OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 22 September 2011 [1]

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1 — Original language of the Opinion: German. Language of the case: English.

I — Introduction

1. One of the greatest challenges in creating the Common European Asylum System is establishing a fair, but also effective distribution of the burden, associated with immigration, on the asylum systems of the European Union ('EU') Member States. This is illustrated particularly clearly by the present reference for a preliminary ruling, in which the referring court asks the Court to clarify the way in which the overloading of a Member State's asylum system affects the EU arrangements for determining the Member States responsible for asylum applications lodged in the European Union.

2. The criteria for determining the Member State responsible for an asylum application lodged in the European Union are laid down in Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. [2] A fundamental characteristic of the system for allocating responsibilities in asylum cases introduced by that regulation is that, in principle, a single Member State is responsible for each asylum application lodged in the European Union. Where a third-country national has applied for asylum in a Member State which is not primarily responsible for examining that application under Regulation No 343/2003, the regulation provides for mechanisms for the transfer of the asylum seeker to the Member State which is primarily responsible.

3. However, in the light of the current crisis affecting the Greek asylum system, the question arises, for the other Member States, whether asylum seekers may be transferred to Greece pursuant to Regulation No 343/2003 for the purpose of examining their asylum applications if it cannot be guaranteed that those asylum seekers will be treated and their applications will be examined in Greece in accordance with the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights') and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Because Article 3(2) of Regulation No 343/2003 accords the Member States the right, by way of derogation from the normal rules on responsibility, to take on the examination of an asylum application lodged in their territory, rather than the Member State which is primarily responsible, the question also arises whether the Member States' right to assume responsibility for the examination themselves may become a duty to assume responsibility for the examination if there is a risk that the asylum seeker's fundamental rights and human rights will be violated if he is transferred to the Member State which is primarily responsible.

4. The referring court must rule on these questions in the main proceedings, in which an Afghan asylum seeker is challenging his return from the United Kingdom to Greece. Against this background, the referring court essentially asks whether, and if so in what circumstances, the United Kingdom may be required under EU law, in a case like the main proceedings, to assume responsibility for examining asylum applications itself, even though Greece is primarily responsible for the examinations under Regulation No 343/2003.

5. Because the Charter of Fundamental Rights has particular relevance in this connection, the referring court also requests clarification about the content and scope of Protocol (No 30) on the application of the Charter of Fundamental Rights of the

2 — OJ 2003 L 50, p. 1.

European Union to Poland and to the United Kingdom.

6. In answering the questions referred, regard must also be had to the judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*[3] – which was delivered after the order for reference had been made – in which the European Court of Human Rights considered the transfer of an Afghan asylum seeker from Belgium to Greece to be a violation by Belgium of Article 3 and Article 13 of the ECHR.

7. Furthermore, the present case is closely connected with Case C-493/10 *M.E. and Others*, in which I deliver my Opinion on the same day as in the present case. In *M.E. and Others* the central issue is the transfer of asylum seekers from Ireland to Greece pursuant to Regulation No 343/2003 and that case has been joined with the present case, by order of the President of the Court of Justice, for the purposes of the written and oral procedure and the judgment. For reasons of clarity, however, I am delivering separate Opinions in the present case and in *M.E. and Others*.

3 — Judgment of 21 January 2011, Application No 30696/09.

II — Legislative framework

A — *EU law*

1. Charter of Fundamental Rights

8. Article 1 of the Charter of Fundamental Rights provides, under the heading 'Human dignity':

'Human dignity is inviolable. It must be respected and protected.'

9. Article 4 of the Charter of Fundamental Rights provides, under the heading 'Prohibition of torture and inhuman or degrading treatment or punishment':

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

10. Article 18 of the Charter of Fundamental Rights provides, under the heading 'Right to asylum':

'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 on

European Union and the Treaty on the Functioning of the European Union.'

11. Article 19 of the Charter of Fundamental Rights provides, under the heading 'Protection in the event of removal, expulsion or extradition':

'1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

12. Article 47 of the Charter of Fundamental Rights provides, under the heading 'Right to an effective remedy and to a fair trial':

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

13. Article 51 of the Charter of Fundamental Rights provides, under the heading 'Field of application':

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

14. Article 52 of the Charter of Fundamental Rights provides, under the heading 'Scope and interpretation of rights and principles':

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the

essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

2. Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

15. Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union ('Protocol No 30'), has two articles which read as follows:

'*Article 1*

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.'

3. Secondary law

16. The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution. At that special meeting, the European Council also acknowledged the need to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

17. The measures adopted to implement the Tampere Conclusions included the following regulation and the following directives: [4]

— Regulation No 343/2003,

— Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [5]

— Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [6]

— Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country

4 — In addition to the regulation and the directives mentioned here, there are many other pieces of secondary legislation which relate to the creation of a common asylum system, the policy of legal immigration, and the fight against illegal immigration, such as Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ 2010 L 132, p. 11) and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

5 — OJ 2001 L 212, p. 12.

