials have been added to the information available to it when

it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the Council of Europe Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

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 in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008-...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.

355. The Court next rejects the Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so (see, *mutatis mutandis*, *Paladi v. Moldova* [GC], no. 39806/05, § 89, ECHR 2009-...). In the instant case, moreover, the letters sent by the Court clearly show that, fully aware of the situation in Greece, it asked the Greek Government to follow the applicant's case closely and to keep it informed (see paragraphs 32 and 39, above).

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.

357. While 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 in

> Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. 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 Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.
>
> 358. In the light of the foregoing, 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 had not sufficiently individualised, 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 (see, *mutatis mutandis*, *Saadi*, cited above, § 132)."

42. A number of important points can be made by reference to this extended passage:

(i) As to the correct approach to assessing a claim of the kind under review here, the Grand Chamber confirms at para. [345] that there is a presumption that a Contracting State will respect its international obligations in asylum matters, which presumption has to be rebutted if the claim is to be made out. This is in line with the Grand Chamber's approving references to *T.I.* and *K.R.S.* at paras. [341]-[343] and with its use of the heading for the extended passage set out above - "Application of these principles to the present case" – which is a reference to the principles to be derived from *T.I.* and *K.R.S.*. Accordingly, in the present case, there is a significant evidential presumption that Cyprus does responsibly and properly act to assess asylum applications made to it in an effective manner which the Claimant has to rebut. The strength of that presumption appears from the other paragraphs in the judgment set out above, in particular at para. [353], where the Grand Chamber refers to a situation in which "reliable sources" have reported practices "which are manifestly contrary to the principles of the [ECHR]";

(ii) The Grand Chamber's adverse assessment of the position regarding risk of

refoulement was based on a substantial number of reports listed at para. [160], most of them from respected international organisations, including a number from the UNHCR. Although in the present case there are adverse opinions on Cyprus's asylum procedures from certain local organisations (see para. [55] below), there is no equivalent pattern of adverse reporting from respected international organisations in the case of Cyprus;

(iii) The Grand Chamber emphasises at paras. [347] and [348] that considerable additional information has become available, and adverse reports have been forthcoming with greater frequency, since the ECtHR's decision in *K.R.S.* in 2008, when it still considered that it was acceptable for countries to send asylum seekers to Greece pursuant to the Dublin Regulation procedures. It thus appears from *K.R.S.* and *M.S.S.* that a degree of adverse commentary on a state's asylum procedures, even from highly respected sources such as the UNHCR, does not immediately lead to the conclusion that the presumption referred to above is rebutted;

(iv) The Grand Chamber emphasised that all the reports from 2008 in the case of Greece "agree" as to the practical difficulties encountered by asylum seekers in Greece, including by reference to the practice of the Greek authorities "of direct or indirect *refoulement* on an individual or a collective basis": para. [347]. The words I have quoted are a reference to para. [192], where the Grand Chamber refers to persons simply being expelled by Greece across the border into Turkey, who were then sent back to Afghanistan without their applications for asylum being considered. There is no evidence of any equivalent practice being adopted by Cyprus. The pattern of the reports which I have reviewed in the case of Cyprus is very far indeed from showing agreement on the part of the leading international bodies that Cyprus's asylum procedures are deficient or that asylum seekers there cannot in practice have their claims for asylum considered effectively. Indeed, none of the respected international bodies such as those referred to in *M.S.S.* has said any such thing;

(v) The Grand Chamber emphasised that of "critical importance" to its assessment of the applicant's claim in *M.S.S.* (see para. [349]) was a letter dated 2 April 2009 from the UNHCR to the Belgian Government, in which the UNHCR stated that (notwithstanding the ECtHR's decision in *K.R.S.*) it maintained its adverse assessment of the Greek asylum system and recommended "that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves …" (paras. [194]-[195]). No equivalent letter has been sent by the UNHCR in relation to removals to Cyprus. The UNHCR has not suggested that asylum procedures in Cyprus are deficient or in any way unacceptable;

