

**THE HIGH COURT
JUDICIAL REVIEW**

BETWEEN

M. E.,	[2010 No. 131 J.R.]
A. S. M.,	[2010 No. 177 J.R.]
M. T.,	[2010 No. 184 J.R.]
K. P. AND	[2010 No. 337 J.R.]
E. H.	[2010 No. 620 J.R.]

CLAIMANTS

AND

**THE REFUGEE APPLICATIONS COMMISSIONER AND
THE MINISTER FOR JUSTICE AND LAW REFORM
RESPONDENTS**

**REFERENCE FOR A PRELIMINARY RULING TO THE COURT OF JUSTICE
OF THE EUROPEAN UNION**

(1) Subject Matter of the Dispute

1. This is the third occasion where similar issues have arisen for adjudication in the High Court of Ireland relating to the transfer of asylum seekers under the terms of Council Regulation (EC) No. 343/2003 (“the Dublin Regulation”). This current series of five cases shares common features with 32 other pending cases relating to the scope of the discretion afforded to Member States under Article 3(2) of the Regulation.

2. Each of the claimants, who have no connection with each other, travelled through Greece and was arrested there for illegal entry. They are all adult men and do not claim any particular vulnerability or disability. Each claimant left Greece and travelled to Ireland where he applied for asylum. Three of the claimants sought asylum without disclosing their previous presence in Greek territory while the remaining two claimants admitted their previous presence in Greece.¹ The EURODAC system confirmed that all five claimants had previously entered Greek territory but that none of them had sought asylum there.

¹ Mr M.E and Mr A.S.M. both immediately disclosed their stay in Greece.

3. In the specific five cases before this Court the claimants claim to be from Afghanistan, Iran and Algeria.² Each of the claimants resists return to Greece. However, no claim is made that the transfer of the claimants to Greece under the Dublin Regulation would breach of Article 3 of the European Convention of Human Rights by reason of potential refoulement, chain refoulement, ill-treatment or interrupted asylum claims.³ Neither is it alleged that the transfer would breach any other Article of that Convention. The claimants argue that there are inadequate procedures and conditions for asylum seekers in Greece and so, Ireland is obliged to exercise its discretion under Article 3(2) of the Dublin Regulation (“the sovereignty clause”) to accept responsibility for examining and determining their asylum applications.

4. The Refugee Applications Commissioner is the authority designated under domestic law⁴ to determine whether, in accordance with the Dublin Regulation, Ireland is responsible for examining an asylum application. The Commissioner notified each of the claimants that his asylum claim would be dealt with under the Regulation.

5. Each claimant was represented by the Refugee Legal Service (RLS), a publicly funded legal aid system for asylum claimants. In each case the RLS presented the Commissioner with a large number of reports from the UNHCR and from various groups and NGOs⁵ describing an inadequate asylum system in Greece and Greece’s inability to deal with the large numbers of illegal immigrants and asylum seekers arriving there. In particular, the claimants relied on the UNHCR position paper on Greece of 2008 which outlined a number of structural shortcomings for asylum seekers returned under the Dublin Regulation to Athens Airport where they faced difficulties in being able to claim asylum. The report described a lack of information

² Mr M.E., Mr A.S.M. and Mr E.H. claim to be from Afghanistan; Mr M.T. from Algeria and Mr K.P. from Iran.

³ With one exception: Mr E.H. claimed that all those detained in Greece were beaten by the police. It is accepted however that no issue arises as to a breach of Article 3 of the ECHR.

⁴ See *Refugee Act 1996 (Section 22) Order* (S.I. No. 423 of 2003).

⁵ See *inter alia* European Parliament *Report of the LIBE Committee Delegation on the Visit to Greece (Samos and Athens)* (2007); press release from the Director of European Affairs for the PROASYL network (2007); *European Council on Refugees and Exiles (ECRE) weekly electronic updates (Ecran)*; UNHCR paper on *The Return to Greece of Asylum-Seekers in ‘Interrupted’ Claims* (July 2007); *Athens News* article by Kathy Tziliivakis (February 2008); U.S. Department of State *Country Report on Human Rights Practices 2007 – Greece* (March 2008); EUobserver.com article *Greece criticised over treatment of asylum seekers* (March, 2008); ECRE Press Release *Spotlight on Greece – EU Asylum Lottery under Fire* (April 2008); Press Release by human rights organisations NOAS, NHC and GHM, Athens launching *Report on the violation of asylum seekers’ human rights by Greece* (April 2008); UNHCR *Position on the Return of Asylum Seekers to Greece under the Dublin Regulation* (April 2008).

