
**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 8**
P358/15

Lady Paton
Lady Clark of Calton
Lord Malcolm

OPINION OF LADY PATON

in the cause

MOHAMMAD RACHEED (AP)

Petitioner and Reclaimer

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioner and Reclaimer: Dewar QC, Caskie; Drummond Miller LLP (for Latta & Co, Solicitors, Glasgow)**
**Respondent: McIlvride QC, Pirie; Office of the Advocate General**

13 February 2019

[1] I agree with the opinions of Lady Clark and Lord Malcolm, and have nothing to add.

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OPINION OF LADY CLARK OF CALTON

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**History**

[2] The petitioner, born 12 January 1996, is a national of Syria which he fled in 2014 and claimed asylum in Bulgaria. According to the petitioner, he spent months in a camp where conditions were described as very bad and Article 3 non-compliant. Having been granted refugee status, he was released from the camp but was left homeless, destitute with no assistance and no Bulgarian identity documents. He was unable to speak Bulgarian, had no idea how to find support and was at risk from criminal gangs with no way of obtaining protection. He left Bulgaria after a short period because of the conditions. He returned to

Syria but fled again and sought asylum in the UK. A formal request was made by the UK authorities to the Bulgarian authorities on 16 January 2015 under Article 1(b) of the Dublin III Regulations inviting Bulgaria to accept responsibility. Bulgaria rejected responsibility for the petitioner on 29 January 2015 and stated that they had granted the petitioner refugee status and thus the case fell out of the Dublin remit. Thereafter further contact was made by the UK authorities and, by letter dated 23 February 2015, the Bulgarian Chief Directorate Border Police confirmed the petitioner's status and stated:

> "… and is ready to take him back on the territory of the Republic of Bulgaria. The person was granted refugee status in Republic of Bulgaria.
>
> If he is not in possession of travel document, provide him with requisite travel document to enter in Bulgaria, including your Laissez-Passer.."

The letter did not contain any information about what would happen to the petitioner and the UK government sought no undertakings about how the petitioner would be treated.

[3] There were and remain many disputed issues between the parties including how the petitioner had been treated both as an asylum seeker and as a refugee; whether he would be detained again if returned to Bulgaria; how he would be treated as a person without relevant documents who had been absent from Bulgaria since at least 13 January 2015; and whether as a refugee the conditions he would face in Bulgaria would create a real risk of treatment contrary to Article 3 ECHR.

[4] The petitioner challenged his removal by the respondent to Bulgaria on the basis of a breach of Article 3 of the European Convention on Human Rights (ECHR). By letter dated 15 September 2016 on behalf of the respondent, the petitioner was informed that:

> "70. Having considered all the evidence available to her the SSHD hereby certifies under the provisions of Schedule 3, Part 2, paragraph 5(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 that your client's human rights claim is clearly unfounded.

71. As the SSHD has certified your client's human rights claim as clearly unfounded your client may not appeal until after he has left the United Kingdom.

72. In light of the above, it remains UK Visas and Immigration's intention to return your client to Bulgaria."

**The judicial review**

[5] The petitioner sought judicial review and challenged inter alia the certification by the respondent of the claim as clearly unfounded. The effect of a successful challenge by judicial review would allow the petitioner to appeal from within the UK to the First-tier Tribunal against the decision to remove him and for the First-tier Tribunal to determine on the evidence whether the petitioner's claim for ECHR violation was made out. In the judicial review, the petitioner relied on further evidence which had not been before the respondent which included an expert report by Radostina Pavlova dated 19 December 2016. The Lord Ordinary in his opinion reported [2017] CSOH 97 paragraph 30 concluded:

> "For these reasons there is in my opinion insufficient evidence from which a First-tier Tribunal would be entitled to conclude that if the petitioner were returned to Bulgaria these were substantial grounds for believing that there was a real risk that the conditions in Bulgaria would amount to a violation of his rights under Article 3 ECHR."

The Lord Ordinary refused the petition.