(vi) The Grand Chamber considered the possibility of asylum seekers in Greece applying for interim measures from the ECtHR under Rule 39 to protect them against removal to a third country where they might be killed or suffer ill-treatment, but concluded that this potential layer of protection was illusory because of difficulties facing asylum seekers in Greece: paras. [355]-[357]. This conclusion is founded on findings at paras. [173]-[181] that there are major difficulties for asylum seekers in gaining access to the asylum procedure in Greece (including being deprived of all information about asylum procedures and how to make an application for asylum and in some cases being tricked by the police to discourage them from following the procedures), leading to the assessment at para. [182]:

> "As to access to the Court, although any asylum seeker can, in theory, lodge an application with the Court and request the application of Rule 39 of the Rules of Court, it appears that the shortcomings mentioned above are so considerable that access to the Court for asylum seekers is almost impossible. This would explain the small number of applications the Court receives from asylum seekers and the small number of requests it receives for interim measures against Greece."

There is no evidence of an equivalent pattern of conduct by the Cypriot authorities to deprive potential asylum seekers of all information about their rights or how to apply for asylum. There is no good basis in the evidence available about Cyprus for concluding that applications to the ECtHR for interim measures under Rule 39 are "almost impossible". This is a significant point, since the possibility of having access to the ECtHR to secure interim relief is an important safeguard against the possibility of *refoulement* to another country where there is a real risk for the individual of death or ill-treatment.

43. The contrast between the position of the Claimant in the present case at the time of the hearing before me and the position of the applicant in *M.S.S.* in relation to the possibility of making an application under Rule 39 is particularly stark. The Grand Chamber in *M.S.S.* was reviewing the position after the applicant had been sent by Belgium to Greece, and found a violation of Article 3 by Belgium in relation to the risk of *refoulement* of the applicant by Greece to Afghanistan. Of course, because of the intervention of the ECtHR the applicant was not in fact sent to Afghanistan, but Belgium was found to have violated Article 3 by sending him to Greece because at the time it did so there was a real risk that Greece would send him to Afghanistan and his notional ability to apply to the ECtHR under Rule 39 was "illusory" because of the way he would be likely to be treated in Greece. That is not the position of the Claimant in this case as things now stand. In the circumstances which now apply, the Claimant is represented by lawyers and is known to KISA, a local non-governmental refugee organisation, which – if he is sent to Cyprus – will be in a position to assist him in making a Rule 39 application to the ECtHR should the need arise. For that reason, quite apart from the other reasons given in this part of my judgment, as things currently stand there is no real risk that if the Claimant is now sent to Cyprus he will suffer *refoulement* to Sri Lanka without careful consideration (if necessary, by the ECtHR on an application under Rule 39 and then on a substantive application) whether that would expose him to the risk of ill-treatment contrary to Article 2 or Article 3 of the ECHR. There would therefore be no violation by the United Kingdom or by the Defendant of his rights under Articles 2 and 3 of the ECHR or as set out in Schedule 1 to the HRA on the basis of the *refoulement* argument if he were now sent to Cyprus.

44. In *M.S.S.* the Grand Chamber placed some reliance on the picture given by statistics in relation to failure rates for asylum applications in Greece (201 refusals out of 202 applications examined in one study) and the stereotypical way in which the decisions in such cases were framed: para. [184]. There is no similar picture to be derived from examination of statistics in relation to Cyprus. Any set of statistics may be open to differing interpretations and explanations for the patterns they show, and I was presented with argument by the Claimant why I should not attach weight to the picture given by the statistics available for Cyprus. It is difficult to be sure what accounts for the simple picture given by looking at the statistics, and I do not attach great weight to them. But it does seem to me to be relevant that the statistics for Cyprus for successful asylum applications at first instance as compared with total applications considered at first

instance (as published by the Eurostat agency of the European Commission) appear to be respectable or even good by comparison with those of other countries whose proper compliance with their international obligations has not been in question in any way (such as France, Ireland and the United Kingdom), and appear to be very much better than the statistics for Greece. The number of positive decisions as compared with the number of total decisions for these countries for 2010 were: Cyprus 425 out of 2,440; France 5,115 out of 37,620; Ireland 25 out of 1,600; United Kingdom 6,440 out of 26,690; and Greece 105 out of 3,455. This is not indicative of a situation in which asylum seekers in Cyprus are in practice unable to vindicate their rights to protection against *refoulement* in appropriate cases.

