R (on the application of Hassan and Another) v Secretary of State for the Home Department (Dublin – Malta; EU Charter Art 18) IJR [2016] UKUT 00452(IAC)

In the Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision

The Queen on the application of Ismail Mohamed Hassan
and Omar Hassoon Karada

Applicants

v

Secretary of State for the Home Department

Respondent

Decision of the President, The Honourable Mr Justice McCloskey and Upper Tribunal Judge O'Connor: the application for judicial review is refused

On this application for judicial review and following consideration of the documents lodged by the parties and having heard Mr R Drabble QC and Ms A Radford (of counsel), instructed by Laurence Lupin solicitors on behalf of the Applicants and Mr D Manknell (of counsel), instructed by the Government Legal Department on behalf of the Respondent at hearings conducted on 15 June and 18 July 2016

(i) *There have been significant developments in Malta during recent years. While there may be imperfections in the Maltese asylum decision making processes, these are not sufficient to preclude returns under the Dublin Regulation and, in particular, do not amount to a breach of Article 18 of the EU Charter.*

(ii) *While Article 18 of the EU Charter confers rights of a procedural nature, the evidence does not establish that these will be infringed in the event of either of the Applicants pursuing a fresh asylum claim in Malta.*

(iii) *The limitations of the mechanisms available under Maltese law for challenging refusal of asylum decisions do not infringe Article 18 of the EU Charter.*

(iv) *In judicial review, decisions of the Administrative Court are not binding on the Upper Tribunal: Secretary of State for Justice v RB [2010] UKUT 454 (AAC) applied.*

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(v) *Per curiam: Article 18 of the EU Charter provides an avenue for challenging transfer decisions under the Dublin Regulation.*

(vi) *Per curiam: Where a Dublin Regulation transfer decision is challenged under Article 18 of the EU Charter, the ECHR "flagrant breach" standard does not apply. Rather, the test is whether there is a real risk of a breach of Article 18.*

JUDGMENT

Handed down on 28 September 2016

McCLOSKEY J

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GLOSSARY

The Charter: The Charter of Fundamental Rights of the European Union.

The CEAS: The Common European Asylum System

The Dublin Regulation: Regulation (EU) No 604/2013 of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

JRS/JRSM: The Maltese Jesuit Refugee Service.

RAB: Refugee Appeals Board of Malta.

RC: Refugee Commissioner of Malta.

(I) INTRODUCTION

(1) Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter the "*Charter*") occupies centre stage in these proceedings. Under the rubric "Right to asylum", it provides:

> "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*"

Article 18 forms the cornerstone of the Applicants' challenge. The Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), has decided that the Applicants must be transferred under the provisions of the current Dublin Regulation (Council Regulation EC No 604/2013) from the United Kingdom to the island of Malta, being the EU state which both first entered following a journey from Libya in 2011. The central pillar of the Applicants' cases, which have been advanced without distinction, is that the implementation of this decision would result in a violation of their rights under Article 18 of the Charter.

(2) The essence of the riposte on behalf of the Secretary of State is that the decision of the Upper Tribunal in R (Hagos) v Secretary of State for the Home Department [2015] UKUT 0271 (IAC) ("Hagos") and that of the High Court in R (Hamad and Ararso) [2015] EWHC 2511 (Admin) ("Hamad & Ararso") are determinative of the issues. It is further contended that only a breach of either Article 4 or Article 19 of the Charter, neither of which is asserted, can prevent the proposed removal of the Applicants. The battle lines are thus drawn.

(II) FACTUAL MATRIX

(3) The factual matrix of each challenge is essentially uncontroversial and, as appears from the two summaries which follow, the Applicants have much in common. Furthermore, while the facts asserted by the Applicants are not formally admitted and there are no formal concessions on behalf of the Secretary of State, the proceedings have been conducted on the basis that there is no substantial factual controversy. While this, of course, is not binding on the Tribunal, having subjected the Applicants' assertions to appropriate scrutiny, we find no reason for rejecting or disbelieving any material aspect of their accounts.

Mr Hassan

(4) The first of the two Applicants, Mr Hassan, surrendered to police in the United Kingdom on 02 August 2014. He volunteered that he had entered the United Kingdom illegally. This event constitutes the origins of these proceedings. A check of the Eurodac Database confirmed that the Applicant's fingerprints matched those taken from him on 29 April 2011 in Malta, on 26 November 2012 in Switzerland and on 18 January 2013 in Denmark. The Applicant had made a claim for asylum in all three countries.

(5) Mr Hassan claims to be a national of Sudan, with a date of birth of 20 June 1982. He further claims to be a member of the Berti tribe from Darfur, which is persecuted by the Sudanese Government as it is perceived to be an ethnic African tribe. This has resulted in the deaths of substantial numbers, including (it is said) this Applicant's brother. This Applicant claims to have been unjustifiably detained and then tortured by the Sudanese police. He asserts significant physical and mental injuries in consequence.

(6) Mr Hassan claims to have escaped to Libya, where he remained for a period of months, at which stage he paid for his transition to Europe by boat, arriving in Malta where, he claims, he was detained and his fingerprints were forcibly taken from him. With the assistance of an unknown fellow detainee a form, evidently designed to record asylum claims, was completed. The Applicant claims to have no understanding of what was written and asserts that no legal advice, interpreter services or other facilities were available. This was followed by an interview which, in terms, he claims was perfunctory and inadequate as he could not answer questions about the contents of the completed form. Then there was a second interview, attended by an interpreter followed by an essentially anodyne consultation with a lawyer. Mr Hassan learned at some unspecified stage that his asylum application had been refused.

(7) Mr Hassan was confined in close detention conditions in Malta for approximately one year. He asserts significant inadequacies, including substandard facilities, a lack of privacy and a failure to respect the basics of human dignity in the conditions in which he was detained. Following his release, he was accommodated in shipping containers in an open detention centre where he remained for about one year. He at no time received legal, social, medical or other support. Thereafter he was obliged to forage for himself. Having secured employment on a construction site where he saved some money and conscious of his vulnerability to arrest on account of his irregular immigration status, he made arrangements to travel to Switzerland (*supra*). From there he travelled to Denmark where from he was forcibly returned to Malta.

(8) Upon arriving in Malta for a second time, Mr Hassan was arrested, detained, convicted in a criminal court and sentenced to six months' imprisonment. Having served his sentence, he found himself without any assistance or support once again. He managed to re-enter the open detention camp by stealth and, further, to secure employment for a period of some months. Aware of a general warning that all unsuccessful asylum claimants would have to leave the camp by June 2014 and fearing for his life if compulsorily repatriated to Sudan, he left Malta and travelled to the United Kingdom via Italy and France. In the pre-action protocol letter, his solicitors formulated his case in the following terms:

> "*Our client fears that if he is returned to Sudan his life will be in danger or he will be tortured because of his ethnicity and because the Sudanese police believe he is a member or supporter of a group that opposes the Sudanese Government. Our client is also afraid that if he is returned to Sudan he will be arrested immediately upon arrival because the police know his identity and that he has failed to sign at the prison as per the conditions upon his release. Our client also fears return to Malta because of the manner in which the police treated him, including but not limited to, his arrest and six months'*

imprisonment, because there is a real risk of destitution and because there is a real risk that he may be returned to Sudan because he has no legal status in Malta following the refusal of his asylum application. In addition we submit that our client requires medical, psychological and material support because of his past trauma and experiences in Sudan and these will not be met if he is returned to Malta."

A real risk of forcible repatriation from Malta to Sudan is also asserted.

Mr Karada

(9) This Applicant also claims to be a national of Sudan, where he was born on 01 January 1984. He was arrested in the United Kingdom on 04 January 2014. A search of the Eurodac Database disclosed that he had previously claimed asylum in Malta on 29 April 2011.

(10) Mr Karada's account is that he is one of five siblings of a Sudanese family originating in Darfur. In 1992, when he was aged 8, an attack resulted in the destruction and loss of the family's dwelling and livestock and obliged them to relocate to a different area of Sudan, Aljazeera. There they remained until June 2008 when, following a further Janjaweed attack on the settlement, his parents and three sisters were killed. His brother fled and there has been no contact between them since. Following a period of some six months' detention, Mr Karada fled to Libya at the beginning of 2009. In April 2011, following the outbreak of the revolution there, he left Libya on a boat, travelling to Malta where he arrived in April 2011.

(11) Mr Karada asserts that he was detained in Malta for approximately 18 months in substandard and degrading conditions. Following his release, he was unsupported and destitute. He was one of 20 sharing a room in a camp of sorts. He claims that while he applied for asylum he does not know the outcome of his application. He departed Malta in December 2013 and arrived in the United Kingdom on 04 January 2014 having travelling through Italy and France. He asserts that his departure from Malta was motivated by the deplorable conditions in which he had been living there. Mr Karada's case is encapsulated in the following extract from his written statement:

> "*I cannot go back to Sudan because of the Al Bashir regime. I fear that I would be killed. I cannot go back to Malta because I had no rights of any kind and lived in total humiliation on the streets. I would prefer to go back to Sudan and be killed rather than going through which I endured in Malta.*"

(12) As appears from the outline in [7] – [11] above, the focus of the case made on behalf of Mr Hassan (in his solicitor's representations) and Mr Karada (in his statement) was the destitution and degradation which they claimed would be their fate in the event of having to return to Malta. This differs from the legal basis upon which their claims were, ultimately, promoted. Nothing of substance turns on this distinction.

(III) THE SECRETARY OF STATE'S DECISIONS

(13) In each case the decisions made on behalf of the Secretary of State followed upon the representations and evidence submitted by the Applicants' solicitors noted above. Both decisions are couched in comparable terms.

(14) In the case of Mr Hassan, the decision letter noted the acceptance by Malta of the United Kingdoms' request that the former accept responsibility for determining the Applicant's asylum claim in accordance with the provisions of the Dublin III regulation. Mr Hassan's case was certified under Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, the decision maker noting that Malta is party to the Refugee Convention, the European Convention and the series of EU asylum Directives. The decision maker concluded that the evidence was insufficient to displace the principle of mutual confidence or to rebut the strong evidential presumption that Malta would comply with its international obligations or to establish a real risk of treatment contrary to Article 3 ECHR. The decision maker further highlighted the absence of any new evidence post-dating the Hagos decision. The absence of any medical infirmity or other vulnerability peculiar to the Applicant was also emphasised.

(15) In the case of Mr Karada, the terms of the Secretary of State's decision are materially indistinguishable. This decision was affirmed in what is described as a "*supplementary refusal letter*" compiled following the initiation of these proceedings.

(IV) EXPERT EVIDENCE

(16) In this context, we record that Mr Manknell, on behalf of the Secretary of State, drew to our attention the judicial criticisms of the expert evidence in R (HK and Others) v Secretary of State for the Home Department [2016] EWHC 857 (Admin), a recent decision of the Administrative Court concerning the lawfulness of the repatriation of third country asylum claimants to Bulgaria. The context of the present litigation is quite different. Our first riposte is that the expert evidence in these proceedings has been produced timeously, in compliance with previous directions of the Tribunal and does not violate any equivalent of CPR35 in this jurisdiction.