**Summary of the Legal Framework applied by the Lord Ordinary**

[6] The Lord Ordinary set out the general legal framework under reference to the Common European Asylum System (the CEAS) which includes the criteria and mechanisms set out in Council Regulation (EU) Number 604/2013 (commonly called the Dublin III Regulation). Also relevant are Council Directive 2013/33/EU (commonly referred to as the reception directive) which sets out minimum standards for the reception of applicants for

asylum and Council Directive 2011/95/EU (commonly referred to as the qualifications directive) which sets out obligations on member states to those recognised as refugees. He applied the approach which he adopted in *IMI*, *petitioner* [2016] CSOH 102 at paragraphs 1, 9-13 and 15. In paragraphs 9 to 11 of *IMI*, he considered the certification powers of the Secretary of State and the UK domestic appeal system. He made reference to the importance of the principles set out in *R (EM (Eritrea))* v *Secretary of State for the Home Department* [2014] AC 1321. He then recorded in paragraph 13 of *IMI* the approach urged upon him by the parties as follows:

> "[13] The parties are agreed that in a judicial review of a Clearly Unfounded Certificate the following principles of law apply.
>
> (a) The court is as well placed as the Secretary of State to decide whether on any legitimate view a human rights claim could succeed in the FTT. Therefore it should do so, rather than reviewing the certificate on *Wednesbury* grounds; *R (Elayathamby)* v *Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) at paragraph 15; *R (Medhanye)* v *Secretary of State for the Home Department* [2011] EWHC 3012 (Admin) at paragraph 6; *R (EM (Eritrea)*) at paragraphs 69-70; *R (MS)* v *Secretary of State for the Home Department* [2015] EWHC 1095 (Admin) at paragraph 97.
>
> (b) The court 'must examine the foreseeable consequences of sending a (petitioner) to the receiving country bearing in mind both the general situation there and the (petitioner's) personal circumstances including his or her previous experience'; *R (EM (Eritrea))* paragraph 70.
>
> (c) The court should take the facts at their highest in a petitioner's favour. Lord Kerr at paragraph 8 in *R (EM (Eritrea))* used the phrase 'reasonable height'. Mr Dewar questioned what that meant. But I think it means that any inferences that are to be drawn from the evidence must be reasonable and not perverse. It does not relieve the court of its task of considering whether there is any merit in the petitioner's legal arguments (*R (EM (Eritrea))* at paragraph 8; *R (Tabrizagh)* v *Secretary of State for the Home Department* [2014] EWHC 1914 (Admin) at paragraph 4 and 169). It does not mean that the court is bound uncritically to accept reports on which the petitioner relies 'if either, they are seriously flawed or unreliable, or if there is other relevant material to which the FTT would be bound to give greater weight, such that (the court) can be confident that (the petitioner's) claims would be bound to fail or accept that the petitioner's account of his experiences in Italy is credible; *R (Tabrizagh*) at paragraphs 4, 169 and 188; *R (MS)* at paragraphs 118 and 147.
>
> (d) It is therefore unnecessary for the court to consider whether there are any errors of law in the reasons that the Secretary of State gave for the Clearly Unfounded Certificates in these cases. If the court finds that, on any

> legitimate view of the evidence before it, a petitioner could succeed before the FTT it must reduce his Clearly Unfounded Certificate. It must do so even if there are errors in the reasons because these are immaterial; see *A* v *The Secretary of State for the Home Department* 2015 SLT 306 at paragraph 23 and *R (Weldegabler)* v *The Secretary of State for the Home Department* [2015] UKUT 00070 (IAC) at paragraph 16.
> (e) The consequence of success in a petition for judicial review of a Clearly Unfounded Certificate (in the absence of a lawful replacement) is that the petitioner may exercise his right of appeal to the FTT (on human rights grounds) against a decision to remove him prior to his removal from the United Kingdom."

**Submissions on behalf of the parties in this reclaiming motion**

[7] This court had the voluminous papers which had been before the Lord Ordinary and additional papers including updated information and a report from a second expert, Dr Valeria Ilareva, dated 10 July 2018. Counsel for both parties agreed that this court should consider all the evidence and we were addressed at length about the evidence.

[8] Counsel for both parties sought to persuade this court that we should consider all the evidence now available and that our decision making should not be limited to a consideration of the decision making of the Lord Ordinary focused on judicial review on Wednesbury grounds of the decision making of the respondent on the material before the respondent. Neither counsel made any submissions about the decision making of the respondent. Counsel for the respondent sought to focus on the decision making of the Lord Ordinary and submitted that in the event of the Lord Ordinary having fallen into material error of law, this court was invited to decide the issue taking into account all the evidence.