6 — OJ 2003 L 31, p. 18.

nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [7]

— Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. [8]

18. That regulation and those directives specifically provide as follows:

(a) Regulation No 343/2003

19. In Article 1, Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

20. Article 3 of Regulation No 343/2003 states:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.

7 — OJ 2004 L 304, p. 12.
8 — OJ 2005 L 326, p. 13.

4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.'

21. Article 4 of Regulation No 343/2003 states:

'1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

2. An application for asylum shall be deemed to have been lodged once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

...'

22. Article 5 of Regulation No 343/2003 provides:

'1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.'

23. Article 10 of Regulation No 343/2003 states:

'1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), that the asylum seeker – who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established – at the time of lodging the application has been previously living for a continuous period of at least five months in a Member State, that Member State shall be

responsible for examining the application for asylum.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application.'

24. Article 13 of Regulation No 343/2003 provides:

'Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.'

25. Article 16 of Regulation No 343/2003 states:

'1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

...

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

...'

26. Article 17 of Regulation No 343/2003 provides:

'1. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.

Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.

...'

27. Article 18 of Regulation No 343/2003 states:

'1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

…

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangements for arrival.'

28. Article 19 of Regulation No 343/2003 provides:

'1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.

…

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…'

(b) Directive 2001/55

29. According to Article 1, the purpose of Directive 2001/55 is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

30. Under Article 2(a) of Directive 2001/55,'temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

31. Chapter II of Directive 2001/55 contains rules on the duration and implementation of temporary protection. Chapter III concerns the obligations of the Member States towards persons enjoying temporary protection. Chapter IV of the directive regulates access to the asylum procedure in the context of temporary protection. Chapter V of the directive concerns return and measures after temporary protection. Chapter VI concerns the distribution of burdens and responsibilities among the Member States in the spirit of solidarity within the European Union.

(c) Directive 2003/9

32. Article 1 states that the purpose of Directive 2003/9 is to lay down minimum standards for the reception of asylum seekers in Member States.

33. The minimum standards laid down in Directive 2003/9 relate to the Member States' information duties vis-à-vis asylum seekers (Article 5), provision of documentation for asylum seekers (Article 6), residence and freedom of movement for asylum seekers (Article 7), the preservation of family unity for asylum seekers (Article 8), schooling and education of minors (Article 10), access to the labour market for asylum seekers (Article 11), vocational training (Article 12) and material reception conditions and health care for asylum seekers (Article 13 et seq.).

34. Article 21 of Directive 2003/9 provides, under the heading 'Appeals':

'1. Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or a review before a judicial body shall be granted.

2. Procedures for access to legal assistance in such cases shall be laid down in national law.'

35. Under Article 23 of Directive 2003/9, Member States must, with due respect to their constitutional structure, ensure that appropriate guidance, monitoring and control of the level of reception conditions are established. Under Article 24(2), Member States must allocate the necessary resources in connection with the national provisions enacted to implement that directive.

(d) Directive 2004/83

36. Under Article 1 of Directive 2004/83, the purpose of the directive is to lay down minimum standards for the qualification of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

37. Chapters II, III and V of Directive 2004/83 contain a number of rules and criteria relating to the assessment of applications for the granting of refugee status or for the granting of subsidiary protection status and relating to the qualification of third-country nationals as refugees or as persons eligible for subsidiary protection. Chapter IV contains, first, a provision under which Member States must grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III (Article 13). Secondly, that chapter lays down detailed rules on revocation of, ending of or refusal to renew refugee status (Article 14). Chapter VI contains the relevant rules on the granting of subsidiary protection status (Article 18) and on the revocation of, ending of or refusal to renew subsidiary protection status (Article 19). Chapter VII lays down the content of international protection, including protection from *refoulement* (Article 21). Chapter VIII governs matters of administrative cooperation. Under Article 36, Member States must ensure, among other things, that authorities and other organisations

implementing the directive have received the necessary training.

(e) Directive 2005/85

38. Under Article 1 of Directive 2005/85, the purpose of the directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

39. Under Article 3(1) of Directive 2005/85, the directive applies to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status. The first subparagraph of Article 4(1) provides that Member States must designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with the directive.

40. The basic principles underlying those procedures and the guarantees to be given to asylum seekers in this connection are laid down in Chapter II of Directive 2005/85. Specific rules on the procedures for granting refugee status are contained in Chapter III of the directive, which also introduces the safe third country concept (Article 27) and the safe country of origin concept (Article 31). Chapter V includes rules on the right of asylum seekers to an effective remedy (Article 39).