45. On this application for judicial review I have read the relevant parts of an extensive range of reports by international organisations, as follows: the Third Report on Cyprus by the European Commission against Racism and Intolerance ("the ECRI"), CRI(2006)17, adopted on 16 December 2005; a report dated 11 July 2008 by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs ("LIBE") on its visit to Cyprus in May 2008 to review the situation regarding the reception of asylum seekers and related matters and the report of 11 July 2008 of the rapporteur for that visit; the Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") from 8 to 17 December 2004, CPT/Inf (2008) 17, dated 15 April 2008, together with the Responses of the Government of Cyprus to that report, CPT/Inf (2008) 18, published by the CPT; a report on Cyprus by the Committee on Economic, Social and Cultural Rights of the United Nations Economic and Social Council dated 12 June 1009, E/C.12/CYP/CO/5; the 2009 Human Rights Report on Cyprus issued by the US State Department, dated 11 March 2010; the 2010 Human Rights Report on Cyprus issued by the US State Department, dated 8 April 2011; the Amnesty International 2010 Report on Cyprus; the ECRI Report on Cyprus (fourth monitoring cycle), CRI(2011)20, adopted on 23 March 2011 (together with an Annex setting out the comments made by the Cypriot authorities); a UNHCR press report dated 13 January 2005 entitled "Cyprus: The twisted reality behind the statistics"; a Weekly Update of 30 May 2008 by ECRAN, the Advocacy Network of the European Council on Refugees and Exiles; and UNHCR Briefing Notes dated 10 December 2010 entitled "UNHCR urges EU and FRONTEX to ensure access to asylum procedures, amid sharp drop in arrivals via the Mediterranean".

46. Overall, the picture one gets from the reports from international organisations in relation to Cyprus which have been put before the court is that certain criticisms may certainly be made about aspects of the asylum procedures in Cyprus, but these are advanced with a view to promoting improved practice in this area and not to condemn Cypriot procedures as clearly inadequate or in breach of its international obligations. It seems likely that a broadly similar picture, where criticisms may be made of asylum procedures in an effort to encourage improvements, could be drawn in relation to the asylum procedures of most, if not all, the ECHR Contracting States (and by way of example I was shown reports critical of aspects of the United Kingdom's asylum procedures). But in such reports it is not suggested that such criticisms as are made show that there is any substantial failure on the part of Cyprus (or the United Kingdom, or any other state subject to similar criticisms) to comply with its international obligations with respect to protecting asylum seekers against *refoulement* to countries where they may be at risk; nor is it suggested that asylum seekers cannot safely be sent to Cyprus (or, as the case may be, the United Kingdom or any other state subject to similar criticisms) under the Dublin Regulation procedures.

47. To give two short examples, I refer to the US State Department Reports on Cyprus of 2009 and 2010. In its 2009 Report, in a section headed "Protection of Refugees" which reviews the position in relation to the Refugee Convention, the State Department stated: "In practice, the government provided protection against the expulsion or return of refugees and beneficiaries of subsidiary protection to countries where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion". In its 2010 Report, the State Department stated "NGOs and refugees reported that the Asylum Service was better staffed and processed applications more quickly than in previous years … In contrast to previous years, refugees and NGOs did not report that any asylum cases were closed without consideration or receiving a government response"; it also repeated its statement regarding the practical protection that the government provided against *refoulement*.