(17) Furthermore, expert evidence is a long established phenomenon in Tribunal litigation and such evidence, where relevant, is admitted and is accorded such weight as specialised Judges consider appropriate. In addition, the rigorous standards and requirements applicable to expert evidence in proceedings in this Chamber do not differ in substance from those obtaining in the High Court and, in this context, we refer to MOJ and Others (Returns to Mogadishu) (CG) [2014] UKUT 442 (IAC) which contains a discrete chapter specially dedicated to this topic and deals with this Tribunal's Practice Direction: see [23] – [28]. The rigorous approach of this Chamber to expert evidence is further illustrated in AAW (Expert Evidence – Weight) Somalia [2015] UKUT 673 (IAC).

(18) We note the absence of any challenge to the expert credentials and qualifications

of any of the experts concerned. We are satisfied that the expert evidence in question is relevant, has been produced timeously and in compliance with case management directions, does not violate any procedural rule, is compliant with the Practice Direction and satisfies the test of materiality. Furthermore, there is no objection to its admissibility. Given this series of considerations recourse to the "indulgence" which the Administrative Court ultimately granted to the equivalent evidence in HK is not required. Accordingly, the long established approach of examining relevant and admissible evidence scrupulously and according to it such weight as the Tribunal considers appropriate falls to be adopted.

(19) The Applicants have enlisted the support of three experts whose evidence has, in the conventional way, been received in written report form.

(20) The first of these experts is Dr Bugre, who describes himself as a "*pastor and lawyer*" who has worked with asylum claimants for some 14 years and currently holds the appointments of Director for the Foundation for Shelter and Support to Migrants and Executive Chairman of Third Country National Support Network.

Dr Bugre describes himself as a conduit between migrants and lawyers, for the Jesuit Refugee Service ("*JRS*"), which counts lawyers among its membership. Very few Maltese lawyers practice in the realm of asylum law. Typically, a migrant is held in a detention centre for 12 – 18 months and then released to an open centre, where some financial allowance is payable. Dr Bugre highlights a lack of co-ordination among the various Maltese agencies – the Immigration police, the Refugee Commissioner (the "RC") and the Agency for the Welfare of Asylum Seekers. This he attributes to a combination of the high volumes of asylum claims and inadequate state resources.

(21) Continuing, Dr Bugre suggests that previously most detained asylum applicants received the customary letter documenting the decision on their claim prior to release. However, as pressures grew, releases were accelerated, with the result that many migrants did not receive the decision letter and, in consequence, appeals were not pursued. This prosaic difficulty was not remedied by transfers to open centres since residence there was not compulsory. As a result, Dr Bugre's agency was forced to return large numbers of decision letters to the RC. Furthermore, as a result of inadequate co-ordination, a lack of information and the unavailability of legal advice, coupled with the time limit of two months, appeals were rarely pursued in practice. Dr Bugre also observes that decision letters were routinely written in English and were inadequately detailed. The first of these two phenomena has been addressed "*recently*". He suggests that inadequate asylum interviews were commonplace. Certain migrants, particularly those from Darfur (Sudan), distrusted the JRS on account of the Eritrean nationality of some of its employees.

(22) Dr Bugre also highlights the phenomenon of many migrants taking medication to treat and remedy psychological conditions. The departure of many asylum claimants from Malta was precipitated by the inadequacies of the reception conditions and related facilities. Sudanese migrants perceived themselves to be the victims of discrimination, treated less favourably than those originating from Somalia, Ethiopia or Eritrea. There were few successful Sudanese asylum claims,

generally confined to the well-educated.

(23) Dr Bugre recounts the introduction of changes in 2015 stimulated by the recast Procedures Directive and the associated disappearance of mandatory detention. While critical of the medical facilities provided, Dr Bugre gives no description of any other changes, improvements or developments of any kind. We construe his witness statement as relating mainly to the pre-2015 period and, in particular, the "peak" phase between 2005 and 2013. One learns from this statement very little indeed about the reception conditions and related facilities and arrangements prevailing during the past two years.

(24) Dr Zannit and Dr Bonnici, both Doctors of Law attached to the Faculty of Laws of the University of Malta, are the joint authors of a report prepared specifically for the purpose of these proceedings, dated 18 April 2016. The expertise which they profess embraces the fields of asylum, immigration and human rights generally. As in the case of Dr Bugre, there is no challenge to their expert qualifications and credentials, which we accept.

(25) The detailed report of Dr Zannit and Dr Bonnici contains much factual material, together with a series of assessments and opinions. We would summarise the salient elements of their opinion evidence as follows:

(i) The Applicants' claims about their previous treatment in Malta harmonise with both the authors' researches and the statement of Dr Bugre.

(ii) The non-service of hundreds of decisions of the Refugee Appeals Board ("RAB"), some of several years vintage, is an uncontentious fact, openly accepted by the RAB itself.

(iii) While the regulations governing proceedings before the RAB admit of the possibility of an oral hearing, this lies within the discretion of the appointed chairman and occurs rarely in practice.

(iv) Since the Applicants were legitimately released from detention before departing Malta, this "…. *would not lead to* [them] *being detained upon return*".

(v) If either of the Applicants departed from Malta in an irregular manner, that is to say without the requisite travel documents or using a false document or using a document issued to another person, they are liable to be charged with a criminal offence, giving rise to remand custody in the Corradino Correctional Facility ("CCF") for up to 2 months and a conviction will foreseeably ensue. The free services of a lawyer would be available during any such process.

(vi) In the event of either Applicant being convicted, there can be no confident prediction of the likely ensuing penalty. The options include a maximum fine of some €11,000, imprisonment for a maximum term of 2 years, a combination of a fine and imprisonment and a suspended sentence.

(vii) The practice of automatic detention of irregular entrants has been

discontinued. Now new entrants are accommodated, medically screened and processed in a designated centre during a period of up to 7 days, during which they are informed of their right to apply for international protection and undergo a so-called "vulnerability" test to enable the provision of proper support and, where appropriate, age verification tests. These new processes are based on the recast Returns Directive.

(viii) The detention of irregular entrants can be effected only if the conditions of the Directive are satisfied.

(ix) A fresh application for asylum in Malta by either Applicant is unlikely to overcome the admissibility threshold, given the following factors:

> "*… The admissibility criteria are hard to know and to fulfil … legal aid is likely to be unavailable …. The procedures of the* [RC] *and* [RAB] *are largely conducted in secret, revolving around documents which are not translated and difficult to access and understand and there are, consequently, substantial information gaps between the asylum seeker and the applicable law.*"

(x) A decision of the Refugee Commissioner of Malta ("RC") dismissing a new asylum claim as inadmissible, gives rise to automatic review by the RAB within 3 working days. Experience demonstrates that this process is invariably unproductive.

(xi) While, in principle, returned unsuccessful asylum claimants such as the Applicants could seek to challenge the further decisions of the RC and RAB by judicial review, this remedy is purely illusory.

(xii) It will be possible for either Applicant to make a fresh claim for asylum in Malta. However, the statutory test of "*new elements or findings*" (*infra*), coupled with an admissibility threshold, would complicate the prospects of such a claim, which would be determined by the RC, succeeding.

(xiii) State funded legal advice is not available at the first instance either in respect of a first asylum claim or a subsequent such claim. While such assistance is available at the appeal stage, it suffers from inadequacies.

(26) The joint report of Dr Zannit and Dr Bonnici is a commendable piece of work. It is evidently well researched and comprehensive in its terms. Its structure is clear and comprehensible and the authors have addressed, in coherent terms, each of the questions they were requested to consider. Furthermore, the report is balanced. We detect no hint of partisanship or exaggeration. Certain parts of the report will require our detailed and critical scrutiny, an exercise to which we shall return at a later stage of this judgment.

(V) RELEVANT MALTESE LEGISLATION

(27) Within the materials which we have considered are certain measures of Maltese legislation, including in particular the Refugees Act 2001 as amended, the most recent amendment having been effected in 2015. Pursuant to the provisions of

Part II and Part III, the first instance decision maker is the RC and an appeal lies to the RAB, a body consisting of three members, one of whom must be a practising advocate with seven years' experience. By article 7 the decisions of the RC which may be challenged on appeal, include refusals of applications for protection and refusals on the ground of inadmissibility. Per article 7(2), an appeal to the RAB must be made within 15 days from the notification of the RC's decision. The RAB is obliged, by article 7(4), to provide an interpreter where required. Per article 7(5), there is a statutory right to free legal aid. By article 7(8) the RAB regulates its own procedure. Article 7A of the statute makes provision for a second, or subsequent, application by an unsuccessful asylum claimant. This provision is of particular importance in the context of the case made by both Applicants.

(28) We have also considered a related measure of subordinate legislation, namely the Procedural Standards for Granting and Withdrawing International Protection Regulations. In accordance with this instrument, decisions of the RC should normally be made within a maximum period of six months (Regulation 6); special procedural guarantees should be provided in appropriate cases (Regulation 7); delay in pursuing an application for protection is not conclusion (Regulation 8); all applications for protection must be subjected to appropriate examination (Regulation 8); the RC regulates his own procedure and must endeavour to gather all relevant information (Regulation 9); a personal interview of the claimant is obligatory (Regulation 10); all such interviews must be recorded (Regulation 11); free legal assistance shall be granted under the same conditions applicable to Maltese nationals and represented applicants must be permitted to consult their lawyer at all stages of the process (Regulation 12).

(29) Having regard to the main thrust of the Applicants' challenge, we consider that the most important aspects of the Maltese statutory measures are those relating to new/subsequent claims for asylum (which we shall describe as "a later application"). Viewed from this discrete perspective our analysis of the relevant legislation may be summarised thus:

(i) It is possible for an unsuccessful claimant for international protection to make a later application for such protection.

(ii) A later application shall be considered only if it contains "*new elements or findings*" of which the claimant could not have been aware or which he could not have submitted in the context of the initial application.

(iii) The time limit for making a later application is 15 days, measured from the date upon which the claimant obtained the new information.

(iv) The examination of a later application may – but not must – be conducted via the mechanism of written submissions.

(v) Upon receipt of a later application, the first question for the RC is whether it is admissible. A later application will be deemed inadmissible where it contains no "*new elements or findings*". A decision on admissibility is made via the mechanism of a "*preliminary examination*".

(vi) At this preliminary, admissibility stage, the test to be applied is whether "*new elements or findings have arisen or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection*". Furthermore, at this stage, the RC must be satisfied that the claimant was "*through no fault of his own incapable of concluding that new elements or findings have arisen*".

(vii) If the threshold outlined immediately above is overcome, the claim is subjected to "*further examination*". Where the assessment is that the requisite threshold is not overcome, the fresh, or further, claim is not processed according to the standard appeal procedure. Rather, such claims are assigned to the so-called "accelerated "procedure (per Articles 23 and 24).

(viii) The main consequences of assignment to the accelerated procedure are that a period of three working days for examination of the claim is triggered and there is no express right to an interview. <u>If</u> an interview is achievable, an interpreter must be provided and the claimant must be informed of his right to the services of a legal adviser.