about the procedures for claiming asylum and deficiencies relating to the availability of interpreters and information. Reception conditions were described as extremely limited and serious flaws in the implementation of the *Reception Conditions Directive*⁶ in Greece were described. The UNHCR concluded that the shortcomings in the Greek system were causing “undue hardships” and advised:-

“In view of EU Member States’ obligation to ensure access to fair and effective asylum procedures, including in cases subject to the Dublin Regulation, UNHCR advises Governments to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice. UNHCR recommends that Governments make use of Article 3(2) of the Dublin Regulation, allowing States to examine an asylum application lodged even if such examination is not its responsibility under the criteria laid down in this Regulation.”

6. Relying on that paper and other reports describing similar conditions and concerns, the RLS argued that the claimants should not be sent back to Greece and that the Commissioner was obliged to apply the sovereignty clause and accept responsibility for examining and determining their particular asylum applications even though such examination was not Ireland’s responsibility.

7. In each case the Commissioner considered those reports and consulted a number of other Member States as to their position on transfers to Greece under the Dublin Regulation. The Commissioner determined that Greece had undertaken not to refoule asylum seekers and appeared to be making substantial efforts to provide support to asylum seekers. He determined that Member States who had suspended transfers to Greece had done so only on a temporary basis and were now returning persons to Greece and were applying Article 3(2) in specific and unique cases involving vulnerable groups such as unaccompanied minors, claimants with a disability or those who were pregnant or who were ill. He also determined that persons transferred to Greece had been accepted into the asylum system. The Commissioner observed that the English Court of Appeal⁷ and the European Court of Human Rights⁸ had determined that complaints as to the operation of asylum procedures in Greece falling short of a breach of Article 3 ECHR should be raised with the Greek authorities and he ultimately concluded that the claimants should be returned to Greece. The Commissioner therefore declined to exercise his discretion to derogate from the normal application of the Dublin Regulation under Article 3(2).

⁶ Council Directive 2003/9/EC of 27 January 2003.

⁷ *A.H. (Iran), Zego (Eritrea) and Kadir (Iraq) v. Secretary of State for the Home Department* [2008] EWCA Civ 985 and *Secretary of State for the Home Department v. Javad Nasser* [2008] 3 W.L.R. 1386.

⁸ *K.R.S. v. United Kingdom* (Application no. 32733/08, decision of 2nd December 2008).

8. Meanwhile, a “take charge” request was made to Greece in each case. Greece failed to respond and was consequently deemed to have accepted responsibility pursuant to Article 18(7) of the Regulation. The Minister for Justice and Law Reform then signed transfer orders in the five cases. However those transfers have been stayed pending the determination of judicial proceedings before this Court which challenge the validity of the Commissioner’s refusal to exercise his discretion pursuant to Article 3(2), primarily on the basis of a change in the law since the Lisbon Treaty came into effect on 1st December 2009. The transfers were stayed on the basis that these five cases would be the test cases for all the other Dublin Regulation cases involving transfers to Greece.

(2) Applicable EU and Domestic Provisions

9. The Dublin Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged by a third-country national. The responsible Member State is ascertained in accordance with a set of objective and hierarchical criteria relating to (i) unaccompanied minors; (ii) family unity; (iii) the issuance of a residence permit or visa; (iv) illegal entry or stay in a Member State; (v) legal entry to a Member State; and (vi) applications in an international transit area of an airport. Where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining it. The Regulation allows for derogation from the normal application of the hierarchy of criteria under the *humanitarian clause* (Article 15) and, of importance to this referral, under Article 3(2), which is commonly described as the *sovereignty clause*. Article 15 allows Member States to bring family members or other dependent relatives together on humanitarian grounds based in particular on family or cultural considerations. The claimants in these five cases do not invoke the operation of Article 15 but rely on the discretion afforded to Member States by the separate and distinct *sovereignty clause*.

10. The purpose of the Regulation is to ensure that each claim for asylum is fairly examined by one Member State, to deter asylum forum shopping and to enhance efficiency.⁹ The procedures by which effect is given in Ireland to the Regulation are set out in the *Refugee Act 1996 (Section 22) Order* (S.I. No. 423 of 2003).

⁹ UNHCR *Position on the Return of Asylum Seekers to Greece under the Dublin Regulation* (2008), 1.