48. The ECRI, in its report of 23 March 2011, noted that the Cypriot authorities sought to provide to all persons in detention (i.e. detained immigrants) information in a range of languages about the procedures for claiming asylum (paragraph 177). Although the ECRI noted that there were problems reported about the distribution of this information, it did not suggest that the problems were so great as to deprive individuals of effective access to the asylum procedure. The contrast with the position in Greece as found in *M.S.S.* is great. Similar comments can be made about what emerges from the other reports of international organisations.

49. The absence of adverse comment by the UNHCR regarding Cyprus's asylum procedures is very telling. According to the ECRI report of 23 March 2011 there is close co-operation between the Cypriot authorities and the UNHCR, "which has unrestricted access to files and can present its views on cases". So if the UNHCR had significant concerns about Cyprus's procedures, he would be in a position to inform itself and to articulate such concerns. He has not raised any significant problems with Cyprus which might suggest that individuals could not be sent there under the Dublin Regulation procedures – by contrast with the position he adopted in relation to Greece, as set out by the Grand Chamber in *M.S.S.*. Local refugee support organisations such as KISA and Future Worlds Center (which received funding from the UNHCR) are also well placed to present any criticisms they have of procedures in Cyprus to the UNHCR for his assessment. The UNHCR has not endorsed the criticisms which they make, as relied on by the Claimant (see below - the same point may be made in relation to the US State Department: it is clear from its 2010 Report that KISA communicates concerns it may have to the State Department, but the State Department reports that overall Cyprus does provide practical protection against *refoulement*).

50. Moreover, in the UNHCR press report of 13 January 2005, it was said:

> "… Cyrpus's extremely low recognition rate [of refugees] is not challenged by UNHCR. 'We believe it to be fair', said Betsy Grove, the outgoing head of UNHCR's office in Nicosia. 'The huge majority of cases are simply not refugees, but students or economic migrants who have been misled to believe that they should apply for asylum in order to prolong their stay in Cyprus'."

51. The report contrasted the position in relation to the low recognition rate in Greece, where

the UNHCR had raised concerns (it may also be noted that it is clear from the latest statistics that the recognition rate in Cyprus has gone up significantly since 2005).

52. There is nothing to suggest that the UNHCR's general view that the asylum procedures in Cyprus are acceptable has changed in any way since 2005. So, for example, in the UNHCR Briefing Notes of 10 December 2010, the UNHCR referred to a range of Mediterranean countries, including Greece and Cyprus, but only made criticisms of Greece (stating, for example, "An asylum seeker arriving in Greece currently has negligible chance of having his or her claim to refugee status properly assessed" – there was no suggestion that the UNHCR would make the same criticism about Cyprus).

53. On the basis of my reading of the reports from international organisations in relation to Cyprus which have been put before me, I consider that the Claimant is very far indeed from showing that the position in Cyprus should be regarded as equivalent to that of Greece, as analysed in *M.S.S.*. In my view, the Claimant is a long way away from being able to rebut the presumption referred to in *M.S.S.*, namely that Cyprus, as a Contracting State, complies in substance with its international obligations to safeguard asylum seekers against *refoulement* to countries where they would face a real risk of death or ill-treatment.

54. Furthermore, the Claimant has not demonstrated that there is any significant impediment to an asylum seeker in Cyprus who fears *refoulement* having access to the ECtHR to obtain its protection under Rule 39. For that reason also, the Claimant cannot show that the Defendant would expose him to an unacceptable risk of refoulement to Sri Lanka by sending him to Cyprus.