(ix) Where the outcome of this accelerated examination is an assessment that the fresh, or further, claim <u>is</u> inadmissible, the RC formulates this as a recommendation to the Chairman of the RAB who is the final decision maker and whose decision, in theory, may not be challenged in any Court.

The most important consideration is that the full suite of procedural safeguards does not apply to claims assigned to the accelerated determination procedure.

(30) Insofar as the Applicants' expert evidence does not concur with the foregoing analysis we do not accept it. We differentiate this from the experts' evidence relating to certain aspects of how the Maltese legislation is applied in practice. A paradigm example of this is the operation of the 15 day time limit noted in [29](iii) above. Based on information provided by the RC himself, the experts' evidence on this discrete issue is that this time limit is rarely applied in practice and, where it is applied, it operates as a further, rather than the sole, ground for deeming a subsequent application manifestly inadmissible. We accept this evidence.

(31) There is no challenge to the experts' evidence, which we accept, that under Maltese law a right to free legal assistance does not exist at the stage of first instance decision making. This right is confined to the appeal stage. We accept this evidence. We further accept that in the first instance context the prospects of an asylum claimant being able to engage a private lawyer are minimal, with the result that, in reality, legal advice and representation can only be secured through one of the two NGOs providing this service, namely the Jesuit Refugee Service of Malta ("JRS") and the so-called Adidtus Foundation, each of which is constrained by its finite resources. We also accept the experts' evidence that in cases where asylum claimants are detained access to one of these organisations is

more difficult.

(VI) THE OBJECTIVE EVIDENCE

(32) In R (Hagos) – v – Secretary of State for the Home Department (Dublin Returns – Malta) IJR [2015] UKUT 0271(IAC) (hereinafter "Hagos"), decided just over one year ago, this Tribunal considered a substantial body of evidence being on the conditions prevailing in Malta in relation to the processing and determination of protection claims and the reception and treatment of migrants: see [8] – [28]. The parties are agreed that, in the context of these proceedings, the objective evidence framework is unchanged. The evidence assembled for the purpose of these proceedings includes all of the reports considered in Hagos. In addition, we have considered a helpful summary paper prepared by Mr Drabble QC and Ms Radford on behalf of the Applicants. This is attached at Appendix 1.

(VII) LEGAL FRAMEWORK

(33) This has been outlined in both Hagos and other reported decisions and, thus, does not require to be reproduced *in extenso*. In [1] above, we have set forth Article 18 of the Charter. Having regard to the obligation imposed by Article 52(7) of the Charter, we must also consider the corresponding "Explanation" which is in these terms:

> "***Explanation on Article 18 — Right to asylum***
>
> *The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties."*

While the formulation of the Applicants' case in writing also made reference to Article 1 (human dignity) and Article 47 (effective remedy) of the Charter neither of these provisions, ultimately, featured in their case as presented.

(34) While the provisions of the "*Dublin III*" instrument of EU law also form part of the legal framework, it is unnecessary to reproduce these *in extenso*. In short, the asylum applications of both Applicants, made in the United Kingdom, were considered under the auspices of Dublin III, resulting in the transmission of "take charge" requests by the United Kingdom to Malta to accept responsibility for "examination" (viz detailed consideration and determination) of the applications and the acceptance by Malta of such requests. Given the thrust of the Applicants' legal challenge, reference must be made to Article 3(2), which provides:

> *"Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international*

protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible."

While Article 17(1) invests the United Kingdom with a general discretion to examine an asylum claim notwithstanding that such responsibility would ordinarily fall on another Member State, nothing turns on this in the present proceedings. Article 27 of Dublin III must also be considered, given the nature of the Applicants' challenge:

> "1. *The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a Court or Tribunal."*

This is the right which both Applicants are in effect exercising in these judicial review proceedings.

(35) The certification provisions of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (the "*2004 Act*") form another element of the legal framework. In light of its bulk, Part 2 of Schedule 3 to the 2004 Act is attached at Appendix 2.

(36) There is a series of EU Directives which prescribe the minimum standards for the reception of asylum applicants and the processing and determination of their claims. These are:

(i) Council Directive 2003/9/EC (the "Reception Directive"): this prescribes minimum standards for the reception and treatment of asylum Applicants.

(ii) Council Directive 2004/83/EC (the "Qualification Directive"): this prescribes minimum standards for the qualification and status of third party nationals or stateless persons as refugees or as persons otherwise in need of international protection, together with the contents of the protection to be conferred.

(iii) Council Directive 2005/85/EC (the "Procedures Directive"): this prescribes minimum standards in respect of the procedures to be applied by Member States in the grant and withdrawal of refugee status.

These measures all form part of the Common European Asylum System

("CEAS"). By their terms, each explicitly respects the fundamental rights and observes the principles enshrined in the Charter.

(37) The three Directives noted above give effect to Article 78 TFEU, which declares that the Union shall develop a common policy on asylum. It states:

> *"1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*
>
> *2. For the purpose of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:*
>
> *(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;*
>
> *(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
>
> *(c) a common system of temporary protection for displaced persons in the event of a massive inflow;*
>
> *(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
>
> *(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
>
> *(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*
>
> *(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection."*

(VIII) THE PARTIES' RESPECTIVE CASES

(38) As noted in [1] above, the centrepiece of the Applicants' case is that they cannot be lawfully transferred to Malta as this would violate their rights under Article 18 of the Charter. Mr Drabble submitted that the criteria applicable to Article 18 are contained in the Refugee Convention and its Protocols, Article 63 TEU and Article 78 TFEU. He argued that these constituent elements combine to confer on the Applicants a right to have their asylum applications determined by a fair procedure and within a reasonable time. He contended that, historically, this right had been denied to both Applicants, giving rise to breaches of Articles 1, 18 and 47 of the Charter. There is a real risk of further infringements of the same Charter provisions in the cases of both Applicants. It follows that the Secretary of State's decisions certifying their claims as unfounded and requiring them to return to Malta are unlawful.

(39) The interlocking elements of the Applicants' case are conveniently set forth in the skeleton argument of Mr Drabble QC and Ms Radford in the following terms:

(a) Article 18 of the Charter confers on individuals the substantive right to be granted asylum, within a reasonable time, where they satisfy the relevant criteria, in which event the Member State concerned has no discretion.

(b) The asylum criteria applicable to Article 18 are those found in the Refugee Convention and its protocols.

(c) In addition to (a), Article 18 confers a right to a fair procedure.

(d) Historically, this latter right was denied to both Applicants by reason of the shortcomings in the reception conditions and arrangements for the processing and determination of asylum claims prevailing in Malta in 2011/2012.

(e) The Applicants, having the status of unsuccessful asylum claimants, are at real risk of being unable to access afresh the Maltese asylum procedure in the future, with a resulting breach of their rights under Articles 1, 18 and 47 of the Charter.

(f) The redress procedures in Malta being either illusory or too slow to remedy the aforementioned breaches, the Applicants are at real risk of suffering an extended state of limbo and are liable to suffer destitution and undergo refoulement, in contravention of Articles 1, 18 and 47 of the Charter.

It is submitted that, by reason of the above, the certification of the Applicants' asylum claims by the Secretary of State and the decision to transfer them to Malta infringes their rights under Article 18 and of the Charter.

(40) The submissions of Mr Drabble focus on both the past and future. As regards the past, it is contended that both Applicants' rights under Articles 1, 18 and 47 of the Charter <u>were</u> infringed due to, in summary, a lack of adequate information; an unfair interview process; a failure to provide the decision made (in the case of Mr Karada); a failure to provide a reasoned decision (in the case of Mr Hassan); the absence of legal advice and assistance; and (in Mr Karada's case) an inability to participate effectively in the hearing which he attended. It is submitted that these shortcomings chime with the systemic deficiencies in the Maltese asylum procedures and arrangements prevailing at the material time, namely 2011/2013.

(41) In response to our questions, Mr Drabble provided the following clarification. In order to succeed, it is not necessary for either Applicant to demonstrate historical breaches of their Charter rights. The submission advanced is that if the Tribunal concludes that such breaches did occur, this will serve to fortify the mainstay of the Applicants' cases, which is that they are at real risk of breaches of their Charter rights in the future in the event of the transfer decisions being implemented.

(42) In crystallising his argument Mr Drabble suggested that the two main issues of law dividing the parties are, respectively:

(a) the nature and importance of the rights conferred by Article 18; and

(b) the core of the Article 18 right, namely the conferment of refugee status on the person concerned.

The main future risk pertaining to the Applicants, he argued, is a risk of finding themselves in "protracted limbo" (his phrase) based on the scenario of returning to Malta and presenting fresh asylum claims. A second, further risk, namely that of *refoulement* is also asserted.

(43) Mr Drabble concurred with our characterisation of the Article 18 right as a right to be granted refugee status provided that the internationally recognised qualifying conditions are satisfied, supported by a series of procedural, or adjectival, rights. He further agreed that in the event of the Applicants pursuing renewed asylum claims in Malta culminating in lawful refusal decisions, no question of unlawful *refoulement* would arise.

(44) Mr Drabble contended that the Dublin Regulation machinery will not provide vindication of the rights formulated above for the Applicant since, in the scenario of enforced return to Malta, any further asylum claims by them will not be determined within a reasonable time. This, he argued, will *per se* infringe their rights under Article 18. Mr Drabble further submitted that one of the rights protected by the Dublin Regulation regime is a right to have one's asylum application determined expeditiously. He contended that there is a substantial risk of the Dublin Regulation machinery seriously malfunctioning in this respect, with the result that the enforced removal of the Applicants to Malta would be unlawful.

(45) Turning to the factual matrix of the Applicants' cases, Mr Drabble's main submission was that they find themselves in a situation which, predictively, is less advantageous and more exposed than that of the claimant in Hagos. The interlocking elements of this discrete submission are the inadequate processing and determination of their original asylum claims in Malta; the absence of the services of any NGO; the fact that the original asylum claim papers cannot be provided to their English lawyers for consideration and advice; the complete absence of any relevant documents; and the likelihood that any fresh asylum application by either Applicant will result in an inadmissibility decision which, he suggested, is effectively unappealable under Maltese law.

(46) On behalf of the Secretary of State, Mr Manknell submits, firstly, that the decisions in Hagos and Hamad & Ararso are determinative of the Applicants' challenges. It is contended that the cases of these two Applicants are, in all material respects, indistinguishable from those of Messrs Hagos, Hamad and Ararso. The absence of any novelty in the objective exercise is emphasised. Mr Manknell further submits that, considered in its totality, the evidence falls well short of establishing that Malta will not comply with its international obligations. Systemic deficiencies in the relevant procedures and arrangements are not demonstrated. Mr Manknell further submits that the Applicants'

reliance on Articles 1, 18 and 47 of the Charter is misconceived since the only means of successfully opposing their proposed transfer to Malta is to establish a real risk of a breach of either Article 4 or Article 19.