***Submissions by counsel for the petitioner***

[9] Counsel for the petitioner presented the case on the basis that there was evidence from the petitioner that during his period of months in detention in Bulgaria as an asylum seeker, the conditions were so appalling that his Article 3 rights were contravened. Thereafter on release, when he had refugee status, he was left homeless and destitute without any practical or other support, at risk from criminal gangs and discrimination and unable to speak the language. In consequence he fled Bulgaria in fear of his life. Counsel submitted that the evidence produced about the general conditions in Bulgaria for asylum seekers and for refugees, disclosed that the situation faced by refugees in Bulgaria and, in particular, a late returnee such as the petitioner, surpassed the minimum level of severity which would entitle a First-tier Tribunal to legitimately find a breach of Article 3 even in circumstances where there was an evidential presumption that Bulgaria will comply with international obligations. The First-tier Tribunal would be entitled to take into account the totally unacceptable conditions disclosed by important reports such as the UNHCR and the UN Human Rights Committee. Updated information was provided in the two more recent reports instructed on behalf of the petitioner from persons of relevant expertise which focus on the conditions of refugees. Counsel did not accept the criticisms by counsel for the respondent of the expert reports. He submitted that there was ample evidence of persuasive weight to enable the petitioner to succeed before the First-tier Tribunal. In summary he submitted that

> "the evidence before the Lord Ordinary and now before this court was and is of a young, vulnerable refugee, who is a low skilled Syrian facing homelessness and destitution whilst living in a society which, in practical reality, has a policy of zero integration. The respondent has produced no evidence to contradict that likely outcome. Rather, she relies on an evidential presumption that fails to engage in the practical realities on the ground in Bulgaria .. there is a realistic prospect that an FT Judge would, in light of the evidence before him or her, conclude that the

> presumption is rebutted in this case and that the petitioner would face a real risk of his Article 3 rights being breached if returned to Bulgaria."

***Submissions by counsel for the respondent***

[10] Counsel relied heavily on the evidential presumption that Bulgaria will comply with relevant obligations and the absence of any current prohibition of the return of asylum seekers or refugees to Bulgaria by the European Court of Human Rights or by any international organisation such as UNCHR. Counsel accepted that it was not for the Lord Ordinary or this court to decide the merits of the case and submitted that the correct test in law was applied by the Lord Ordinary. The test was whether on any legitimate view of the evidence, the First-tier Tribunal judge could find that substantial grounds existed for believing that there is a real risk that the petitioner would suffer treatment contrary to Article 3 of the ECHR if the respondent removed him to Bulgaria. Counsel submitted that there was no material error of law by the Lord Ordinary. Even if the Lord Ordinary erred in misdirecting himself, any error was not material. As a generality, he submitted little weight attached to privately commissioned reports. In this case even if the report rejected by the Lord Ordinary was accepted, the report does not testify to conditions of a minimum level of severity required to contravene Article 3 ECHR.

[11] Counsel under reference to the grounds of appeal, submitted that the Lord Ordinary had not materially erred in law in his reasoning which led him to make his findings. In the event that this court found there was a material error in law by the Lord Ordinary, the question for this court is whether on the basis of all the material now placed before the court, this court considered that on any legitimate view of the evidence before the hypothetical First-tier Tribunal, it could find that substantial grounds have been shown for believing that there is a real risk that the petitioner would suffer treatment contrary to Article 3 ECHR.

[12] Counsel accepted that the court was entitled to take the petitioner's evidence at its reasonable height under reference to *R (EM (Eritrea))* v *Secretary of State for the Home Department* [2014] AC 1321 at paragraph 8. Under reference to *R (Tabrizagh)* v *Secretary of State for the Home Department* [2014] EWHC 1914 (Admin) at paragraphs 4 and 169, he submitted that the court is not bound to uncritically accept evidence which is seriously flawed or unreliable or if there is other relevant material to which the First-tier Tribunal would be bound to give greater weight. He referred to a number of general principles about a breach of Article 3 which appeared to be uncontroversial. This court should direct itself in accordance with accepted legal principles, as would the First-tier Tribunal, in considering whether there was a breach of Article 3. Regard must be had to the significant evidential presumption that Bulgaria will comply with obligations including obligations under the ECHR and the qualification directive. The court was asked to consider a number of principles in answering whether the presumption is rebutted. The court was also invited to consider the factual and expert evidence in detail subject to many detailed criticisms, comments and assertions about the weight of evidence. This included detailed criticisms of the reports by Ms Pavlova and Dr Ilareva which counsel submitted carried very little weight. He listed many detailed and varied reasons including assertions that a report was irrelevant, inaccurate, outwith expertise, contradicted by other information and overstated. Counsel submitted that the First-tier Tribunal could not legitimately find on the evidence available that the presumption was rebutted and the test met.