55. In my judgment, the Claimant gets little or no support for his *refoulement* argument from the reports from international organisations. Indeed, the overall impression from those reports is that Cyprus is not regarded by those organisations as having problems in relation to its asylum procedures which are in any way comparable with the position in Greece reviewed in *M.S.S.*. Accordingly, Ms Physsas was obliged to submit that the court should treat certain reports from local Cypriot refugee support organisations (KISA - an acronym for its Greek name, which in translation is Action for Equality, Support, Antiracism; Symfiliosi; and Future Worlds Center, which has been funded by the UNHCR to implement a project entitled "Strengthening Asylum for Refugees and Asylum-seekers in Cyprus") as having greater weight. The reports from these organisations which she relied on were: a KISA report dated May 2011 entitled "Asylum procedures and conditions of Asylum Seekers in Cyprus" (which those acting for the Claimant had asked KISA to provide as an expert opinion in the Claimant's case), a report by Symfilosi of 2009 for the Jesuit Refugee Service in Europe; a questionnaire return on Cyprus by Future Worlds Center to Refugee Council Hesse dated 4 January 2011; the "Report on the Asylum Procedure in Cyprus – 2011" by Future Worlds Center dated 8 June 2011; a KISA report entitled "Migrants' detention and ill treatment in Cyprus" dated 25 May 2008; a KISA report entitled "Reception Conditions of Asylum Seekers" dated 25 May 2008; a KISA report entitled "KISA's positions on the Fifth periodic report submitted by the Government of Cyprus on the implementation of the International Covenant on Economic, Social and Cultural Rights" dated 24 October 2008; a KISA report entitled "Asylum Procedures in Cyprus" dated January 2009; and a KISA report entitled "The Right to an effective remedy in the context of asylum procedures in Cyprus" dated 29 June 2009.

56. In my assessment, although the reports of these local organisations which are produced

for publication in the public domain are entitled to weight (as equivalent reports from local organisations in Greece were taken into account in *M.S.S.* alongside reports from international organisations), they carry considerably less weight than the considered reports of bodies such as the UNHCR, the ECRI, LIBE and the US State Department. Local organisations such as KISA do not have the resources nor the general perspective on acceptable standards of protection for asylum seekers which those other bodies have. Nor is it apparent that the local organisations are engaged in a process of dialogue with the Cypriot authorities in the way that the UNHCR, the ECRI and LIBE appear to be, in the course of which the authorities are given an opportunity to comment on possible criticisms. Therefore, the reports of the local organisations risk being rather one-sided in the picture they present.

57. Moreover, looking at the specific comments in the published reports from local organisations, I do not think that they provide especially compelling evidence to support the Claimant's *refoulement* argument. For example, in KISA's report entitled "Reception Conditions of Asylum Seekers" dated 25 May 2008, it refers to an "improvement of access to asylum procedures" which it acknowledges has taken place, and although it refers to continuing problems with the procedures its comment is: "In very rare occasions asylum seekers are arrested and deported instead of given access to the Asylum procedure". In its report of January 2009 it again referred to "the improvement of access to asylum procedures in the last few years", while referring to continuing problems. These materials cannot outweigh the general impression which emerges strongly from the reports of international organisations, as referred to above.

58. I consider that the other materials produced by the local organisations on which the Claimant sought to rely carry considerably less weight than their published reports, since they do not afford any opportunity for assessment by neutral outsiders such as the UNHCR or for response by the Cypriot authorities. The Grand Chamber in *M.S.S.* does not give any indication that it would be inclined to give significant weight to unpublished materials of this kind.

59. In particular, I should comment on the Claimant's use of what purported to be an expert report from KISA commissioned by the Claimant's lawyers for the purposes of this case. In my view, this was an unsatisfactory document which should be given comparatively little weight:

    (i) No order was obtained from the court for expert evidence to be adduced. Had an application been made for such an order, it is very likely it would have been refused. At the very least, if the application was allowed, the Defendant would have been on notice that expert evidence was to be received by the court and would have had a fair opportunity to seek to obtain an expert report of her own;

    (ii) The KISA report contained statements about the law in Cyprus and how it operates in practice, but the author of the report was not a lawyer, and indeed provided no information by reference to which the court could assess his expertise in relation to the matters dealt with in his report;

    (iii) The report referred to statutory provisions and case law, but provided no translations of the full text of these materials by reference to which the court could assess the accuracy or intended meaning of what was stated in the report. There were points at which I found the report confusing and hard to follow;