(47) Developing his argument, Mr Manknell advanced two main theses. First, by reason of the existing case law Article 18 of the Charter cannot be invoked as a stand alone basis for resisting enforced removal under the Dublin Regulation. Only a real risk of a breach of either Article 4 or Article 19 of the Charter will suffice. Second, there is no material factual difference between the present cases and those of Hagos and Hamad and Ararso. Mr Manknell submitted, in the alternative, that if the Applicants can permissibly invoke Article 18 of the Charter, the operative threshold is that of flagrant breach and their cases fall short of establishing this. It was further submitted that the CJEU test of systemic deficiencies is not satisfied. Furthermore, insofar as any risk of *refoulement* is demonstrated, the appropriate course will be for the Applicants, on the scenario of enforced return, to seek their remedy against the state of Malta by applying to the ECtHR for interim relief. Mr Manknell also laid emphasis on the ethos of the Common European Asylum System ("CEAS") which, he contended, contra-indicates one Member State reviewing the asylum handling and decision making processes of another.

(48) Mr Manknell further drew attention to the sparsity of the evidence relating to the Applicants' claims for asylum in Malta in 2011/2012, contending that in any event this evidence is irrelevant since the focus must be on predicted future events. He developed the linked submission that the policy of Malta's fresh claim procedure (which we have summarised in [30] above) is irrelevant. The substance of this argument is that the Applicants do not make the case that they are likely to bring fresh asylum claims. Rather, the substance of their complaint relates to historical shortcomings in the processing and determination of their asylum claims in Malta in 2011/2012. The final element of Mr Manknell's submission entails the contention that, in any event, the evidence fails to demonstrate systemic deficiencies in the processing and determination of fresh asylum claims in Malta. The last port of call in this discrete submission is that the interim relief process of the ECtHR would, in any event, be available to the Applicants.

(IX) CONSIDERATION

The CJEU Decision in NS & ME

(49) The submissions of the parties focused on a small number of decided cases. In two of the leading cases, NS and ME [2011] EUECJ C-411/10 and EM (Eritrea) v Secretary of State for the Home Department [2014] UKSC 12, the Charter right which features with most prominence is Article 4. In NS and ME the CJEU ruled, at [94]:

> *"…. The Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation number 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk*

of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."

In Hagos, this Tribunal noted, in [43], the series of hurdles which a claimant must overcome in order to satisfy this test.

EM (Eritrea)

(50) In EM (Eritrea), the Supreme Court construed the decision in NS and ME, ruling that it was harmonious with the following conclusion, at [58]:

> *"The Court of Appeal's conclusion that only systemic deficiencies in the listed countries' asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in Soering v United Kingdom [1989] 11 EHRR 439. The removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR."*

Given that Article 3 ECHR and Article 4 of the Charter are indistinguishable, we observe that this passage applies *mutatis mutandis* to a context such as the present where both the transferring state and the proposed host state are EU Member States. The Supreme Court, in thus concluding, reasoned that the demonstration of systemic deficiencies does not constitute a *sine qua non*. Rather

> *"… the search for such failings is by way of a route to establish that there is a real risk of Article 3 breach, rather than a hurdle to be surmounted."*

See [63].

(51) As this Tribunal noted in Hagos, at [45], there is evident disharmony between the decision of the Supreme Court in EM (Eritrea) and that of the Grand Chamber of the CJEU in Abdullahi v Bundesasylamt [2013] EUECJ C-394/12, which was promulgated days before the Supreme Court's decision. Neither of the two Courts considered the decision of the other. The evident disharmony arises on account of the formulation of the test in [60] of the decision of the Grand Chamber, where it is stated that in circumstances where the host Member State agrees to "take charge" of the asylum applicant for the purpose of examining his claim, the demonstration of systemic deficiencies (in the sense outlined above) is the "**only**" way in which the transfer can be successfully challenged.

The Abdullahi Decision

(52) Having regard to the main orientation of the Applicants' challenge, the task – and duty – of examining in some depth the decision in Abdullahi seems to us inescapable. We begin with an interesting point of distinction between this case and that of NS and ME. In the latter case, the Charter rights invoked by the claimants, who were opposing their proposed enforced return to Greece under

the 2003 Dublin Regulation, were Articles 1, 4, 18 and 47. The Grand Chamber Stated in [86]:

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

As appears from [94], [106] and [123], this is what NS and ME decided.

(53) In Abdullahi, it is of note that the Grand Chamber chose to answer only the first of the three questions referred to it by the Austrian Court. The essence of this question was whether, having made a decision to transfer the claimant to the Member State considered to be responsible for examining the asylum application, the national review authority could change its mind and make a fresh decision in circumstances where it emerged that a different Member State was the responsible one. The Grand Chamber supplied the following answer, in [62]:

> *"Having regard to the foregoing considerations, the answer to Question 1 is that Article 19(2) of Regulation No 343/2003 must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation – namely, as the Member State of the first entry of the applicant for asylum into the European Union – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."*

(54) The effect of this decision was that while the Member State of first entry was Greece, Hungary was bound by its acceptance of the request of the Austrian authorities to take charge of the claimant. Notably, the claimant was not contending that she would suffer any infringement of her rights under Article 4 of the Charter in the event of being transferred to Hungary. Rather, the two elements of her case were that she would suffer a breach of Article 4 in the event of being transferred to Greece and that, in the circumstances, the responsible Member State was Austria. That the claimant was making no complaint about conditions in Hungary was explicitly recognised by the Court in [61]. It follows, in our judgment, that while the Grand Chamber took the opportunity to restate the NS and ME test in indisputably different and more emphatic terms, by the repeated use of the "*only way*" standard in [60], [62] and [64], certain questions did not fall to be determined and were not addressed in consequence. These include the following:

(a) First, the question of whether a Dublin Regulation transfer to another Member State for the purpose of examining the claimant's protection application could be successfully opposed invoking a provision of the Charter other than Article 4.

(b) Second, if the above question attracts an affirmative answer, is the test to be applied: "systemic deficiencies" or something else?

(c) Third, interaction between the Charter and the ECHR dichotomy relating to apprehended breaches of Articles 2 and 3 (on the one hand) and apprehended breaches of other Convention rights (on the other).

(55) We venture to add the observation that there is something of a disconnect between the questions referred to the CJEU and the main conclusion contained in its judgment. In countries adhering to the common law tradition there would be a lively debate about whether the conclusion of the Grand Chamber constitutes an essential element of its reasoning. If yes, it belongs to the *ratio decidendi*. If not, it is otherwise.

(56) Based on our analysis above we would venture to suggest, with due deference, that the decision of the Grand Chamber in Abdullahi is not without its difficulties.

The Decision in Puid

(57) Next, in Federal Republic of Germany v Puid (Case C-4/11) [2014] QB 346, a national of Iran travelled to Greece and on to Germany, where his application for asylum was refused and, in accordance with the criteria specified in Dublin II, Greece was identified as the Member State responsible for examining his asylum claim and his transfer there was ordered. This was annulled by a German Court on the basis that Germany was required to exercise the assumption of responsibility enshrined in Article 3(2) in light of the relevant conditions prevailing in Greece. On appeal, a reference was made to the CJEU.

(58) The ruling of the Grand Chamber adopted, without qualification, the NS and ME test: see [29] – [31]. The second aspect of the ruling, which does not arise in the present case, was that where the said test is satisfied, it does not follow automatically that the transferring state must examine the application under Article 3(2). Rather, applying the criteria enshrined in Chapter III of the Dublin Regulation, a transfer to another Member State is possible, provided that this would not give rise to excessive delay in the final determination of the claim.

(59) This decision has the intriguing feature that, having proceeded through the various stages of the CJEU in close (though not precise) proximity to those of Abdullahi, the consideration that Puid adopted *mutatis mutandis* the test devised in NS and ME does not feature in Abdullahi, where judgment was delivered less than four weeks subsequently.

(60) At this juncture, in an ever thickening plot, we switch the spotlight back to Abdullahi. There the Grand Chamber's formulation of the "*only way*" test in [60] is followed immediately by:

> "*……: See the NS (Afghanistan) case, paragraphs 94 and 106 and Federal Republic of Germany v Puid …….. paragraph 30.*"

The conundrum which arises is that neither NS and MR nor Puid, in the specified paragraphs, or anywhere else in the text, formulates the "*only way*" test espoused by the Grand Chamber in Abdullahi.

(61) At this juncture, we record Mr Drabble's submission, based on this decision, that the cause of the legal inhibition on transfer is not relevant. Rather, the question to be determined is how the Dublin Regulation hierarchy is to be operated where such inhibition has been held to exist.

The Decision in Hamad and Ararso

(62) In R (Hamad and Ararso) v Secretary of State for the Home Department [2015] EWHC 2511 (Admin), the Secretary of State made a certification decision in respect of the two Claimants, a Libyan citizen and an Ethiopian citizen, proposing to transfer both to Malta, being the EU Member State of first entry. Mr Hamad, prior to travelling from Malta to the United Kingdom, had not claimed asylum. In contrast, Mr Ararso had made an unsuccessful asylum claim in Malta. Mr Hamad claimed that compulsory transfer to Malta would infringe his rights under Article 4 of the Charter. In the case of Mr Ararso, the Charter rights invoked were Article 4, Article 18 and Article 19(2). One of the arguments advanced was that where it can be demonstrated that the host state is incapable of guaranteeing the claimant's rights under Article 18, this suffices to found a successful challenge to the proposed transfer: the Article 4 test need not be satisfied. (See [98] – [100].)

(63) The Administrative Court made the following series of conclusions:

(i) There was no sufficient evidential basis for finding a real risk that Mr Hamad would be refouled from Malta to Libya or would suffer infringement of his Article 4 rights in Malta. Further, the evidence did not establish that Mr Hamad would be unable to seek effective redress: see [122].

(ii) The evidence supported the conclusion that the Maltese system of adjudication of asylum applications both at first instance and on appeal, though imperfect, was "*…. adequate to provide judicial protection and an effective remedy in the generality of cases*": see [123].

(iii) Neither the possibility of Mr Ararso being prosecuted and imprisoned for the commission of a criminal offence upon his irregular departure from Malta, nor his inability to satisfy the Maltese statutory requirements governing a fresh asylum claim amounted to an infringement of his rights under Articles 1, 4, 18, 19 or 47 of the Charter: see [124] – [125].

The Court made the following omnibus conclusion, at [127]:

> "*For those reasons, I reach the same conclusion in relation to conditions in Malta as that reached by the Upper Tribunal in the Hagos case: the evidence does not rebut the*

presumption that Malta will comply with its relevant international law obligations. Nor are there any circumstances present in the cases of these two individual claimants which lead to a different conclusion.

We interpose the comment that, to our knowledge, under the guise of GA (Ethiopia) & YH (Libya), an uncompleted attempt to secure permission to the Court of Appeal continues.