[13] In addition, counsel submitted that even if evidence provided by the petitioner was entitled to weight, the First-tier Tribunal could not legitimately find that the test was met because the petitioner was not supported by respected reports by national, international and non-governmental organisations monitoring the situation of refugees in Bulgaria. Reference

was made to *MSS* v *Belgium and Greece* (2011) 53 EHRR 2. He submitted that reports lodged did not demonstrate the minimum level of severity required for a breach of Article 3. Counsel provided a detailed analysis of evidence before the Lord Ordinary, but not relied on by the Lord Ordinary, which demonstrated that living conditions for refugees in Bulgaria do not reach the minimum level of severity. Finally he submitted that there was no evidence that there is a real risk that the legal system in Bulgaria would not provide the petitioner with sufficient protection from a breach of his rights under Article 3.

**Decision and reasons**

[14] I am grateful to counsel for both parties for their detailed revised written notes of argument which were adopted and for their oral submissions. There was complex and extensive case law cited. There appeared to be some dispute between the parties about the relevant law and the approach to be applied by this court in considering a reclaiming motion for judicial review of a clearly unfounded certification where there was new evidence not placed before the Lord Ordinary. Parties accepted that Bulgaria was a member of the European Union, and accordingly there was a significant evidential presumption that as a member state Bulgaria would comply with the international obligations in relation to asylum procedures, reception conditions and treatment of refugees. The petitioner raised in evidence whether in fact those obligations would be fulfilled in the circumstances in which the petitioner would be returned to Bulgaria as a refugee. It was a matter of dispute between the parties whether the evidence was capable of rebutting the presumption. There was a major dispute about the weight to be given to the voluminous documents lodged as evidence and the conclusions properly to be made. Counsel for both parties agreed that if this court accepted that, on a legitimate view of the evidence before it, a human rights claim

could succeed before the First-tier Tribunal, it must reduce the clearly unfounded certificate issued by the respondent.

[15] I have concerns about the general approach which has been urged by counsel upon this court and the Lord Ordinary in a case such as this where there are disputed facts, complex law and in circumstances where there is extensive new evidence available which was not before the respondent when the "clearly unfounded" certification was made. In some cases a practice has developed, as illustrated, for example, in *R (HK) Iraq and others* v *SSHD* [2017] EWCA Civ 1871, Lord Justice Sales paragraph 5. For practical reasons, such as to avoid the need for a fresh certification decision based on further evidence and a potential new judicial review claim in relation to a new certificate judges have been invited to subject the original certification decision of the Secretary of State to judicial review and further consider, as at the date of judgment, whether the "clearly unfounded" test in paragraph 5(4) was satisfied in respect of the ECHR claims in light of further evidence produced to the court. In other cases cited by the Lord Ordinary in *IMI* in paragraph 13, the first step is omitted and the judge has been invited to consider himself in as good a position as the respondent to consider the test taking into account new evidence not available to the respondent. Counsel for the respondent invited this court at the appeal stage to consider the decision making of the Lord Ordinary and in the event that this court concluded there was a material error of law to consider all the information, including the new information placed for the first time before this court, in order to come to a view as to whether on any legitimate view of all the evidence the petitioner could succeed before the First-tier Tribunal. Counsel for the petitioner submitted that this court should decide the issue in the case on the basis of all the evidence now provided.

[16] I consider that with all the layers of decision making and predictions about what a hypothetical First-tier Tribunal might do on the basis of evidence which is seriously disputed and criticised, there is a risk that the function of the court in judicial review proceedings and any subsequent appeal is overlooked.