(iv) The author of the report did not provide the standard statement to be expected in an expert opinion prepared for court proceedings, to confirm that he understood it to be his duty to report in a neutral and non-partisan way. In fact, since the author of the report did not refer to (let alone attempt to respond to or deal with) any of the international materials which tended to set out a picture contrary to that put forward in his report, the impression given was that this was a partisan report produced specifically to promote the Claimant's case rather than neutrally to inform the court about the position in Cyprus;

(v) It does not appear that the author of the report had sought any comment or response from the Cypriot authorities on the criticisms he made in his report;

(vi) Particularly given what appears to be the partisan nature of the report to favour the Claimant, it contained statements which in my view weighed heavily against the Claimant's case. At paragraph 35 the report referred to a set of cases in which protection against *refoulement* had not been forthcoming from the Cypriot authorities but where it had been possible to secure protection by a Rule 39 application to the ECtHR - i.e., unlike in the case of Greece, the ability of asylum seekers in Cyprus to gain effective access to the ECtHR to protect their Convention rights seems to be real and effective, rather than "illusory". At paragraph 61 - the critical paragraph of the report, where it refers to the danger of *refoulement* for returnees under the Dublin Regulation - the danger is simply asserted in bald and unparticularised terms, and the only supporting material referred to is that KISA is aware of at least one case (no details of date, name etc were provided) where access by a Dublin returnee to the asylum procedure "was restricted by the Police and the asylum seeker was to be deported" and "[a]ccess to the procedure was only made possible after the intervention by KISA" - i.e. even in what appears to have been a stray case where the procedures did not operate as they were supposed to, the actual outcome was that KISA was able to secure proper access to the relevant procedures for that individual;

(vii) Still more fundamentally, there is nothing in the Grand Chamber's judgment in *M.S.S.* to lend support to the idea that claims regarding potential violation of Convention rights on the basis of a *refoulement* argument should be determined by reference to expert opinions obtained for the purposes of court proceedings regarding the claims in question. The materials relied on by the Grand Chamber were not of that character. They were published reports from highly regarded bodies, of which the Greek government would obviously have been aware and in respect of which it would have had a full opportunity over several years to answer (if it could) any of the criticisms levelled against it. A private expert report of the kind commissioned from KISA by the Claimant is, in my view, in a completely different category. Other than in exceptional cases, I do not think it is appropriate for a *refoulement* argument of the kind made in *M.S.S.* and in this case to be mounted by reference to private expert reports. They will not usually carry significant weight, when compared with the sort of materials to which the Grand Chamber had regard in *M.S.S.*, and are more likely to add disproportionately to the time, effort and expense involved in determining the proper outcome on such an argument. I do not think that *M.S.S.* type claims should be converted into trials by way of consideration of opposing expert reports.

60. Furthermore, where materials are not published and readily accessible in the public domain, a Contracting State cannot be expected to be aware of those materials when

deciding whether it is lawful to send an individual to another country under the Dublin Regulation procedures: see *M.S.S.* at paras. [352]-[353]. It might be said that, since these materials have now been deployed in these proceedings, the Defendant is now on notice of them (albeit she could not have been when she took her decision in September 2010) and she and the Court should now take them into account when assessing whether to issue a declaration of incompatibility. This gives rise to the question of when the issue of incompatibility should be addressed - at the time of the decision in September 2010 or at the time the court considers the matter.

61. I make it clear that, on the evidence in this case about the general position in Cyprus, I reject the claim for a declaration of incompatibility whichever of these dates is focused on. However, I should also point out that if the focus were to be on the time when the court considers the matter, the Claimant's case would in fact have got weaker (indeed, would in my view have become hopeless) because now his practical ability to make an effective application to the ECtHR under Rule 39 if Cyprus threatened to deport him has improved from what it was in September 2010: see para. [43] above.

62. When considering whether to issue a declaration of incompatibility, I consider that it is appropriate (at any rate, in normal circumstances) to focus on the specific claim of breach of Convention rights presented on the particular facts of the case before the Court. Section 4 of the HRA is not intended to create a new form of *actio popularis* or a new form of representative action, in which a person whose own Convention rights will not be breached can nonetheless claim a declaration of incompatibility on the basis that he can posit a different, hypothetical person whose Convention rights might be violated if he was in a similar position. It is not the function of the courts to give advisory opinions on hypothetical cases.