The Decision in Pour

(64) The next in the series of decided cases to be considered is Pour (And Others) v Secretary of State for the Home Department [2016] EWHC 401 (Admin). This case concerned three Iranian nationals who travelled to the United Kingdom having unsuccessfully claimed asylum in the Republic of Cyprus. The determination of the Secretary of State entailed a refusal to decide their renewed asylum claims substantively, the statutory certification of such claims on safe third country grounds and the proposed transfer of the Claimants to Cyprus, being the Member State responsible for examining their claims under Dublin III. The Secretary of State's decisions were challenged on the ground, *inter alia*, that there was a real risk of the Claimants being *refouled* from Cyprus to Iran in contravention of their rights under Article 19 of the Charter. As appears from [40] of the judgment of Ouseley J, the question which the Court had to determine was whether the only legal mechanism for successfully challenging a transfer decision under the Dublin Regulation was the demonstration of a real risk of an infringement of the Claimants' rights under either Article 4 or Article 19 of the Charter.

(65) The Administrative Court's first conclusion was that, based on the evidence, the Claimants had failed to demonstrate a real risk of *refoulement* from Cyprus to Iran: see [99] – [106]. This conclusion disposed of the Claimants' challenge under Article 19 of the Charter. The Court nonetheless proceeded to consider certain further, related contentions of the Claimants, including the submission that Cyprus was in breach of the relevant EU Directives. Having noted, at [108], that this is a task for the CJEU and not a domestic court, albeit the issue could arise in (essentially) a collateral fashion, Ouseley J, having considered the substance of the case made, reached the following conclusion, at [125]:

> *"Accordingly, I am satisfied that even if there have been or were to be breaches of the Directives, there is no real risk that the Claimants, if returned to Iran from Cyprus, would have been refouled there. It follows too that the inclusion of Cyprus on the list of safe third countries involves no incompatibility with the ECHR."*

(66) Bearing in mind the thrust of the Applicants' challenge, the most significant passages in the judgment of Ouseley J begin at [171], where His Lordship undertakes an assessment of the question of:

> *"…. How the relationship of EU law and the CEAS to the requirements of the ECHR works out in relation to Dublin returns."*

Continuing, the Judge states, at [171]:

> "*There are two possible answers: (1) the CJEU decisions should be regarded as providing an answer only in relation to Article 3 ECHR and Article 4/19 CFR, and despite the clarity of the language, not dealing with the position in relation to breaches of other Articles; (2) the CJEU intended Article 3 ECHR and Articles 4/19 CFR breaches alone to warrant refusal of return under Dublin II.*"

He continues, at [172]:

> "*My view is that, although Abdullahi was not cited in R(B) v SSHD, R(B) v SSHD decides by necessary implication that other Articles of the ECHR and CFR than 3 and 4 respectively can be prayed in aid to prevent Dublin II returns. Article 52 CFR permits the CJEU jurisprudence under CFR to progress with the ECHR jurisprudence. The CJEU has not addressed the issue head-on, but the way it confines its judgments to the issues it faces directly, means that it should not be taken to have decided the point.*"

The judge's reasoning is expressed in the next succeeding paragraph, at [173]:

> "*Compliance with Dublin II, if even a flagrant breach of other Articles were irrelevant, could put a Member State in breach of the ECHR in order to comply with its EU obligations. I find it very difficult to suppose that the CJEU, while insisting on the primacy of the Community legal order, would reach such a conclusion rather than align itself in practical effect, even if expressing its tests in different ways, with the jurisprudence of Strasbourg. It could not rule out for all possible circumstances, that other Articles of the CFR might lawfully preclude the operation of Dublin returns. The CJEU would emphasise the mutual confidence which Member States have, and the redress available through directly applicable law, and adopt a further, stronger but analogous distinction between EU Member States and other Council of Europe states when considering the practical strength in the presumption of compliance.*"

(67) Faithful to the doctrine of precedent, the judge continues, at [175]-[176]:

> "*It would be wrong to interpret <u>NS/Abdullahi</u> as holding that breaches of Directives, however widespread, but which did not amount to flagrant breaches of fundamental rights should prevent returns under Dublin. It is the relationship between breaches of the Directives and breaches of fundamental rights which would engage the CFR, and it is that which would lead to the return breaching the Dublin Regulation*
>
> *[176] Second, the CJEU has given no indication, quite the reverse, that it would itself contemplate an approach to CFR rights which was more favourable to the individual than the ECtHR's. Whatever language it chose to use, if it were to allow breaches of Articles other than 4 and 19 CFR to affect Dublin returns in the CEAS, the effect would be no less demanding than the flagrant breach test, which would rarely be proved in a Member State. EU jurisprudence would march in step with Strasbourg's, and neither lag behind nor outpace it. Systemic breaches, as a sufficient condition, though not always a necessary one, will prevent removal in the case of Article 4, because that will show that in the general run of cases that the risk of a breach of Article 4 is real. That language is confined to that Article. A systemic breach cannot of itself suffice to show that the breach of other Articles is flagrant, a complete nullification of their essence.*"

Based on this reasoning, the judge then expresses the following conclusion, at [177]:

> "*Accordingly, I accept that it is open to the Claimants to show that their Article 5 ECHR and Article 6 CFR rights would be flagrantly breached by return to Cyprus. But that is a very hard task to show because of the significant evidential presumption of*

compliance."

We record here Mr Drabble's submission that the decision in Pour is not determinative of the present challenges since it concerned provisions of the Charter other than Article 18.

The Decision in R (B)

(68) The jurisprudence belonging to this field has been organic in nature. A review of the leading decisions considered in this judgment was undertaken by the Court of Appeal in R (B) v Secretary of State for the Home Department [2016] EWCA Civ 854. There the Court identified a clear dichotomy of removals challenged on the ground of Articles 2 or 3 ECHR (on the one hand) and challenges based on other Convention Rights (on the other), the latter category of case engaging the more elevated threshold of flagrant breach: see [19] – [21]. Notably, in Pour (*supra*), Ouseley J was of the view that the Court of Appeal had decided "*by necessary implication*" that removal decisions under the Dublin Regulation can be challenged by invoking Charter provisions other than Articles 3 and 4: see [72].

The Decision in Dudaev

(69) Next, there is the decision in Dudaev & Ors v The Secretary of State for the Home Department [2015] EWHC 1641 (Admin). This is a first instance decision. The judgment of Burnett LJ contains an admirable review of the governing legal framework applicable to Dublin Regulation cases. In [55] His Lordship noted that the test in Abdullahi had been expressed by the CJEU "*with conspicuous clarity*". Other issues, of no direct relevance in the context of the present challenge, were addressed and determined. We note in particular the following passage in [78]:

> "[In Sweden] *there is a system which allows fresh applications supported if necessary with court orders preventing removal pending their resolution. Should it be necessary, there is access to Strasbourg with every expectation that Sweden would abide by any interim measures indicated by the Strasbourg Court."*

The judicial review application was dismissed.

Abdulkadir

(70) We complete our review of the European and domestic jurisprudence by considering a recent first instance decision, that of Abdulkadir v Secretary of State for the Home Department [2016] EWHC 1504 (Admin). There each of the claimants, challenging clearly unfounded certifications by the Secretary of State, contended that their enforced removal to Austria, which had accepted that it was the responsible Member State under the Dublin Regulation, would expose them to a substantial risk of inhuman or degrading treatment and, further, would be in contravention of Article 18 of the Charter. This threw up the question of

whether Article 18 was justiciable at the suit of the claimants, focusing attention on Article 27 of the Dublin Regulation.

(71) Irwin J concluded as follows, at [141]:

> *"Article 27 stipulates there must be a proper procedure for an individual to challenge transfer. However, it does not seem to me to broaden the proper basis for such a challenge. The whole thrust of the Dublin Regulation is to determine where asylum claims are to be decided, on the basis they will be properly decided by the member state receiving an asylum claimant under the arrangements. I do not see any compelling argument derived from Article 27 to the effect that individuals may litigate to prevent their transfer on a broader ground than before."*

The Judge also laid emphasis on the narrow confines of the Abdullahi test and its conjunctive requirements, impelling the conclusion that the demonstration only of systemic deficiencies in asylum procedure in the host state would not suffice to render a transfer unlawful, given that the test incorporates the second, separate element of systemic deficiencies in the state's reception conditions for asylum claimants providing substantial grounds for apprehending a breach of Article 4 of the Charter.

(72) It is convenient to record here the discrete submission of Mr Manknell which highlighted the holding of Irwin J, at [145] – [147], that it is not open to a claimant to rely on Article 18 as a free standing right. It would appear that this is the only decision, first instance or appellate, which has addressed this specific issue. We return to this point in [86] *infra*.

(X) OUR CONCLUSIONS

(73) It seems to us that the chief ingredients of the foundation upon which the Applicants' case is advanced are, in brief compass, as follows. In the event of their enforced return to Malta, they will, predictively, endeavour to pursue fresh asylum claims. This will trigger, under Article 18 of the Charter, a right to determination of such claims within a reasonable time and according to a fair procedure. It is said that they will be denied these rights because of the shortcomings in the Maltese asylum system, which contains procedures that are either illusory or too slow. Their fate, it is argued, will be that of "indefinite limbo" (per Mr Drabble) with an associated, or consequential, risk of unlawful *refoulement*. The twin components of the evidential substratum upon which this future scenario is canvassed are the circumstances of their previous unsuccessful asylum claims in Malta and the expert evidence.

(74) We agree with Mr Manknell that the evidence of the Applicants' past experiences in Malta is sparse. Only one of the Applicants (Mr Karada) has made a witness statement and this is notably light in detail. There is nothing from Mr Hassan. The only other evidential source of substance in this respect, leaving to one side the expert evidence, is what is contained in the pre-action protocol letters. We also take into account that the Applicants' assertions about their previous experiences in Malta are untested.

(75) The evidence bearing on this historical issue is, therefore, unsatisfactory. However, we propose to take it at its reasonable zenith for present purposes. Having adopted this point of departure, we make clear our view that if it lies within our competence to decide whether the previous asylum claim in Malta of either Applicant was determined in a manner compatible with Article 18 of the Charter, which competence we seriously doubt but do not need to decide, the evidence bearing on this issue is so impoverished that a negative answer would be swiftly supplied.

(76) One of the most important features of the Applicants' evidence of their past experiences in Malta is its vintage. The events which they describe occurred some four to five years ago. As the evidence summarised in Hagos makes clear, there have been significant changes in the relevant conditions in Malta during recent years. In Hagos, a decision promulgated just over one year ago, this Tribunal stated, at [36]:

> *"As our summary of the evidence … demonstrates, time has not stood still on the island of Malta. With each passing year, the notional graph has been one of gradual improvement in the conditions and processes for the reception, accommodation and general treatment of asylum applicants and the processing of their protection claims."*

Having accepted the real possibility that the Applicant would seek to re-open the earlier refusal decision or make a fresh application for asylum, the Tribunal embarked upon the following evaluative prediction, at [53]:

> *"It is appropriate to emphasise that, in this future scenario, the Applicant will have had the benefit of his previous experience and any lessons to be learned thereby. Furthermore, he has been in receipt of relevant legal advice during his sojourn in the United Kingdom. The services provided by his lawyers here have included direct contact with the JRSM. As a result, the Applicant's particular case now has a certain profile. It is to be expected that his solicitors will alert the JRSM to the Applicant's return to Malta. We consider it highly likely that in this scenario and assuming that the Applicant is detained afresh to be prosecuted and/or following conviction, he will have access to the JRSM and will receive legal advice and support in pursuing one or more of the options identified above. Furthermore, it is probable that the Applicant will be further assisted in the presentation of his claim by the availability of the written statement and written representations prepared by his English solicitors."*

This gave rise to the conclusion that the Applicant would not be denied a procedurally fair decision making process.