[17] In judicial review proceedings relating to the decision making of the respondent, I consider that the focus of the Lord Ordinary should be on the review of the decision making of the respondent on the basis of the material available to the respondent. I note that in his opinion the Lord Ordinary did not address this and did not carry out such an assessment. Possibly because of the submissions made to the Lord Ordinary he identified the issue for consideration in the present case in paragraph 8 and stated:

> "In my opinion the issue for me is whether there is a sufficiency of evidence which, taken together with the other matters which the First-tier Tribunal would require to consider, would entitle the First-tier Tribunal to hold the human rights claim established".

The Lord Ordinary then considered some of the evidence made available to him namely the UNHCR reports of 2014, the UN Human Rights Committee decision of December 2016 and a report from Radostina Pavlova described as an independent legal expert. He considered the weight which should be given to the Pavlova report and in paragraph 24 reached a view that "he would not be entitled in circumstances such as these .." to conclude that "there was a substantial risk of violation of Article 3 on the basis of one privately commissioned report ..". He appeared to be influenced in this conclusion by the opinion of Sales J in *R (Elayathamby)* v *The Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) about the weight to be given to reports. Having considered criticisms of the Pavlova report, the Lord Ordinary concluded that there is

> ".. insufficient evidence on which a First-tier Tribunal would be entitled to conclude that if the petitioner returned to Bulgaria there were substantial grounds for

> believing that there was a real risk that the conditions in Bulgaria would amount to a violation of his rights under Article 3 ECHR".

I also note that the Lord Ordinary did not deal with all the evidence produced to him. There was a chapter of evidence before him which was the subject of specific and detailed criticism by counsel for the respondent in the submissions made to this court.

[18] This is a case in which the facts are complex and disputed. There is no agreement as to the conditions for refugees in Bulgaria either at the time of the respondent's decision, the time of the Lord Ordinary's decision when he considered new evidence or at the date when this court was invited to consider further new evidence. When deciding whether an asylum claim is capable of succeeding, it is customary for the court to take the facts at their highest in the claimant's favour (*R (EM (Eritrea))*, paragraph 8). Counsel for the respondent said he accepted this but nevertheless embarked on a sustained attack on the evidence on which the petitioner sought to rely.

[19] The appellant in this case has personal experience of what he claimed are the conditions he suffered as a refugee in Bulgaria. The evidence before this court disclosed serious problems for refugees. The fact that no international organisation has thought it necessary to impose a complete ban on sending refugees back to Bulgaria cannot in my opinion be interpreted as an acceptance that there are no serious problems for refugees in Bulgaria. It is plain from some of the reports that the focus of some of the international organisations was on the dire conditions of asylum seekers in detention. It is not at all clear that international organisations have researched, documented and assessed current conditions for refugees. There was certainly no clear information from such international organisations to indicate that at any recent period there was a functioning system to support and protect all refugees in Bulgaria from Article 3 non-compliant treatment. I consider that

the weight to be given to any international or inter-governmental organisation report will vary taking into account factors such the relevancy of the report to the particular case and the date thereof. Obviously in a case where an international organisation has called for a halt to a transfer of refugees to a particular country, such information may, in an appropriate case, be regarded as "pre-eminent and possibly decisive". But the absence of such a recommendation by the international organisation does not mean that no legal obstacles exist in respect of a particular transfer and that the court should assume that all is well in relation to conditions. I agree with the general approach of Lord Kerr in *R (EM (Eritrea))* at paragraph 74 where referring to a report by UNHCR he stated "The UNHCR material should form part of the overall examination of the particular circumstances of each of the appellant's cases, no more and no less." I do not consider that privately commissioned reports about country conditions for refugees must necessarily have little weight merely because the report is privately commissioned. Indeed I consider that such a report may be of considerable assistance in identifying and explaining conditions by reference to such material and information which is available and giving context to the problems faced by a particular individual. And where there are serious disputes about the weight and interpretations of evidence in such a case I am not persuaded that this court is the proper forum to resolve, as if at first instance, such matters on appeal in judicial review proceedings. I consider that the approach to apply is that adopted in *R (EM (Eritrea))* and I note that the Supreme Court referred the case to the appropriate court for a proper examination of the evidence.