B — *International law*

1. Geneva Convention

41. Under Article 33(1) of the Geneva Convention, no Contracting State may expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. European Convention on Human Rights

42. Under Article 3 of the ECHR, no one may be subjected to torture or to inhuman or degrading treatment or punishment.

43. Under Article 13 of the ECHR, everyone whose rights and freedoms as set forth in the Convention are violated must have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

III — Facts and reference for a preliminary ruling

44. In the main proceedings, the referring court has to decide on an appeal brought by an Afghan asylum seeker ('the appellant in the main proceedings') against a decision of the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) ('the Administrative Court'), by which the appellant in the main proceedings challenges his transfer to Greece by the United Kingdom. The respondent in the main proceedings, the Secretary of State for the Home Department, is the Government Minister with responsibility for immigration and asylum in the United Kingdom.

45. On his journey from Afghanistan to the United Kingdom, the appellant in the main proceedings travelled through, among other countries, Greece, where he was arrested and fingerprinted on 24 September 2008. He did not claim asylum in Greece. Following detention in that Member State, he was ordered to leave Greece within 30 days and was subsequently expelled to Turkey. Having escaped from detention in Turkey, he made his way to the United Kingdom, where he arrived on 12 January 2009 and applied for asylum on that same date.

46. On 1 April 2009, the Secretary of State requested Greece, pursuant to Regulation No 343/2003, to take charge of the appellant in the main proceedings. Following failure by the Greek authorities to respond within the period laid down by Regulation No 343/2003, Greece was deemed to have accepted responsibility under that regulation for consideration of the claim.

47. The appellant in the main proceedings was informed on 30 July 2009 that he would be removed to Greece on 6 August 2009. On 31 July 2009 the Secretary of State notified the appellant in the main proceedings of a decision taken under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 certifying that his claim that removal to Greece would violate his rights under the ECHR was clearly unfounded. The effect of that decision was that the appellant in the main proceedings did not have a right, under national law, to appeal against the decision to remove him to Greece, to which he would otherwise have been entitled.

48. Following an unsuccessful request that the Secretary of State accept responsibility for determining his asylum claim pursuant to Article 3(2) of Regulation No 343/2003 inter

alia on the ground that his fundamental rights under EU law would be breached in the event of his return to Greece, the appellant in the main proceedings was informed, on 4 August 2009, that the Secretary of State was maintaining the decision to remove him to Greece.

49. On 6 August 2009, the appellant in the main proceedings issued a claim for judicial review of the decision to certify that his claim under the ECHR was unfounded and of the decision to remove him to Greece. As a result of this claim, the directions which had been made to remove him to Greece were cancelled by the Secretary of State.

50. In view of the importance of the issues raised, on 14 October 2009 the Administrative Court granted the appellant in the main proceedings permission to bring his claim for judicial review, it being ordered that his case should become the lead case in England and Wales on returns to Greece under Regulation No 343/2003.

51. By judgment of 31 March 2010, the Administrative Court dismissed the claim by the appellant in the main proceedings, but granted him permission to appeal to the referring court in view of the general importance of the issues raised.

52. The referring court concluded that the treatment of the appeal raises fundamental questions regarding the scope of Article 3 of Regulation No 343/2003 and the effect on that article of rights which the appellant in the main proceedings claims under the Charter of Fundamental Rights and under international conventions such as the ECHR.

53. Against this background, the referring court stayed the main proceedings and made reference to the Court for a preliminary ruling on the following questions:

'1. Does a decision made by a Member State under Article 3(2) of Council Regulation No 343/2003 ("the regulation") whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the regulation fall within the scope of EU law for the purposes of Article 6 of the Treaty on European Union and/or Article 51 of the Charter of Fundamental Rights of the European Union?

If the answer to Question 1 is yes:

2. Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2)

and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

3. In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under EU law; and/ or (ii) the minimum standards imposed by Directives 2003/9/EC ("the Reception Directive"); 2004/83/EC ("the Qualification Directive") and/or 2005/85/EC ("the Procedures Directive") (together referred to as "the directives")?

4. Alternatively, is a Member State obliged by EU law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in the directives will not be applied to him?

5. Is the scope of the protection conferred upon a person to whom the regulation applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention")?

6. Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a Court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to the regulation, to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the Convention or his rights pursuant to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees?

7. In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to Questions 2 – 4 qualified in any respect so as to take

account of the Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom?'

IV — Procedure before the Court

54. The order for reference dated 12 July 2010 was lodged at the Registry of the Court of Justice on 18 August 2010. In its order for reference, the referring court requested, pursuant to Article 104b(1) of the Rules of Procedure, that the reference for a preliminary ruling be dealt with under the urgent procedure. By an order of the President of the Court of Justice of 1 October 2010, that request was rejected.

55. By order of the President of the Court of Justice of 9 November 2010, Cases C-411/10 and C-493/10 were joined for the purposes of the written procedure and, by order of the President of the Court of Justice of 16 May 2011, for the purposes of the oral procedure and the judgment.