(3) Reasons for the Reference

11. At the substantive hearing of the joint judicial review action the Court was made aware that there has been controversy in a number of Member States as to when and in what circumstances Article 3(2) of the Regulation should be exercised and in particular whether a Member State is obliged to exercise its discretion in favour of claimants who argue that reception conditions and asylum standards and procedures are seriously deficient in other Member States, especially in Greece.

12. The claimants also argued that the Commissioner failed to have regard to the UNHCR *Observations on Greece as a Country of Asylum* of December 2009 which had specifically been brought to his attention. The report indicates that by Presidential Decree in June 2009 the appeals process was abolished in Greece and a revised first instance decision became subject only to an appeal to the Court of Cassation. The report further indicates that the UNHCR representatives in Greece then refused to participate in the process owing to perceived unfairness.

13. In a previous decision *Mamo, Mirza and Abrahim v. The Commissioner and the Minister* (Unreported, High Court, Clark J., 21st October 2009) I held that, properly construed, Article 3(2) does not oblige the designated domestic decision-maker (who in Ireland is the Commissioner) to undertake an assessment of the effectiveness of the asylum procedures in another Member State. Ireland as a Member State is entitled to assume compliance by Greece, a fellow Member State, with its obligations under the Asylum Procedures,¹⁰ Reception Conditions and Qualification Directives¹¹ and under the Dublin Regulation and the Convention Relating to the Status of Refugees of 1951. I held that in the absence of any asserted breaches of a claimant's rights under Article 3 ECHR, there was no obligation to apply the sovereignty clause in favour of the claimants and I refused to quash the decision to transfer the claimants to Greece. However, I granted a certificate of leave to appeal to the Supreme Court of Ireland on one discrete point of law, that is:-

“On the assumption that issues relevant to Article 3 of the ECHR do not arise, what is the extent of the obligation or entitlement on the part of the ORAC, pursuant to Council Regulation (EC) No. 343/2003, to assess whether the Member State prima facie responsible for taking back an applicant for asylum status operates an asylum system which fails to accord with the obligations of that Member State pursuant to that Regulation?”

¹⁰ Council Directive 2005/85/EC of 1 December 2005.

¹¹ Council Directive 2004/83/EC of 29 April 2004.

14. Since that decision, all transfers to Greece have been stayed pending the decision of the Supreme Court. In the meanwhile, in subsequent cases which also challenge transfer orders to Greece, it was argued that the Lisbon Treaty has changed the legal landscape in asylum law and that my decision in *Mamo & Ors* should be reconsidered. It was then agreed that this point would be argued before me in this series of five cases. The applicants in the judicial review proceedings relied on the Charter of Fundamental Rights of the European Union and, in particular Article 18 thereof which states:-

“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”.

15. They argue that as this guarantee now has the status of “hard law” equating to that of EU Treaties and as the Dublin Regulation is secondary legislation, the extent of the discretion afforded by Article 3(2) of the Regulation must be interpreted to accord with the guarantee contained in Article 18. It is argued that Member States are therefore prohibited from transferring an asylum seeker to another Member State under the Dublin Regulation when material provided from objective and responsible sources such as the UNHCR question the compliance of that Member State with the guarantee afforded by Article 18. The claimants further argue that where such evidence is available, Member States are obliged to derogate under Article 3(2) as to return Dublin claimants would amount to a breach of its obligations under the Charter.

16. In this regard, the UNHCR and AIRE sought leave to participate in the proceedings. This Court granted both parties leave to participate as *amici curiae* to assist in determining whether it would be appropriate for the Court to apply the procedure set out under Article 267 TFEU and refer the issue to the Court of Justice of the European Union. Both of those bodies advised the Court that a referral was appropriate, specifically because of the change effected by the Lisbon Treaty and the Charter of Fundamental Rights. In addition they brought to the Court’s attention the fact of two differing determinations by Courts in England and Germany, where inconsistent views were taken on the extent of the obligation, if any, to exercise discretion to derogate under Article 3(2) of the Regulation. The decision of Cranston J. in the High Court of England and Wales in *Saeedi v. Secretary of State for the Home Department* [2010] EWHC 705 (Admin) and that of the Administrative Court

of Frankfurt in “*Mr P*” v. *Federal Office for Migration and Refugees (Transfer of Asylum Claimants to Greece)* (BeckRS 2009 36287) (8th July 2009).