[20] On the basis of the information before the Lord Ordinary, I consider that there was information sufficient at least to raise a case to be tried as to whether the enforced return of the petitioner to Bulgaria would violate his Article 3 rights and I am not persuaded that the

petitioner must necessarily fail. The petitioner seeks to present evidence for consideration by the First-tier Tribunal that despite the presumption that Bulgaria will comply with its ECHR obligations, it is likely that the obligations will not be fulfilled in practice in the reality of conditions current in Bulgaria. Criticisms may be made of the privately commissioned report and other evidence relied on by the petitioner before the Lord Ordinary but I do not consider that the Lord Ordinary in a judicial review is in the position of a fact finder and he was not well-placed to decide about the weight and interpretation of evidence in a case such as this.

[21] The petitioner offers to prove facts about the practical realities of life for refugees such as himself returning to Bulgaria and further offers to prove that there is a real risk of Article 3 ill-treatment to him if there is an enforced return. It is important that the courts do not usurp the fact finding functions of the First-tier Tribunal. In certain circumstances it may be possible and appropriate on the material presented to a Lord Ordinary to come to a conclusion that even taking into account new evidence, the evidence was not capable of overcoming the evidential presumption and the case must necessarily fail. But I do not consider that this is such a case.

[22] I am fortified in that conclusion when I take into account the additional material presented to this court. The issues raised by the petitioner are complex in fact and law and the weight to be given to evidence is a matter properly determined by the fact finder and not by this court. The detailed nature of the criticisms made by counsel for the respondent of the material before this court merely underlined that the issues involved and the resolution of the evidential material are difficult and are capable of more than one determination. It is certainly not obvious that certification as clearly unfounded was the inevitable conclusion.

[23] I am of the opinion that it should be a matter within judicial control as to whether or not the court will entertain new evidence. I do not consider that the judicial review process should be diverted from its proper focus which is the review of the decision making of the respondent's decision to certify the human rights representations as clearly unfounded in her decision dated 15 September 2016. The mere fact that parties, for their different reasons, find it convenient to deal with the matter in the way which they have presented this case, does not mean that the court should necessarily entertain new evidence in judicial review proceedings particularly in circumstances where that evidence is extensive and capable of many different interpretations, and the weight to be given to the evidence is open to reasonable dispute.

[24] I agree with the comments of Lord Malcolm. For these reasons we grant the order of reduction sought by the petitioner. The case will be put out By Order to allow parties to address the court, if they wish, on the form of the interlocutor and expenses.


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[24] I agree with Lady Clark of Calton that this reclaiming motion should be allowed, and this for the reasons given by her Ladyship. I share the concerns expressed, for example at paragraphs 14/15 of her opinion, and wish to offer some general observations in that context.

[25] It is correct that, in general, the focus in judicial review proceedings should be on the decision under challenge, and the information upon which it was based. Nonetheless it is clear from the case law that in challenges against "clearly unfounded" certificates (and in "fresh claim" cases) it is commonplace for additional material to be lodged and for it to be taken into account by the court. Indeed in the present case a bench of the Inner House

allowed new reports to be lodged in advance of the appeal hearing. I agree with her Ladyship that the court should not be bound to accept new information. I suspect that it often does so in recognition that, in cases of this kind, the core question is whether the claim would be hopeless if placed before an immigration judge, who would be required to consider the up to date position as reflected in all the evidence relied upon, not simply that which was before the Secretary of State. To ignore or leave aside potentially relevant material would simply invite another application to the Secretary of State. Though a departure from traditional judicial review procedures, I consider that this approach can be supported and justified, not least in cases where such serious issues are at stake. That said, in my opinion it should be accompanied by a recognition that the jurisdiction of the reviewing judge remains subject to important restraints.

[26] There will be cases where it is clear that much can be said in favour of a claim, and that, although it has been refused, a different decision would be available to a tribunal judge, and thus a "clearly unfounded" certificate should be quashed. There will be cases where the opposite applies and it is plain that a certificate is appropriate. Indeed, if a claim is "clearly unfounded", that should be obvious and capable of determination and explanation with a minimum of fuss and deliberation. There will be a third category falling between the two extremes. It is in respect of such cases that difficulties can arise. *NA (Sudan)* [2016] EWCA Civ 1060 provides an example. The Court of Appeal was considering two appeals concerning refusals of challenges to "clearly unfounded" certificates in respect of claims that return to Italy would breach the appellants' article 3 rights. In the first case Lewis J considered *NA*'s case along with those of *MS* and *SG*, and provided what was described as a "very substantial" judgment in which he considered "a great deal of evidence" relating to asylum-seekers and beneficiaries of international protection (BIPs) in

Italy. Whipple J issued a shorter judgment in *MR*'s case based upon the other decision. (Thereafter the claims of *MS* and *SG* were compromised.)