56. In the written procedure, observations were submitted by the appellant in the main proceedings, Amnesty International Limited and the AIRE (Advice on Individual Rights in Europe) Centre, the United Nations High Commissioner for Refugees and the Equality and Human Rights Commission, as interveners in the main proceedings, the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Finland, the French Republic, the Hellenic Republic, Ireland, the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the United Kingdom, the Czech Republic, the Swiss Confederation and the European Commission. The representatives of the appellant in the main proceedings, Amnesty International Limited and the AIRE (Advice on Individual Rights in Europe) Centre, the United Nations High Commissioner for Refugees and the Equality and Human Rights Commission, the Republic of Slovenia, the French Republic, the Hellenic Republic, Ireland, the Kingdom of the Netherlands, the Republic of Poland, the United Kingdom and the Commission took part at the hearing on 28 June 2011.

V — Arguments of the parties

57. The first question, which asks whether a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum falls within the scope of EU law, must be answered in the affirmative in the view of the *Commission*, the *Finnish*, *French* and *Netherlands Governments*, the *appellant in the main proceedings*, the *United Nations High Commissioner for Refugees*, *Amnesty International Limited* and the *AIRE Centre*, and the *Equality and Human Rights Commission*. In the view of the *Austrian Government* too, the EU fundamental rights are applicable to a decision made by a Member State whether to exercise its right to assume responsibility

for the examination itself under Article 3(2) of Regulation No 343/2003.

58. In the view of *Ireland* and the *Italian, United Kingdom* and *Belgian Governments*, on the other hand, the decision on the exercise of the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 does not fall within the scope of EU law. The *Belgian Government* adds a significant qualification to its statement, however, pointing out that the transfer of an asylum seeker to the Member State primarily responsible under Regulation No 343/2003 does fall within the scope of EU law.

59. In answering the first question, the *Czech Government* differentiates between the case where a Member State exercises the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003 and the case where it does not exercise that right. Only the decision to exercise the right to assume responsibility for the examination under Article 3(2) falls within the scope of EU law. On the other hand, the non-exercise of the right to assume responsibility for the examination under Article 3(2) does not fall within the scope of EU law.

60. The *German Government* does not comment expressly on the first question and answers the other questions in case the Court were to conclude that the exercise of discretion in Article 3(2) of Regulation No 343/2003 should be regarded as 'implementing Union law' within the meaning of the first sentence of Article 51(1) of the Charter of Fundamental Rights.

61. In answering the second, third and fourth questions, the *Commission*, the *Finnish, French, German and Netherlands Governments,* the *United Kingdom Government* [9] and the *Belgian Government, the appellant in the main proceedings* and *the United Nations High Commissioner for Refugees* essentially take the view that, in the context of the application of Regulation No 343/2003, the rebuttable presumption may be made that the Member State responsible for examining an asylum application will act in accordance with EU law and international law. However, in so far as it should be established in a specific case that the transfer of the asylum seeker to the Member State which is primarily responsible and the treatment of the asylum seeker in that Member State would violate the rights enshrined in the Charter of Fundamental Rights, the transferring Member State is required, in the view of the Commission, the Finnish, French, Belgian and United Kingdom Governments, the appellant in the main proceedings, the United Nations High Commissioner for Refugees, Amnesty International Limited and the AIRE Centre, to exercise its right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003. In the view of the German and

9 — The United Kingdom Government has answered the other questions in the event that, contrary to its proposal, the Court were to conclude that the decision on the exercise of the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 does fall within the scope of EU law.

the Netherlands Governments, an asylum seeker may no longer be transferred to the Member State which is primarily responsible in such a case.

62. The *United Kingdom Government* also stresses that an obligation to exercise the right to assume responsibility for the examination may arise only under extraordinary circumstances, namely where the presumption that the responsible Member State will act in accordance with humans rights and EU law vis-à-vis a certain category of asylum seekers has been clearly rebutted and the asylum seeker comes under that category.

63. In the view of the *Swiss Confederation*,[10] Regulation No 343/2003 inherently contains a rebuttable presumption that the participating States will comply with the Geneva Convention and the ECHR. However, where that presumption is rebutted in a specific case and it is not guaranteed that the asylum seeker will be treated in accordance with international law in the responsible State, a transfer to that State is precluded and the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 exceptionally becomes a duty.

64. In the view of the *Italian*, *Polish*, *Slovenian* and *Greek Governments* and *Ireland*, on the other hand, it is not possible to infer from Article 3(2) of Regulation No 343/2003 a duty to exercise the right to assume responsibility for the examination. In the view of the *Greek*, *Slovenian* and *Polish Governments*, moreover, under EU law a Member State may not review the conformity with EU law of the action of another Member State.