(77) We consider that, in substance and reality, the only feature of these Applicants' cases which differs from that of Mr Hagos is the JRSM factor. Whereas the evidence in Hagos established that there had been direct contact between the English solicitors and the JRSM, there is no comparable evidence in this case. However, there is every reason to expect that the experienced solicitors who have represented the Applicants so competently in these proceedings will take the simple step of making the necessary contact with either the JRSM or the other NGO which provides comparable services to asylum applicants in Malta (or both) – or, as a minimum, equipping the Applicants to do so. We are not deflected from this conclusion by the rather limited evidence bearing provided

by the Applicants' solicitor. Furthermore, both the Applicants and their English solicitors have the considerable benefit of the detailed treatise of Maltese asylum law, systems and procedures contained in the evidence of their experts and set forth in this judgment. This evidence is infused with practical insights and observations of which the Applicants and their English solicitors will be able to avail.

(78) We accept that, viewed from the perspective of the notional paradigm asylum handling process, there will be imperfections in the processing of any future renewed asylum claims by the Applicants in Malta. For example, the conditions under which there will be access to the Applicants' asylum files would be considered unsatisfactory by English lawyers. Furthermore, the legal advice and representation facilities which we anticipate will, as a matter of probability, be available to them may not be as extensive as those prevailing in this jurisdiction. However, the evidence supports the view that the Applicants will, more probably than not, have the benefit of legal advice and representation. Furthermore, the Applicants' experts do not suggest that factors of the aforementioned kind give rise to an endemically and incurably unfair and substandard decision making process.

(79) One of the cornerstones of Mr Drabble's submissions was that fresh asylum claims on behalf of the Applicants are likely to generate an inadmissibility decision and that the right to challenge such a decision by appeal is illusory. We reject both aspects of this submission. First, while we are prepared to accept, in their favour, that it is more likely than not that both Applicants will pursue fresh asylum applications, the suggestion that this will inevitably result in inadmissibility decisions lacks the necessary evidential foundation. It is purely speculative.

(80) In this context, while we do not overlook that the Applicants' apparent (though unsubstantiated) limited knowledge and understanding of the original asylum refusal decisions will have some bearing on the formulation of their new claims we would emphasise again the predictive probability that they will have the benefit of legal advice and representation, coupled with some support from their English lawyers prior to their departure from this country (at least) and aided by the insights, information and illumination provided by their experts' report and this judgment. In the absence of any evidence of what the content and thrust of their fresh asylum applications is likely to consist, we decline to adopt the purely speculative view that an inadmissibility decision by the RC is the likely outcome. To this we would add that we are unable to distil from Article 18 of the Charter any right to pursue a subsequent asylum application or any right to have a first, or subsequent, asylum application determined in accordance with a process which does not have an admissibility threshold.

(81) Furthermore, if a refusal of any fresh asylum claim by either Applicant were to eventuate, there is no basis for concluding that this would infringe any procedural element of rights conferred by Article 18 of the Charter. We consider that this aspect of the Applicants' case, properly exposed, involves crystal ball gazing. Moreover, the expert evidence, which we accept, is to the effect that the strict time limit of 15 days is unlikely to be applied to the detriment of either Applicant: see [34] above. In addition, while the experts describe the exercise

involved in a fresh asylum claim as "*fairly difficult*", the immediately succeeding passages in their report, [55] – [56], drawing on the most authoritative Maltese source available, demonstrate that new claims are capable of succeeding. To this we add two matters. First, the uncontested statistical evidence that new claims have been gradually increasing during recent years. Second, as emphasised in Dudaev, it is essential to bear in mind that the Applicants will have access to the Strasbourg court via an application for interim protective measures.

(82) The final, discrete ingredient in Mr Drabble's submission involves the contention that there is in substance no right of appeal against an inadmissibility decision. While we have rejected the premise upon which this contention is constructed we would add the following. First, we note the evidence, uncontested, that unsuccessful subsequent asylum claimants are informed of both the decision and the mechanisms for challenging same. Second, there is an automatic review of such decisions by the RAB. Third, an appeal lies to the RAB on safe third country grounds. Fourth, there is the legal remedy of a challenge in the Maltese Civil Court, exercising is constitutional jurisdiction, on the basis of an alleged violation of a fundamental human right protected under either the Constitution of Malta or the European Convention Act. Fifth, there is the remedy of a challenge by proceedings in the Maltese Administrative Tribunal, from whose decisions an appeal lies to the Court of Appeal. We consider that these factors operate to confound Mr Drabble's submission.

(83) We take into account the experts' opinion that there are certain limitations attendant upon these various avenues of legal redress. However, we find the evidence insufficient to warrant the conclusion that these are purely illusory or theoretical. Furthermore, we would not be prepared to hold, absent clear binding authority to the contrary, that the limitations of these mechanisms (as we have diagnosed them) for legal challenge to a decision by the RC rejecting a later asylum claim as inadmissible give rise to a breach of any procedural right under Article 18 of the Charter. We also take into account the emphasis in Dudaev on the available mechanism of resort to the ECtHR and an application for interim relief.

(84) The Applicants' "indefinite future limbo" contention is, in our view, further defeated by the clear evidence relating to the decision making processes of the RC and RAB, considered in tandem with the relevant statutory provisions. These sources provide no warrant for concluding that any future asylum application of either Applicant would suffer the fate of indefinite drift in a sea of extensive inertia and delay on the part of any of the authorities concerned.

(85) For the reasons elaborated above we reject the first limb of the Applicants' case. It follows, in our judgment, that the second and sequential limb of the Applicants' case, which involves a predictive real risk of unlawful *refoulement* to their countries of origin must be rejected. This aspect of the Applicants' challenge is based on the contention that unlawful *refoulement* will be the consequence of the suggested future infringements of the procedural dimension of Article 18. The two elements of the challenge are inextricably intertwined. As we have rejected the primary component of the challenge this, the remaining, element must founder accordingly.

(86) In making our findings and conclusions above, we have been prepared to assume that the proposed transfer of a third country asylum claimant to another Member State under the Dublin Regulation for the purpose of examining their claim can be challenged under Article 18 of the Charter. While we are mindful of [141] – [148] of Abdulkadir, there is evidently no binding decision in which this issue has been decided to date. Ultimately, a reference to the CJEU under Article 267 of TFEU in a suitable case may be the appropriate course. We have conducted a detailed examination of the Luxembourg and domestic jurisprudence bearing on this interesting issue. In contrast with Irwin J, our close analysis of the decision in Abdullahi suggests to us that this decision does not provide a clear and conclusive answer to the question. The superficially conclusive nature of the decision in Abdullahi is questioned both by our analysis above and the decisions in EM (Eritrea), R (B), and Pour. In this respect we are inclined to align ourselves with the reasoning of Ouseley J in the latter case.

(87) Finally, we address briefly the self-evidently elevated "flagrant breach" threshold. We have adverted to this in the context of our consideration of the decision of the Court of Appeal in R (B). Given our analysis, findings and conclusions above it is unnecessary to decide this discrete issue. However, in deference to the arguments advanced and considering the importance of the issue, we would offer the following observations.

(88) This is another issue which belongs to the interface between EU and ECHR law. There is no authority, European or domestic, in point. In Pour, the "flagrant breach" threshold was assumed, rather than analysed and decided. Furthermore, the doctrine of precedent does not bind the Upper Tribunal, in its judicial review jurisdiction, to follow decisions of the Administrative Court. The correct analysis is that these two organs exercise coordinate jurisdiction. See Secretary of State for Justice v RB [2010] UKUT 454 (AAC) at (86) – (95).

(89) Article 18 of the Charter has no sister provision in the ECHR. On the assumption that as regards Charter rights and freedoms the CJEU would adopt the ECtHR dichotomy noted above, we would observe, first, that Article 18 finds its home in one of the supreme constitutional instruments of the EU legal order, namely the Charter. Second, while recognising that there is obvious scope for more detailed scrutiny of this issue, we cannot overlook that all of the rights and freedoms enshrined in the Charter, the Pandora's box in its entirety, have been accorded the status and denomination of "fundamental". This we readily recognise is not decisive *per se* and, indeed is another issue which may foreseeably attract more detailed scrutiny in some future case.

(90) Our third observation is that the most cursory of reflections on the history and rationale of the right to asylum in the modern world suggests that it belongs to an elevated plane. It is a right to lead one's life free of the pernicious, unremitting and invasive evil of persecution. We consider it uncontroversial to suggest that persecution permeates, devalues and contaminates indefinitely the lives of its victims. It does so by attacking core elements, rights and freedoms of the lives of human beings to which all signatories of the Refugee Convention and its associated EU measures subscribe without reservation.

(91) Decisions under the Refugee Convention and related instruments of domestic

and EU law frequently involve issues of life, liberty and torture. These are all fundamental rights which the Convention is designed to protect. Furthermore, persecution may be actuated by more than one of the proscribed grounds. It is well settled that the principle of anxious scrutiny applies in this field. Other features of asylum decision making include the special standard of proof and the flexible approach to the reception of evidence. The impetus for claiming asylum is not infrequently catastrophic events in one's home country – war, genocide, military insurrection and civil war to name but some. The context in which the Refugee Convention was adopted is well known. Furthermore, the importance of asylum law is such that it has occupied the attention of the highest Courts in the United Kingdom in a large number of cases, beginning with Bugdaycay v Secretary of State for the Home Department [1987] AC 514. There is also the well established principle that having regard to the potentially grave consequences of removing refugee protection from a beneficiary, the exclusion clauses in the Refugee Convention are to be interpreted restrictively and applied with caution.

(92) While recognising that this issue is worthy of more detailed examination in a suitable future case, even the brief treatise which we have undertaken above suggests strongly that the "flagrant breach" test cannot be the correct one. We see much force in the argument that this test would so weaken and erode the protection of this vital, internationally recognised human right, particularly in the context of the CEAS and its underlying rationale and ethos, that it cannot simply be exported from the ECHR machinery of Strasbourg, where the right to asylum does not exist, to the EU arena wherein, by virtue of Article 18 of the Charter and other legislative measures the right to asylum occupies a prominent position.

(93) We, therefore, favour the view that in cases where a proposed transfer under the Dublin Regulation for the purpose of examining an asylum claim is opposed under Article 18 of the Charter, the test to be applied is whether there is a real risk that a breach of the right protected by Article 18 will occur. By parity of reasoning – and acknowledging that this further issue does not arise in these proceedings – this would also appear to be the correct test in cases involving other fundamental Charter rights, such as Articles 3, 4, 5 and 19.