[27] In the Court of Appeal the leading judgment was given by Underhill LJ. It runs to 242 paragraphs, plus a 17 paragraph appendix. (The other judges simply agreed with it.) It is a monumental judgment, not least in the explanation of the legal framework, the case law, and the general principles to be applied. In considerable detail his Lordship considered the facts of the two cases before the court and Lewis J's assessment of the evidence. His response to the grounds of appeal runs to 90 paragraphs, and includes a consideration of a large number of reports, some from UNHCR, some from other official bodies, and some from privately commissioned individual experts, including from a lawyer at the Rome bar specialising in immigration and asylum law. It was considered that the judge below had been overly dismissive of her report, and of another report, but it did not follow that the appeal should be allowed – paragraph 209. Underhill LJ addressed the claimants' experiences in Italy and whether, overall, the evidence established a risk of breach of article 3. At paragraph 218 his Lordship concluded:

> "Taken as a whole, this evidence does not in my view justify the conclusion – contrary to the evidence of Mr Dangerfield – that there is a real risk that NA would not if returned be found a SPRAR place (ie a centre providing accommodation, food, healthcare etc for BIPs) if she were judged sufficiently vulnerable to require one."

The learned judge was "sure" that *NA* would not be abandoned by the system, though he recognised that many BIPs returned under the Dublin Regulation to Italy lived in deplorable conditions. The evidence did not support the proposition that they included people returned from the UK in the circumstances in which *NA* would be returned, and who nevertheless ended up on the streets – see paragraph 220. Accordingly the judge agreed with Lewis J's conclusion that the conditions for BIPs returned to Italy under the Dublin

Regulation were not such that there was a real risk that *NA* would suffer inhuman or degrading treatment. Whipple J's decision to a similar effect in respect of *MR* was also upheld.

[28] It is however clear that Underhill LJ was troubled. Having dismissed both appeals he added the following at paragraph 242:

> "There is one observation that I wish to make by way of coda. I think it is a pity that the issues raised in these cases have had to be decided in the context of a judicial review challenge to a certification decision. In a certification challenge the Court has to focus not on what it believes is the right decision but on what a tribunal – which is in principle the primary forum for determination of the underlying issues – might decide: that is an inherently awkward exercise, and it carries the risk that if the Court believes that the answers are less than clear-cut the litigation will have to start all over again in the tribunal (as nearly happened in *EM (Eritrea)*). Also, the judicial review procedure is less well-adapted to deciding disputed issues of primary fact or expert evidence: indeed the types of issue raised by a case of this kind would be peculiarly suitable for the employment of a version of the 'country guidance' procedure of the Upper Tribunal."

[29] I would respectfully agree with the above observations and perhaps carry them a stage further. The decisions of Lewis J, Whipple J, and of the Court of Appeal, are but examples of judges, when dealing with challenges to certification decisions, being drawn into adjudicating on the merits of an arguable claim. Once judges have engaged in detail with the evidence and submissions on either side, and have reached an adverse decision, it is a short step to pronouncing themselves satisfied that the specialist tribunal could not properly conclude otherwise. As is implied in Underhill LJ's remarks, in such circumstances the court has stepped outside its jurisdiction and trespassed on that allocated to the tribunal system. The risk is at least mitigated if throughout it is kept firmly in mind that the issue is whether the claim is properly certified as "clearly unfounded". If a judge does address and reach a decision on the merits of a claim, it will be important not to allow that decision to

influence the "inherently awkward exercise" of considering what a tribunal might reasonably and legitimately decide.

[30] If a decision of a reviewing judge against a claimant is appealed, there is then a risk that the appeal court addresses itself as to whether the judge's conclusions on, for example, risk on return, are justifiable on the facts – see for example the reasoning of Sales LJ (as he then was) in *R (HK Iraq)* [2017] EWCA Civ 1871. In other words the appeal court's attention can become focused on whether, in the whole circumstances, the judge below was entitled to reach an adverse decision on the merits of the claim, as opposed to whether it was correct to categorise the claim as "clearly unfounded", which depends upon whether a different view was open to a tribunal judge.