65. In answer to the fifth question, the *United Kingdom*, *Italian* and *Netherlands Governments* argue that the scope of the protection conferred upon a person to whom Regulation No 343/2003 applies by the rights set out in Articles 1, 18 and 47 of the Charter of Fundamental Rights is not wider than the protection conferred by Article 3 of the ECHR. The *appellant in the main proceedings*, the *Equality and Human Rights Commission*, the *United Nations High Commissioner for Refugees*, *Amnesty International Limited* and the *AIRE Centre* claim, on the other hand, that the protection of an asylum seeker to be transferred on the basis of the Charter of Fundamental

10 — On the basis of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ 2008 L 53, p. 5), the Swiss Confederation participates in the EU's system for establishing the States responsible for asylum applications. Under Article 5(2) of that Agreement, the Swiss Confederation has the right to submit statements of case or written observations to the Court of Justice in cases where a court in a Member State has applied to the Court of Justice for a preliminary ruling concerning the interpretation of Regulation No 343/2003.

Rights and the general principles of EU law extends further than the protection guaranteed by Article 3 of the ECHR.

66. In the view of the *German Government*, the EU fundamental rights stemming from Articles 4 and 19(2) of the Charter of Fundamental Rights correspond to the fundamental right under Article 3 of the ECHR. Article 18 of the Charter of Fundamental Rights does not contain a right to guaranteed asylum, but to protection against removal in accordance with Article 33 of the Geneva Convention. The scope of Article 47 of the Charter of Fundamental Rights is wider than that of Articles 6 and 13 of the ECHR in so far as the first paragraph requires a judicial remedy and the second paragraph is not restricted to civil and criminal proceedings.

67. In answer to the sixth question, the Commission, the Netherlands Government, the appellant in the main proceedings, the United Nations High Commissioner for Refugees, Amnesty International Limited and the AIRE Centre argue that a national law imposing a conclusive presumption that each Member State is a safe country from which the asylum seeker will not be sent to another State in contravention of his rights pursuant to the ECHR and the Geneva Convention is incompatible with Article 47 of the Charter of Fundamental Rights. The United Kingdom Government stresses that this presumption may be considered to be rebutted only in the case of manifest violations of fundamental rights and human rights. The Italian Government, on the other hand, takes the view that a conclusive presumption applying in national law, according to which the other Member States are safe countries, is compatible with Article 47 of the Charter of Fundamental Rights.

68. In answer to the seventh question, the Commission, the Polish Government, the United Kingdom Government, the appellant in the main proceedings, the United Nations High Commissioner for Refugees, the Equality and Human Rights Commission, Amnesty International Limited and the AIRE Centre argue that the provisions of Protocol No 30 do not affect their proposed answers to the questions referred.

VI — Legal assessment

A — *First question*

69. By its first question, which asks whether a decision made by a Member State, pursuant to its right to assume responsibility for the examination under Article 3(2) of Regulation

No 343/2003, to examine a claim for asylum, rather than the Member State which is primarily responsible, falls within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights, the referring court is essentially seeking to ascertain whether, and if so in what circumstances, the Member States must comply with the provisions of the Charter of Fundamental Rights in deciding whether to exercise their right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003. [11]

70. The answer to this question should have regard to Article 6(1) TEU, which classifies the Charter of Fundamental Rights as EU primary law (first subparagraph) and also states that the provisions of the Charter do not extend in any way the competences of the European Union as defined in the Treaties (second subparagraph). With regard to the specific interpretation and application of the Charter of Fundamental Rights, the third subparagraph of Article 6(1) TEU refers to Title VII (Articles 51 to 54) of the Charter.

71. Article 51 of the Charter of Fundamental Rights defines the field of application of the Charter. Article 51 confirms, first of all, that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the European Union, and to the Member States. Secondly, it is ensured that the binding force of fundamental rights for the EU institutions and the Member States does not have the effect of either shifting powers at the expense of the Member States or extending the field of application of EU law beyond the powers of the European Union as established in the Treaties. [12]

72. In order to preclude an extension of the European Union's powers in relation to the Member States, Article 51(1) of the Charter of Fundamental Rights provides in particular that

— the application of the Charter must not restrict the principle of subsidiarity (first sentence of Article 51(1)),

— the Member States are bound by the Charter only when they are implementing EU law (first sentence of Article 51(1)),

— the observance and application of the Charter must respect the limits of the powers of the European Union as conferred on it in the Treaties (second sentence of Article 51(1)).

11 — In the main proceedings, the referring court considers that it must address this question because the Secretary of State had argued that, in exercising their discretion under Article 3(2) of Regulation No 343/2003, the Member States are not required to take account of EU fundamental rights, because the exercise of that discretion does not fall within the scope of EU law.

12 — See also the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 32).

73. In addition, Article 51(2) of the Charter of Fundamental Rights contains the general statement that the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties.