17. In *Saeedi*, the applicant relied on material on the procedures and conditions for asylum seekers similar in content to that which was before the Commissioner in these cases. Cranston J. reviewed that material and found that “*the evidence is too speculative to amount to substantial grounds for believing that there is real risk of detention in conditions breaching Article 3.*” He accepted that on the evidence, conditions in Greece for Dublin returnees “*leave a great deal to be desired*” but when addressing Article 3(2) of the Dublin Regulation, he held that there was nothing in the Regulation which required the Secretary of State to use his discretion to examine the substantive rights of asylum seekers simply because aspects of the Common European Asylum System are not fully observed by the receiving State. Cranston J. found that “*It is Greece's responsibility to implement the provisions of the constituent instruments in its own territory.*” He held at paragraph 152:-

“To require the Secretary of State to exercise the Article 3(2) discretion to make good any deficiencies in Greece's compliance with the different aspects of the Common European Asylum System would be, in a sense, inimical to the purpose of the Dublin Regulation. As indicated earlier one of its purposes is to prevent secondary movements of asylum seekers caused by differences in the conditions in different Member States. If a failure of a Member State were a reason to exercise the Article 3(2) discretion, it would encourage forum shopping and lead to delay in the determination of claims.”

18. Cranston J. also held that “*[s]erious and consistent breaches of the Common European Asylum System by a Member State, so claimants do not have access to an effective and lawful procedure and the guarantee of a right to asylum, is a matter at a European institutional level between that Member State and the Commission.*” He expressed the view that Member States may be obliged to exercise the sovereignty clause where the transfer of the claimant would give rise to a breach of his rights under Articles 1, 18 or 19 of the Charter of Fundamental Rights, though he accepted that in practice, the matters relevant to Article 19 would already have been factored into the consideration given to Article 3 of the ECHR.

19. A substantially different approach was taken by the Administrative Court of Frankfurt in the *P* case where it was held that the purpose of Article 3(2) can be discerned from the purpose of the Dublin Regulation as a whole and from the Asylum Procedures, Reception Conditions and Qualification Directives. The Court noted that the Regulation seeks to ensure full observance of the right to asylum guaranteed by

Article 18 of the Charter which is “*an elemental and obligatory component of the legal order of the European Union which must be observed*”. The Court noted that the Directives “*presuppose the existence of a joint European asylum law system*” and that it is therefore generally acceptable to transfer claimants between Member States subject to the following caveat:-

“[...] to the extent that any substantive or procedural asylum law provisions laid down by the above mentioned Directives have not been transposed satisfactorily by a Member State or are not applied for other reasons, the competence provisions of the Regulation do not exempt the Member State in which the application was lodged from its international law obligation under the Geneva Convention to examine the asylum application. In so far, the sovereignty clause in Article 3(2) Dublin II Regulation must at least also be interpreted as an instrument guaranteeing an applicant’s right to have his asylum application examined, with the purpose to guarantee asylum procedures in compliance with the Directives if it can be expected that he does not have any access to such procedures in the Member State which is responsible under Regulation (EC) No 343/2003.”

20. Having considered the applicant P’s evidence of his particular experiences of seeking asylum in Greece as a Dublin transferee and having considered objective information on the situation there, the German Court found that it could not be assumed that the applicant had access in Greece to procedures which complied with the relevant Directives or that he would have such access in the future. The Court expressed concern that “*it must be feared that there will be no hearing to investigate deeper into the details of the persecution alleged by him.*” It found that the applicant had suffered “*serious impairment*” of his rights which violated the essential core and substance of the Directives. In those circumstances the Court found that the German State’s discretion under Article 3(2) was reduced to zero – that is, Germany was obliged to accept responsibility for determining Mr P’s asylum application.

21. It should be noted that the German and English Courts were dealing with entirely different facts. Mr Saeedi – like the applicants herein – never applied for asylum in Greece. In contrast, Mr P. had applied for asylum when transferred from Germany to Greece under the Dublin Regulation. The German Court found that Mr. P had given credible evidence of the substantial difficulties he had faced in his attempts to apply for asylum as a Dublin returnee.

(4) Views of the Respondent

22. The respondents oppose any reference under Article 267 TFEU denying that the Lisbon Treaty has effected any change which could cause the Court to depart from its

previous decision in *Mamo*. They contend that a referral is unnecessary as the point of law was previously determined in *Mamo* where it was found that a Member State has no obligation to derogate under Article 3(2) simply because conditions in a receiving country under Dublin Regulation are alleged to be sub-optimum, provided that there is no risk that the transfer would breach Article 3 ECHR.