(94) As appears from our findings and conclusions above, the adoption of the less stringent of the two competing tests does not avail either of the Applicants.

DECISION

(95) On the grounds and for the reasons elaborated above we dismiss this application for judicial review.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

29 August 2016

APPENDIX 1

Summary of Objective Evidence

The following summary takes each report in chronological order, thus beginning with the last report in bundle ACB and working towards the front, with focus on the evidence contemporary with the Applicants' arrival in Malta and the processing of their asylum claims (i.e. early 2011 to late 2012).

Council of Europe Committee for the Prevention of Torture ('CPT'), December 2008, p. B668-749, based on a visit in May 2008

Material Conditions for Immigration Detainees

B688 Material conditions for immigration detainees in several parts of the detention centres were "poor" or "very poor," and "could well be considered to amount to inhuman or degrading treatment."

B689 Lyster Barracks immigration detention centre, Hermes Block: very dilapidated, dirty, infested with rats; practically impossible to ensure basic standards of hygiene, detainees could not drink the water without getting ill.

B689 Lyster Barracks tent compound "rudimentary", no insulation against heat or cold, CPT called for urgent replacement with a proper building.

B690 Safi Barracks had some improvements, but still some "poor" conditions.

B690 Ta' Kandja police complex housing 60 immigrants remained "a cage-like, grim and oppressive place", severely overcrowded, dry-rot and mould inside dormitories, dilapidated toilets and showers, 22 hours a day inside dormitories.

Access to the asylum procedure

B693 "Vast majority" of detainees interviewed said they had never received or seen the information leaflet on asylum procedures which is supposed to be distributed on arrival (in English, French, Arabic).

B694 Letters can be sent and received and telephone cards for payphones provided free of

charge, but detainees not allowed mobiles, and there were no visit facilities. Visits took place at the entrance gate.

Medecins sans Frontieres, April 2009, pp. B636- B667, based on MSF's work in detention centres from August 2008 to February 2009

B637 Map shows the 3 detention centres and the Marsa Open Centre.

B638 "Appalling" living conditions and "serious barriers" to health care endanger physical and mental health of detainees. Poor hygiene and inadequate shelter cause skin & respiratory infections and overcrowding spreads epidemics. Poor quality health care has "significant and potentially long-term impact on detainees' health."

B639 Photo of Lyster Barracks, Hermes Block

B643 Ever since began working in detention centres, have witnessed living conditions falling "far below" those required by EU Directive, UN minimum standards and Maltese law.

B644 Photo of Lyster Barracks, Hermes Block

JRS Malta, 'A report on a pilot study on destitution amongst the migrant community in Malta' in partnership with IOM and UNHCR, March 2010, pp. B615-B630, based on a study from Sept 2009 – Feb 2010

Study looks into the causes of destitution amongst migrants in Malta. Identifies:

B622 No consistent criteria for continuation/discontinuation of material assistance;

B622 Assistance (provided by the Agency for the Welfare of Asylum-Seekers, 'AWAS') is tied to accommodation;

B624 Accommodation is inadequate, particularly for those with medical needs;

B622 There is extreme difficulty re-accessing assistance if one leaves to find/pursue work which is later lost;

B623 The amount of assistance provided to recipients of subsidiary protection (as opposed to refugee status) is inadequate for subsistence;
Dublin returnees with subsidiary protection have their allowance reduced;
Recipients of subsidiary protection (as opposed to refugee status) have no access to free healthcare or medicines;

B624 Study notes that beneficiaries of subsidiary protection are entitled to core welfare

benefits under the EU Qualifiction Directive, but implication is that they don't receive them ("*upon losing their job, they can no longer pay the rent and have no alternative but to try to be readmitted in the AWAS … many migrants in this situation are beneficiaries of subsidiary protection and are therefore entitled to "core welfare benefits" according to the EU Qualification Directive.*"

B625 Asylum-seekers and recipients of subsidiary protection have no clear entitlement to education. But they are more immediately concerned with securing basic subsistence

JRS Malta, 'Becoming Vulnerable in Detention', June 2010, based on research Feb – Sept 2009, pp. B599-B614

B601 Outline of detention policy: eight facilities for detaining immigrants in 3 locations within army or police barracks [c.f. map at B637]. Boat arrivals are immediately detained. National law does not limit detention, which lasts 12 months for those whose application is still pending, and 18 months for those who have been refused asylum. Those identified as vulnerable are not detained.

B602 After the study, the Italian navy agreed an interception and return policy with Libya, thus the numbers of arrivals in Malta dropped off significantly and centres were far less crowded by June 2010.

Information and contact with outside world

B606 Most people did not know why they were being detained or how long it would last. This caused frustration, anger and worry (c.f. p. B609 – cause of sleeplessness).

B609 Telephone access was "very limited", visits allowed from NGOs and lawyers but not from family or friends. Limitation on contact with outside world was mainly caused by lack of internet and inadequate provision of telephone and calling cards.

Detention of vulnerable persons

B610 Policy not to detain the vulnerable was not effected due to the automatic detention of all migrants pending a vulnerability assessment that could take months.

Amnesty International, 'Seeking Safety, Finding Fear', December 2010, pp. B587-598

Refoulement at sea

B588 AI highlights the case of a stricken vessel in July 2010 from which the Maltese

authorities took 28 passengers, leaving 27 to be picked up by a Libyan vessel. The asylum-seekers returned to Libya were detained and beaten/tortured by the Libyan authorities.

B589 Malta denied that it had duties to the returned asylum seekers which it abandoned in this "and other similar incidents". AI considered that Malta had power over the passengers on board the stricken vessel and thus did have duties to ensure full and fair access to an asylum procedure, and of non-*refoulement*.

B590 AI expresses "deep concern" over the agreement between Libya and Italy that resulted in vessels being returned to Libya.

Deficiencies in the asylum procedure

B594 "Inadequate" screening of vulnerability and provision for their needs of the vulnerable
Lack of effective remedies for detention

B595 Open-ended removal orders allow for removal months or years after arrival, while the right to challenge removal can only be exercised in a limited timeframe. "In practice, a challenge at point of enforcement is often impossible."

B596 AI has concerns about the effectiveness of appeal against negative asylum decisions. Negative decisions are "not sufficiently reasoned, depriving rejected asylum-seekers of the opportunity to challenge successfully the decision."
Asylum-seekers and lawyers "are not granted full access to the case file."
RAB hearings are in private and are reported to have reversed only 4 decisions between 2002 and 2008.

Material conditions in open centres

B596 Residents of open centres complained of, "overcrowding, poor sanitation, the lack of privacy and the absence of recreational activities."

Amnesty International "saw the deplorable conditions" at Hal Far Hangar and Tent Village, jointly housing over 1,000 people. 16-20 people live in each metal container with no running water. "No proper sanitation"; only 15 toilets and showers in each centre.

Most residents cannot find employment. The monthly allowance must be signed for 3 times a week, far from any commercial centre, which "further impedes their ability to

search for work."

B597 Maltese authorities are actively trying to resettle refugees elsewhere in Europe and the USA but "do not make an effort" to ensure social and economic rights in Malta. Thousands have "a bleak future".

Council of Europe, Commissioner for Human Rights, Thomas Hammarberg, 9 June 2011, following a visit on 23-25 March 2011, pp. ACB B573-B586

Overview

B573 Commissioner considers Malta's detention policy to be "irreconcilable" with ECHR. Some living conditions in open centres are "clearly inadequate for even short periods of time."

Policy on vulnerable groups is "at variance with international standards".

B574 "Progress is necessary" in the refugee status determination procedure. Including the "need" to provide legal aid for first instance proceedings; need to improve access to case files; Second instance proceedings "must be made an effective tool for review, notably by improving legal assistance and access of asylum seekers and lawyers to case files and through the holding of hearings at which asylum seekers may be present."

The system of welfare support "currently perpetuates their social exclusion and leaves them at serious risk of destitution."

The Commissioner was 'seriously concerned" about xenophobia and racism.

Arrivals in Malta had decreased sharply from mid 2009 when the joint Italian-Libyan operation began. Only 27 arrivals in 2010. However, 1,100 arrivals in just 2 weeks at the end of March 2011 following outbreak of armed conflict in Libya. Currently there were 11,300 non-EU citizens in Malta.

B575 "It is clear that due to its small size, the density of its population and the limited absorption capacity of its labour market, Malta can offer adequate conditions of reception and opportunities for long-term livelihoods to only a fraction of these migrants." Unless Europe offers meaningful solidarity and co-operation, there is a risk that migrants "continue to be prevented from fully enjoying their human rights, and might in some cases suffer serious human rights violations."

Malta's human rights responsibilities to migrants "has not been fully met" in spite of some improvements during the lull in arrivals in 2010.

Reception Conditions

B576 As at mid-March 2011, there were only 49 immigrants detained in Malta, all at Safi Barracks, where conditions were better than in open centres, but the Commissioner was concerned about the impact of the 1,100 people who arrived from Libya in the two weeks after his visit.

Hal Far tent village housed 600 people in "totally inadequate" conditions. Hal Far hangar accommodating 500 reopened after the visit and was "reported to be seriously sub-standard". Marsa Open Centre housing 600 was "somewhat better" but suffered "serious overcrowding".

Refoulement at sea

B578 The Commissioner repeats the same views as AI concerning Malta's reliance on Libyan vessels to rescue asylum-seekers in 2010, potentially leading to refoulement.

Refugee Determination Procedure

B578 Number of improvements noted: faster processing, better information provision and higher % of refugee status grants, but the report expresses concern about the impact of the Libyan armed conflict (§45).

However, "decisions are not sufficiently reasoned, which makes challenging them on appeal particularly difficult." (§46)

RAB proceedings "do not appear to be effective" due to the "poor" quality of legal aid assistance, "extremely limited" access to case files, and the fact that RAB does not hear from appellants. Only 6 decisions have been overturned by RAB from 2004 to 2011 (§47).

Mandatory detention results in shortcomings in the asylum procedure due to: difficulty obtaining documents inside detention; difficulty lodging an appeal in time; the need to rely on detention centre staff or visiting NGOs to lodge documents; refusal of RAB to accept out-of-time appeals (§48).

B579 The Maltese authorities believe that the main solution for migrants is to resettle elsewhere in Europe (§54).

"The possibilities for establishing a new life in Malta are extremely limited for most migrants." (§54).

Only recognised refugees (not recipients of subsidiary protection) receive benefits on a par with Maltese nationals. The system of support for asylum-seekers and beneficiaries of subsidiary protection "effectively marginalises and perpetuates the social exclusion of migrants." (§56).

Jobs are seasonal and/or very precarious, but the majority of those with subsidiary protection have no access to unemployment benefits "in the likely case that they become unemployed." (§57).

Maltese practice was "difficult to reconcile" with the requirements of EU and Maltese law (§58).

Many of the difficulties that migrants face are underpinned by embedded racist and xenophobic attitudes" (§62).

Council of Europe CPT, Report on its visit of 26-30 September 2011, 4 July 2013, pp. ACB B526-B572

B532 Management at Safi detention centre attempted to mislead the delegation and hide a significant number of complaints which had been lodged.