74. Against this background, with its first question the referring court takes up the requirement laid down in the first sentence of Article 51(1) of the Charter of Fundamental Rights that the Member States are bound by the Charter only when they are implementing EU law. In this connection it asks whether the Member States 'are implementing Union law' within the meaning of that provision where they decide, on the basis of their discretion under Article 3(2) of Regulation No 343/2003, whether or not to examine an asylum application instead of the Member State which is primarily responsible.

75. In my view, this question must be answered in the affirmative.

76. As can be seen from the Explanations relating to the Charter of Fundamental Rights ('the Explanations'), [13] the principle laid down in the first sentence of Article 51(1) of the Charter of Fundamental Rights, according to which the Member States are bound by the Charter only when they are implementing EU law, is to be regarded as a confirmation of the Court's previous case-law on respect by the Member States for the fundamental rights defined in the context of the European Union. The Explanations make express reference to the decisions of principle in *Wachauf*[14] and *ERT*, [15] and to *Karlsson*. [16]

77. In *Wachauf* the Court found that the requirements of the protection of fundamental rights are also binding on the Member States when they implement EU rules and the Member States must, as far as possible, apply those rules in accordance with those requirements. [17] In *ERT* the Court also found that restrictions of the fundamental freedoms made by the Member States must satisfy the requirements of the protection of fundamental rights in the EU legal order. [18]

13 — OJ 2007 C 303, p. 32. Under Article 52(7) of the Charter of Fundamental Rights, the Explanations, drawn up as a way of providing guidance in the interpretation of the Charter, are to be given due regard by the courts of the European Union and of the Member States. The importance of the Explanations for the interpretation of the individual provisions of the Charter is also expressly confirmed in the third subparagraph of Article 6(1) TEU.

14 — Case 5/88 [1989] ECR 2609.

15 — Case C-260/89 [1991] ECR I-2925.

16 — Case C-292/97 *Karlsson and Others* [2000] ECR I-2737. This judgment can be classified in the 'Wachauf' line of case-law.

17 — *Wachauf*, cited above in footnote 14, paragraph 19. That judgment was confirmed in Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 104 et seq.

18 — Case C-260/89 *ERT*, cited above in footnote 15, paragraph 41 et seq.

78. Having particular regard to the fact that the Explanations make reference to both the *Wachauf* case-law and the *ERT* case-law, the Member States must be regarded as being bound by the Charter of Fundamental Rights, under Article 51(1) of the Charter, both when they implement EU rules and in the context of national restrictions of the fundamental freedoms. [19]

79. Against this background, the question arises in the present case whether a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum is to be regarded, for the purposes of Article 51(1) of the Charter of Fundamental Rights and in the light of the *Wachauf* case-law, as a national implementing measure for Regulation No 343/2003.

80. In my view, this question must be answered in the affirmative. The discretion enjoyed by the Member State in making that decision does not preclude that assessment. Rather, the crucial factor is that Regulation No 343/2003 lays down exhaustive rules for determining the Member State responsible for examining an asylum application. The option afforded to the Member States to examine asylum applications pursuant to Article 3(2) of Regulation No 343/2003 is an integral part of those rules, which is, inter alia, reflected in the fact that the regulation lays down comprehensive rules governing the legal consequences of such a decision. [20] Consequently, decisions taken by the Member States on the basis of Article 3(2) of Regulation No 343/2003 are also to be regarded as implementing measures, despite the discretion available to them.

81. This view is confirmed in *Wachauf*, [21] in which the Court examined, among other things, the compatibility of individual provisions of Regulation No 1371/84 [22] with the requirements of the protection of fundamental rights in the EU legal order. Regulation No 1371/84 conferred on the Member States the power to give the lessee of a milk-producing farm, under certain circumstances, compensation for the definitive discontinuance of milk production at the end of the lease. In the main proceedings, a lessee brought an action because he had been refused such compensation, even though he had definitively closed the farm intended for milk production he had built up. Against this background, the Court

19 — See also Ladenburger, C., Article 51, in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, paragraph 22 et seq.; Nowak, C., in *Handbuch der Europäischen Grundrechte* (ed. Heselhaus/Nowak), Munich 2006, § 6, paragraph 44 et seq.

20 — Under Article 3(2) of Regulation No 343/2003, the Member State which decides voluntarily to examine the application for asylum becomes the Member State responsible within the meaning of that regulation and assumes the obligations associated with that responsibility.

21 — Cited above in footnote 14.