63. If one asks the question whether the removal of the Claimant to Cyprus would have involved a breach of his Convention rights under the HRA as at the time the decision was taken (September 2010), one has to leave out of account any unpublished material from local organisations of which the United Kingdom authorities could have been not be expected to be aware at that time, including the expert report from KISA. The Defendant's answer to the *refoulement* argument and the claim for a declaration of incompatibility by reference to the published reports from international organisations as at that date would therefore be even stronger.

64. On the other hand, if one asks the question as at the time of the hearing before me, although the Claimant can argue that the United Kingdom authorities are now aware of the further materials from local organisations on which he seeks to rely, including the expert report from KISA, his claim by reference to the *refoulement* argument that his Convention rights would be violated if he is sent to Cyprus would have become weaker because of the other change in circumstances since September 2010 to which I have referred above (his improved ability to gain access to the ECtHR under Rule 39). Therefore, again, he cannot successfully claim a declaration of incompatibility by reference to the circumstances judged now.

65. For the reasons given above, I dismiss the Claimant's claim based on the *refoulement* argument.

The conditions of detention argument

66. If he is returned to Cyprus and claims asylum there, it is likely that the Claimant will be held in detention while his claim is considered. This is in principle legitimate under the ECHR: see Article 5(1)(f). In my judgment, the Claimant's claim based on the conditions of detention argument falls to be dismissed as well.

67. In *M.S.S.* the applicant successfully mounted a conditions of detention argument against Belgium under Article 3 by reference to the very poor conditions in which he was to be (and was) held in detention upon return to Greece: paras. [160]-[166], [205]-[234] and [362]-[368]. In my view, however, the conditions of detention in Greece as revealed in the reports of respected organisations and assessed by the Grand Chamber were considerably worse than the conditions of detention in Cyprus as appears from the evidence available to me and to the Defendant (whether judged at the time of the decision in September 2010 or at the time of the hearing).

68. Although in the various reports of international organisations there are, at some places, some criticisms of the detention conditions in which asylum seekers are held, they are comparatively muted in tone. They fall a long way short of the sort of material which could support a claim that the Defendant would act in violation of the Claimant's rights under Article 3 by sending him to Cyprus to face detention there. The overall picture is very different from the sorry state of the Greek detention facilities assessed in *M.S.S.*.

69. Again by way of short example, the assessments by the US State Department in their Human Rights Reports for 2010 on Cyprus and Greece can usefully be contrasted as giving a fair summary of the picture in those two States. In the report on Greece, the State Department said: "Conditions in prisons and detention facilities did not meet international standards. … During the year the Office of the UN High Commissioner for Refugees (UNHCR), the UN special rapporteur, the CPT, and NGOs asserted that conditions in detention centers for undocumented aliens were unacceptable and amounted to serious violations of human rights …". By contrast, in the report on Cyprus the State Department said: "Conditions in prisons, detention centers, and other government institutions generally met international standards, although there have been reports of overcrowding …".

70. The CPT report of 15 April 2008 stated that most of the allegations of ill-treatment made to it related to the time of arrest by the police or subsequent questioning (paragraph 16, i.e. rather than to the conditions of detention at detention centres); referred to issues of overcrowding at Nicosia central prison (where some asylum seekers are detained) (paragraphs 54-57); but also stated that most of the prisoners interviewed spoke in positive terms about their relations with staff (paragraph 58). The ECRAN Weekly Update of 30 May 2008 noted that the members of LIBE who visited Cyprus that month found conditions in immigrant detention centres there "to be good compared with other Member States". By contrast with his stringent criticisms of the conditions of detention for asylum seekers in Greece over many years (e.g. in his Briefing Notes of 10 December 2010), the UNHCR has not criticised the conditions of detention for asylum seekers in Cyprus.