[31] One can see something similar happening in the decision of Lord Boyd of Duncansby (also the Lord Ordinary in the present case) in *Petition of IMI and others* [2016] CSOH 102. In deciding how a First-tier Tribunal "would be bound to view (the) evidence" he reached his own view on the claims at issue, being heavily influenced by observations about privately commissioned reports expressed by Sales J (as he then was) in an earlier case. In each of the cases before him his Lordship held that there was "insufficient evidence" in support of the claims, thus the "clearly unfounded" certificates were valid. On the face of it this was simply the result of his Lordship's own assessment of the claims – see paragraphs 87/90.

[32] The effect of a certificate is that the claimant cannot exercise his right of appeal to a tribunal judge until after his return to the country which he contends will violate his article 3 rights. That outcome can be understood and justified if and when it is plain that such an appeal could achieve no more than a delay of the inevitable, in that it is clearly without substance and is bound to fail. Assessing whether a claim is bound to fail before an immigration judge is a materially different exercise from a determination of its merits. It

requires a distinct and separate process of deliberation and reasoning. It is a necessary consequence of the current system that the Secretary of State's officials have to address the issue after reaching and explaining an adverse decision on the merits of a claim. That necessarily adds to the inherent awkwardness of the exercise, in that one requires to revisit the various building blocks of the decision and ask whether if at any stage an alternative decision could be taken and, if so, the potential impact of such upon the ultimate outcome. However these issues need not be faced by the reviewing judge whose only concern is as to the validity or otherwise of the certificate. To borrow Lord Justice Underhill's phrase, if the answers are "less than clear-cut", this in itself suggests a problem with a "clearly unfounded" certificate.

[33] As the discussion at the appeal hearing proceeded it became clear that there is more than sufficient material in support of the claim to justify quashing the certificate. The court was urged to examine all the material and form a view on whether a return to Bulgaria carried the necessary level of risk for the petitioner to amount to a breach of his article 3 rights. The Lord Ordinary answered this in the negative by placing considerable weight upon his understanding of the UNHCR material, and in particular the absence of a current call from that body that transfers to Bulgaria should stop. Allied to this his Lordship decided that no weight should be given to a report on conditions in Bulgaria provided by an individual commissioned on behalf of the petitioner. Nothing was said about the other evidence and material relevant to the matter, including the petitioner's own experiences. In my view the criticisms expressed by the Lord Ordinary, and by counsel for the Secretary of State to this court, as to the terms of the report are somewhat overstated, but this is truly a matter for a tribunal judge to assess in the context of all the other relevant information.

[34] The Lord Ordinary proceeded upon the basis that a tribunal judge would adopt the same approach as him and reach the same conclusions, but I would not be prepared to make those assumptions. Whatever else, that judge is likely to have regard to the guidance from the UK Supreme Court in *R (EM (Eritrea))* [2014] AC 1321 at paragraph 74 that the UNHCR material, much of which does raise significant concerns about the position in Bulgaria, should form only part of the overall examination of the particular circumstances – "no more and no less". The submission on behalf of the Secretary of State came close to rendering any claim of the present nature "clearly unfounded" unless it was accompanied by an express ban declared by UNHCR. The submission emphasised the evidential presumption of compliance, however, again as explained in *EM* (*Eritrea*), that is a rebuttable presumption to be explored on a case by case basis. Furthermore I keep in mind that at this stage, namely the issue of certification, the facts are to be taken at their highest in the claimant's favour (*EM (Eritrea)* paragraph 8); an approach similar to that adopted when assessing a no case to answer submission in a criminal trial.

[35] I would reach these conclusions even without the new material lodged since the case reached the Inner House. As counsel for the Secretary of State urged us to look at parts of the voluminous material now before the court, and take certain views on it, and reject others, to my mind his submissions eloquently demonstrated that the claim, while it may well ultimately fail, does not qualify for a "clearly unfounded" certificate. To be fair to counsel, he proceeded upon the basis of an express invitation on his part to the court to fully engage with the substance of the matter and thereby avoid any need for it to proceed to the tribunal system. In that regard, I refer again to the coda attached to Underhill LJ's opinion in *NA (Sudan)* – see above.