22 — Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, OJ 1984 L 132, p. 11.

was required to rule, inter alia, on whether that refusal to grant compensation inevitably followed from Regulation No 1371/84 and whether it was consistent with the EU fundamental rights which had been recognised as general principles of law. In its judgment, the Court held, on the one hand, that the refusal to grant a departing lessee the compensation in question should be regarded as an infringement of the requirements of the protection of fundamental rights in the EU legal order if he was deprived, without compensation, of the fruits of his labour and of his investments in the tenanted holding. [23] Because, however, Regulation No 1371/84 allowed the Member States, specifically in these cases, a sufficient margin of appreciation in granting the lessees due compensation which was consistent with the requirements of the protection of fundamental rights, in the view of the Court, the rules contained in the regulation were to be regarded as consistent with the fundamental rights. [24]

82. Even though in *Wachauf* the Court addressed, first and foremost, the consistency of the contested regulation with fundamental rights, it confirmed, at least implicitly, that the decisions by the Member States to grant compensation to departing lessees, which are taken by the national authorities on the basis of the discretion conferred by Regulation No 1371/84, must, as far as possible, be in accordance with the requirements of the protection of fundamental rights. The Court thus confirmed, at the same time, that decisions made by the Member States on the basis of the discretion available to them under EU legislation are to be regarded as implementing measures for that EU legislation for the purposes of protection of fundamental rights under EU law. [25]

83. In the light of the foregoing, the first question must be answered to the effect that a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the regulation constitutes a measure implementing EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights.

23 — *Wachauf*, cited above in footnote 14, paragraph 19.
24 — Ibid. (paragraph 22 et seq.).
25 — See also Case C-540/03 *Parliament* v *Council*, cited above in footnote 17, paragraph 104.

B — *Second, third and fourth questions*

84. It follows from my above observations that in their decision under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum for which another Member State is primarily responsible under the criteria set out in Chapter III of the regulation, the Member States must comply with the Charter of Fundamental Rights. By the second, third and fourth questions, the referring court essentially asks whether, and if so in what circumstances, the Member States may be required, in the light of this need to comply with the Charter of Fundamental Rights, to exercise their right to assume responsibility for the examination themselves under Article 3(2) of Regulation No 343/2003 if it were established that transfer to the Member State which is primarily responsible would expose the asylum seeker to a risk of violation of his fundamental rights and/or to a risk that that Member State would not comply with its obligations under Directives 2003/9, 2004/83 and 2005/85.

85. The referring court asks these questions because it has clear evidence that there is a wide gulf between the EU rules applicable to Greece as regards the organisation of its asylum system, on the one hand, and the actual treatment of asylum seekers in Greece, on the other, such that there may be a risk that asylum seekers' fundamental rights and human rights will be violated if they are transferred to Greece.

86. In order to gain a better understanding of these questions, I will first examine the asylum measures in secondary law which are relevant in the present case and the relationship between those measures and the Charter of Fundamental Rights, the Geneva Convention and the ECHR. I will go on to consider the problems faced by the Greek asylum system at present. I will then address the question how the overloading of the Greek asylum system must be taken into consideration by the other Member States when applying Regulation No 343/2003.

1. The asylum measures in secondary law and their relationship with the Charter of Fundamental Rights, the Geneva Convention and the ECHR

(a) Enabling legal basis in primary law

87. The European Union's competences were extended to matters related to asylum seekers and refugees in the Treaty of Amsterdam of 1997, by which rule-making powers in relation to asylum, refugees, immigration and residence of third-country nationals were

transferred to the European Union. A new Article 73k was inserted in the EC Treaty, as an enabling legal basis in primary law, which was subsequently renumbered as Article 63 EC.

88. In asylum matters, rule-making powers were transferred to the European Union on the proviso, laid down in Article 63(1) EC, that the measures on asylum to be adopted by the EU legislature must be in accordance with the Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties. The 'other relevant treaties' include the ECHR. [26] Furthermore, Article 63(1) EC expressly provided that the power of harmonisation in asylum matters was limited to establishing minimum standards. [27]

(b) Directives 2001/55, 2003/9, 2004/83 and 2005/85

89. On the basis of this enabling legal basis in primary law, the EU legislature adopted four directives laying down minimum standards regarding various aspects of national asylum systems. The first directive adopted was Directive 2001/55, which lays down, inter alia, minimum standards for giving temporary protection in the event of mass influxes. The other three directives introduced common minimum standards for the reception of asylum seekers (Directive 2003/9), for the qualification of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Directive 2004/83), and for procedures in Member States for granting and withdrawing refugee status (Directive 2005/85) in nearly all the Member States. [28]

90. In accordance with the primary-law provisions of Article 63(1) EC, under which the measures of secondary law adopted on that

26 — A correct analysis is given by Graßhof, M., in *EU-Kommentar* (ed. Schwarze), 2nd edition, Baden-Baden 2009, Article 63 EC, paragraph 4.

27 — Article 63(1)(b), (c) and (d) EC.