B545 Ta'Kandja had been closed since 2010. Immigration detainees were thus held in either Safi Barracks (506 people, all men: 236 in Warehouse no 1; 113 in Warehouse no 2; 124 in Block B) or Lyster Barracks (248 people including 89 women). The majority had arrived in spring 2011 but some had been detained for over a year.

B546 There were complaints about staff member's racist or disrespectful behaviour.

Detainees were called by their tag numbers, which is perceived as humiliating and degrading. CPT again called for Malta to put an end to the practice.

B547 There were "hardly any" allegations of deliberate physical mistreatment, but there were frequent, serious allegations of the excessive use of force during recent disturbances.

B548 There appeared to be a problem of violence among detainees in both detention centres.

"It will be difficult if not impossible to effectively resolve this problem as long as more than 240 foreign nationals are being held under cramped conditions and in total idleness in one single warehouse and that for prolonged periods."

Material conditions in Safi Barracks' two warehouses were "still appalling"; "Extremely crowded"; Warehouse no. 1 only had 7 mobile toilets and 7 mobile shower booths for 236 people, in "a deplorable state."

Conditions in Lyster Barracks and Block B had, however, improved significantly since 2008.

B549 "A significant number of detainees were lying in bed all day in total apathy." There was a "great" likelihood that urgent psychological needs went undetected for a long time.

International Commission of Jurists, 'Not Here to Stay', May 2012, based on a visit from 26-30 September 2011, ACB pp. B478-B525

B485 In 2011 1,574 people arrived in Malta, proving 2010 (with 47 arrivals) to have been an aberration caused by the Italian-Libyan 'push-back' initiative. Nevertheless, Maltese reception policies continue to be premised on the idea that migration flows are an exceptional, temporary crisis.

B491 Maltese law excludes the vast majority of undocumented migrants from the protection of the EU Returns Directive, and thus rights such as the right to be informed of the reasons for their removal in a language they understand and the right to legal aid. ICJ considers that the provision of legal aid at appeals stage only breaches international human rights law.

Detention conditions

B497 ICJ visited the couples' accommodation at Lyster Barracks and Warehouse no 1 and B Block at Safi Barracks.

B501 ICJ considers the immigration detention policy to be incompatible with Malta's obligations under international human rights law.

B507 "In Safi Barracks, the accumulation of poor conditions of detention, including sanitary conditions, together with apparent existence of cases of psychological instability, the the lack of leisure facilities, the overcrowded conditions and the mandatory length of 18

months detention brought, at the time of the visit, the situation in the detention centre beyond the threshold of degrading treatment." Violation of Article 3 ECHR. This was caused by the lack of capacity to deal with the sudden rise in the number of arrivals.

Access to legal assistance

B510 Detainees complained that they did not have access to effective or appropriate legal aid. "Lawyers sometimes spoke only very briefly to detainees and did not, or did not have time to, advise them in detail or gather sufficient information on their cases,"

Conditions in open centres

B517 Marsa Open Centre, which is run by an NGO contracted by the government, showed signs of overcrowding and "raised issues" with regard to the right to adequate housing. However, good progress was being made.

Hal Far hangar was reopened in 2011 and housed single men in metal containers who had fled from Libya.

B520 Conditions were "very unsanitary", prone to floods, infested with rats, toilets were "quite dirty", there were drug and alcohol problems, insufficient bedding, dirty floors, insufficient lighting, relatively exposed to the elements. ICJ considered that conditions were sufficiently poor to establish degrading treatment in breach Article 3 ECHR.

Human Rights Watch, 'Boat Ride to Detention', July 2012, ACB pp. B432-B477

B447-8 In 2011 Malta had the highest rate of asylum applications per population in the industrialised world. Its asylum system was efficient – it had low backlogs – but only 4% of applicants in 2011 were granted refugee status. 37% were granted subsidiary protection. 17% were given "temporary humanitarian protection" at the discretion of the Refugee Commissioner.

B451 Malta's automatic detention policy of all irregular migrants "amounts to arbitrary detention prohibited by international law".

B457 Prolonged detention impacts negatively on migrants' and asylum-seekers' mental health.

Amnesty International, World Report 2013, ACB pp. B424-B425

B424 Arrivals by sea increased by 28% [in 2012] from 1,577 to 2,023.

Malta continues to automatically detain asylum-seekers in breach of international law.

Appeal procedures to challenge asylum decisions "did not meet international human rights standards."

Conditions in detention centres "remained poor and were exacerbated by overcrowding, with hundreds experiencing lack of privacy, insufficient access to

B425 sanitary and washing facilities, and poor recreation and leisure facilities. There were consistent and credible reports that being detained in such conditions was adversely affecting the mental health of migrants. Conditions in open centres ... remained inadequate."

Asylum Information Database, National Country Report: Malta, March 2013, ACB pp. B379-B423

B388 Overview of the asylum procedure.

Appeals

B392 Asylum seekers can face obstacles in appealing a decision in practice.

There are "no clear and established procedures in place to lodge an appeal", but the RAB "does not accept late appeals". Forms are not always available in detention.

The decision containing reasons for rejection is in English only.

Only in "very limited and discretionary circumstances" will the RAB hear evidence. Evidence that was not before RefCom would also only be admitted if it had been previously unavailable or unknown.

Hearings are in private.

There is no onward appeal.

Judicial review of the RAB have been lodged in years past [cites the same 3 cases cited by Dr Zammit] but these are not merits appeals and are not automatically suspensive.

Interviews

B393 Personal interviews are conducted in practice. Interpreters are required in national law but interpreters are not always readily available unless for Somalis/Eritreans. Complaints about interpretation are sometimes raised on appeal.

Applicants are not always provided with interview notes

No opportunity to correct interview notes

The quality of the notes "may not be fully ascertained."

Legal assistance

B394 Legal aid is not available until appeal stage.

Free legal assistance is only provided by "a limited number of NGO lawyers". The limited number of lawyers is the main obstacle to obtaining such assistance. Private lawyers are inaccessible in practice in detention.

B395 Lawyers ability to effectively assist applicants is impinged by not having access to the file – having to manually copy documents at RefCom's office, which discourages lawyers from assisting, or assisting effectively.

The appeal is by way of written submissions, and "the assistance of a lawyer is essential for an effective appeal."

Remuneration is inadequate for the work required.

Detained appellants are particularly hard to assist because of obstacles to lawyers visiting detention centres and the lack of any suitable place in detention centres where they can consult with their client.

Provision of information

B403 An information leaflet from the police is in English only

B404 Information sessions run by RefCom are conducted only once per group of arrivals, prior to asylum-seekers registering any desire to claim asylum.

There is a lack of constant flow of information from the authorities throughout the various stages of the procedure, no information desk or similar.

Applicants can only obtain further information from NGOs

No 'major obstacles' to accessing UNHCR or NGOs.

B413 Information provided is not adequate to meet the requirements of the Reception Regulations.

People for Change Foundation, Malta Human Rights Report 2013, ACB pp. B307-357

B317 In summer 2013 there were several incidents of attempted 'push-backs' to Libya. On 9th July the ECtHR issued a Rule 39 injunction, which was respected.

B318 Nevertheless, from 4-6 August 2013 the Maltese authorities refused to let a rescue ship disembark and proposed the migrants be returned to Libya.

B320 The Maltese attempts to refoul asylum-seekers to Libya followed a judgment of 28 June 2013 of the Constitutional Court that Malta had refouled two Somalis to Libya in 2004.

JRS Europe, 'Protection Interrupted' 4 June 2013, ACB pp. B286-B305

B291 Migrants who leave Malta irregularly are detained and charged on return with a criminal offence, maximum penalty 2 years imprisonment.

B292 Their asylum claims will be treated as implicitly withdrawn (after 2008) if they were not contactable while abroad. He will be susceptible to return.

Returnees are not systematically informed of the status of their application for asylum. They will only obtain information if they seek legal assistance.

B293-4 Sets out the different material provision for asylum-seekers, recipients of subsidiary protection, rejected asylum-seekers and refugees.

B295 Dublin returnees need to approach AWAS to request accommodation in an open centre, which will only be given if there is capacity. Priority is given to other asylum seekers.

Amnesty International Public Statement, 'Malta: collective expulsions, push-backs and violating the non-refoulement principle never an option, 12 July 2013, ACB pp. B281-B282

B281 Documents the planned 'push-back' of a group of 102 Somali nationals in July 2013, prevented by the ECtHR.

UNHCR's position statement on the detention of asylum seekers in Malta, 18 September 2013, ACB pp. B243-B275

B275 Despite some improvements in conditions, UNHCR considers the current Maltese reception system, based on systematic administrative detention of asylum-seekers, is not in conformity with international law standards.

European Commission against Racism and Intolerance ('ECRI'), report of 15 October 2013, up to date to 6 December 2012

Asylum determination procedure

B194 Authorities report difficulties finding and keeping interpreters.

Videoconferencing to the UK has now been introduced where interpreters are unavailable.

ECRI stresses the importance of legal assistance at the 'preliminary questionnaire' stage. Since almost all boat arrivals are indigent, only legal aid can secure their right to access legal assistance. It is "imperative" that asylum seekers receive advice on what is relevant to his/her application at first instance, particularly in light of reports that

appeal success rates are "close to nil."

Authorities claim applicants are provided with a copy of interview notes, a copy of their asylum application form, and a copy of the asylum decision as soon as the case is closed. However, ECRI received information that detained applicants have difficulty accessing their case files.

ECRI is 'not convinced' that RAB is a 'judicial body' in view of the appointment of its members by the Prime Minister.

B195 Applicants have been refused an oral hearing by the RAB.

Reception Conditions

B195 Marsa Open Centre had improved since ECRI's last report.

Hal Far family centre had been improved, and tents were being replaced with containers. Tents that remained were "clearly inadequate" and offered inadequate protection from inclement weather.

B196 ECRI was informed that Hal Far hangar complex now only houses men and that the sanitary facilities had been refurbished. ECRI remained concerned that the facilities were not suitable for long-term stay.

APPENDIX 2

Asylum and Immigration (Treatment of Claimants etc.) Act 2004, Schedule 3, Part 2

"2.

This Part applies to–

(a) Austria,
(b) Belgium,
(ba) Bulgaria,
(c) Republic of Cyprus,
(d) Czech Republic,
(e) Denmark,
(f) Estonia,
(g) Finland,
(h) France,
(i) Germany,
(j) Greece,
(k) Hungary,
(l) Iceland,
(m) Ireland,
(n) Italy,
(o) Latvia,
(p) Lithuania,
(q) Luxembourg,
(r) Malta,
(s) Netherlands,
(t) Norway,
(u) Poland,
(v) Portugal,
(va) Romania,
(w) Slovak Republic,
(x) Slovenia,
(y) Spain,
(z) Sweden,
(z1) Switzerland.

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.

(3) The person may not bring an immigration appeal from within the United Kingdom
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 from within the United Kingdom in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is not clearly unfounded.

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

6.

A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies 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.