23. The respondents further argue that as none of the applicants actually applied for asylum in Greece, they were not in a position to comment upon or complain of the effectiveness or otherwise of the asylum system there. Generic, standard representations were made to the Commissioner about the situation in Greece which the Commissioner had considered and assessed. He determined that those submissions by taking a wide view of Article 3(2) of the Regulation.

24. The respondent's position is that Member States' obligation, when implementing EU law, to ensure that the right to asylum set out in Article 18 of the Charter is respected does not affect the manner in which Article 3(2) ought to be interpreted, as the right to asylum is implicit in recital 15 to the Dublin Regulation.

(5) Views of the Domestic Court

25. This Court expressed the view in a number of previous cases and remains of the view that in the absence of any evidence that a transfer would raise a risk of treatment contrary to Article 3 ECHR, each Member State is entitled to assume compliance with the common obligations under the Asylum Procedures, Reception Conditions and Qualification Directives and under the Dublin Regulation, where applicable.

26. The Court is also of the view that it would be contrary to the spirit of the Regulation for either the Commissioner or the domestic courts to examine the effectiveness of asylum systems in another Member State when considering the transfer of an asylum claimant to the Member State deemed responsible for examination of that claim. It is the function of the Commissioner to determine which Member State is responsible for determining the claimant's asylum claim in accordance with the hierarchy of objective criteria set out in the Regulation, and not whether the receiving Member State is compliant with the Regulation or relevant asylum Directives. While the facts relevant to the particular application may well trigger the exercise of the Commissioner's discretion to apply the *humanitarian clause* (Article 15) or for other reasons to apply the *sovereignty clause* (Article 3(2)), the fact remains that if the Commissioner determines that the operation of the

discretionary clauses is not appropriate, he is entitled to determine that the claimant should be transferred to the responsible Member State. It is not the function of the High Court to determine when and how the Commissioner exercises his discretion.

27. In arriving at the above view, the Court was mindful of previous decisions of the Court of Appeal and House of Lords in *Nasseri*¹² and the European Court of Human Rights in *K.R.S.*¹³ However, having regard to the above mentioned decisions of the Court of Appeal in *Saaedi* and the Frankfurt Administrative Court in *Mr P*, the Court is unsure whether in the light of the guarantee outlined in Article 18 of the Charter, it is now appropriate for the transferring Member State to examine the adequacy of the receiving Member State's asylum system. It seems to this Court that such an examination would defeat the purpose of the Dublin Regulation but the Court is unsure whether Article 18 of the Charter of Fundamental Rights effected any change to the manner in which Article 3(2) the Dublin Regulation should be interpreted.

28. Following legal argument the Court agreed to stay further hearing of the judicial review proceedings in order that a preliminary ruling would be sought. The Supreme Court of Ireland was informed of this intention and the appeal to that Court of the earlier cases of *Mamo et al* has been stayed pending the Court's ruling.

29. The Court would therefore welcome the ruling and advice of the Court of Justice of the European Union on the correct interpretation of Article 3(2) of the Regulation. The Court requires guidance on the matter to assist in this and further decisions on the transfer of claimants to Member States where assertions are made and even supported by expert views of unfavourable reception conditions and / or ineffective asylum procedures.

(6) The Questions

30. The Court respectfully requests a preliminary ruling from the Court of Justice of the European Union on the following questions which are predicated on the assumption that the transfer of the claimants raises no issues under Article 3 ECHR:-

- (1) Is the transferring Member State under Council Regulation (EC) No. 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter of Fundamental Rights and Freedoms of the EU, Council Directives 2003/9EC, 2004/83/EC and 2005/85/EC and Council Regulation (EC) No. 343/2003?

¹² [2008] 3 W.L.R. 1386 and [2009] 2 W.L.R. 1190.

¹³ (App no. 32733/08, decision of the 2nd December 2008)

- (2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member State obliged to accept responsibility for examining the application under Article 3(2) of Council Regulation (EC) No. 343/2003?

31. The interpretation of Article 3(2) in the light of the answers to those questions is an issue of law the resolution of which is essential to the Court's determination of the five test proceedings and those of the 32 known dependent and other cases not yet identified. The Court considers it necessary to seek a preliminary ruling in order to enable it to deliver its judgment.