71. In my judgment, all this clearly outweighs suggestions in the material from local organisations relied on by the Claimant that there may be problems about the conditions of detention for asylum seekers. I repeat my observations above about the comparative weight to be attached to these different sorts of report. In fact, the complaints by local organisations about conditions of detention are themselves fairly muted. For example, Future Worlds Center, in its questionnaire return dated 4 January 2011, in answer to the

question, "What are the conditions in detention?", does not suggest that conditions are so poor as to be wholly unacceptable (albeit it refers to some problems – but the problems referred to are of a completely different kind and quality from the serious problems identified in *M.S.S.* with the conditions of detention in Greece). Similar points may be made about the Symfiliosi report, which was detailed and directed specifically to a review of the conditions of detention. Once again, the KISA expert report (paragraphs 36-51) makes bald and very general criticisms of detention conditions, which do not carry significant weight when placed alongside all the other available materials.

72. For these reasons, I reject the Claimant's conditions of detention argument.

The living conditions argument

73. This argument also corresponds with another complaint made successfully by the applicant in *M.S.S.*, relying on Article 3 against both Greece and Belgium: see paras. [167]-[172], [235]-[264] and [362]-[368]. The Grand Chamber found that the applicant spent months in Greece "living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live" (para. [254]); it noted that the European Commissioner for Human Rights, the UNHCR and non-governmental organisations considered that the sort of situation in which the applicant found himself "exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as the applicant" (para. [255]).

74. In my view, none of the materials before the court (even the materials from local organisations relied on by the Claimant) indicate that there is anything like as serious a problem and disregard for the interests of asylum seekers as occurred in Greece. In my judgment, once again, the Claimant is a long way away from being able to show that the Defendant would act in breach of his rights under Article 3 by sending him to Cyprus.

75. So far as concerns the reports by international organisations, similar points to those made above can be repeated. The reports do not suggest that there is a serious problem with living conditions for asylum seekers in Cyprus such as to amount to inhumane treatment contrary to Article 3. The UNHCR has not suggested that there is any such problem, by contrast with his views expressed in relation to Greece.

76. Overall, if one reads the parts of the ECRI report of 23 March 2011 relating to living conditions (paragraphs 84-112, 176 and 178-180), the impression is given of criticisms being made to encourage improvement in what is being done rather than of any serious criticisms that Cyprus is failing to respect and safeguard fundamental rights of asylum seekers (contrast paragraph 170, where on another topic the ECRI does make a criticism by reference to a possible violation of the ECHR). In relation to provision of housing, the Cypriot Government, in its comments in the Annex to the ECRI report of 23 March 2011, states "there are no reported cases of homeless asylum seekers"; it also says that if there are delays in examining applications for public assistance, "special provisions apply in the case of asylum seekers to allow interim payments in order to cover immediate basic needs and accommodation." Those statements are not rejected by the ECRI, although it does note that there may be problems for some asylum seekers in securing accommodation; but it simply recommends that the authorities develop a better housing policy (paragraphs 103-106 of the report).

77. The 2010 US State Department report on Cyprus noted that asylum seekers whose cases were awaiting adjudication were allowed to work in certain areas after residing for six months in the country, and that during the six month period before they were able to work "asylum seekers had access to a subsistence allowance and could live in the reception center for refugees located in Kofinou …".

78. On this aspect of the Claimant's case, KISA's expert report (at paragraphs 52-57) acknowledges that there is in place in Cyprus a legislative framework designed to ensure appropriate minimum living conditions for asylum seekers. The same is true of KISA's report entitled "Reception Conditions of Asylum Seekers" dated 25 May 2008. Although in both these reports KISA is critical of aspects of the delivery of the welfare support for which the domestic legislation provides, I do not consider that KISA paints a picture which provides any substantial support for the Claimant's Article 3 complaint under the living conditions argument. Nor does the other material from local organisations.

79. Accordingly, I reject the living conditions argument of the Claimant as well.

Conclusion

80. For the reasons given above, I dismiss the Claimant's application for judicial review and each of the grounds put forward in support of it.