28 — Under Article 1 et seq. of Protocol (No 5) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of those directives and those directives are not therefore binding upon or applicable in Denmark (see recital 21 in the preamble to Directive 2003/9, recital 40 in the preamble to Directive 2004/83, and recital 34 in the preamble to Directive 2005/85). Whilst under Article 3 of Protocol (No 4) on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland took part in the adoption of Directives 2004/83 and 2005/85 (see recitals 39 and 33 in the preambles to those directives), it did not take part in the adoption of Directive 2003/9 pursuant to Article 1 of that Protocol (see recital 20 in the preamble to that directive). The United Kingdom took part in the adoption of the three directives pursuant to Article 3 of that Protocol (see recital 19 in the preamble to Directive 2003/9, recital 38 in the preamble to Directive 2004/83, and recital 32 in the preamble to Directive 2005/85).

basis must comply with the Geneva Convention, the recitals in the preambles to Directives 2003/9, 2004/83 and 2005/85 all make reference to the conclusion of the Tampere European Council, according to which the Common European Asylum System to be developed is to be based on the full and inclusive application of the Geneva Convention. [29] The recitals in the preambles to those directives also stress that the directives respect the fundamental rights and observe the principles recognised by the Charter of Fundamental Rights, [30] and that the Member States are bound by the instruments of international law to which they are party with respect to the treatment of persons falling within the scope of those directives. [31]

91. Directives 2003/9, 2004/83 and 2005/85 therefore contain substantive minimum standards with respect to the treatment of asylum seekers and the examination of their applications. Furthermore, Article 24(2) of Directive 2003/9 expressly provides that Member States must allocate the necessary resources to achieve the minimum standards for the reception of asylum seekers laid down therein. Similarly, Article 36 of Directive 2004/83 provides that Member States must ensure that authorities and other organisations implementing the directive have received the necessary training.

92. It is therefore ensured, from a legal point of view, that the treatment of asylum seekers and the examination of their applications in the Member States, which must respect the minimum standards contained in Directives 2003/9, 2004/83 and 2005/85, in principle also comply with the requirements of the Charter of Fundamental Rights, the Geneva Convention and the ECHR. [32]

(c) Regulation No 343/2003

93. According to recital 3 in its preamble, the aim of Regulation No 343/2003 – adopted on the basis of Article 63(1) EC – is to introduce a clear and workable method for determining

29 — See recital 2 in the preambles to Directive 2003/9, Directive 2004/83 and Directive 2005/85.

30 — See recital 5 in the preamble to Directive 2003/9, recital 10 in the preamble to Directive 2004/83, and recital 8 in the preamble to Directive 2005/85.

31 — See recital 6 in the preamble to Directive 2003/9, recital 11 in the preamble to Directive 2004/83, and recital 9 in the preamble to Directive 2005/85.

32 — See also, in this connection, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* [2010] ECR I-1493, paragraph 51 et seq., and Joined Cases C-57/09 and C-101/09 *B* [2010] ECR I-10979, paragraph 77 et seq., in which the Court held, in connection with the interpretation of Directive 2004/83, first that the provisions of the directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of the Geneva Convention on the basis of common concepts and criteria and, second, that those provisions must be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter. See also, in this connection, Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38.

the Member State responsible for the examination of an asylum application lodged within the European Union. [33] According to recital 4, this method should be based on objective, fair criteria both for the Member States and for the persons concerned and should make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the asylum procedure and the rapid processing of asylum applications.

94. In order to achieve these objectives, which are also intended to prevent forum shopping by asylum seekers, Regulation No 343/2003 lays down a provision under which responsibility for examining an asylum application lodged in the European Union rests with a single Member State, which is determined on the basis of objective criteria. Those objective criteria include, for example, the existence of a link, in relation to the law on asylum and foreign nationals, between the asylum seeker or a family member and a Member State. [34] In the case of an illegal entry into the European Union, the Member State of first entry is responsible for examining the asylum application under Article 10 of Regulation No 343/2003. [35] Under Article 16 of Regulation No 343/2003, the Member State responsible for examining an application for asylum is obliged to take charge of an asylum seeker who has lodged an application in a different Member State and to complete the examination of the application for asylum. [36] The mechanism for transferring asylum seekers is laid down in Articles 17 to 19 of Regulation No 343/2003.

95. The system under Regulation No 343/2003 for determining the Member

33 — Under Article 1 et seq. of Protocol (No 5) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of Regulation No 343/2003 and was not therefore initially bound by it nor subject to its application. The Dublin Convention thus remained in force between Denmark and the Member States (see recital 18 et seq. in the preamble to Regulation No 343/2003). With the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2006 L 66, p. 38), the scope of Regulation No 343/2003 was extended to the relations between the Community and Denmark. Ireland and the United Kingdom took part in the adoption and application of that regulation in accordance with Article 3 of Protocol (No 4) on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community (see recital 17 in the preamble to Regulation No 343/2003). It should also be borne in mind that some non-EU Member States have participated under international agreements in the EU system for determining the State responsible for asylum applications, such as the Swiss Confederation; see footnote 10 of this Opinion.

34 — See Articles 6(1), 7, 8 and 9(1) and (2) of Regulation No 343/2003.

35 — Article 10 of Regulation No 343/2003. However, that responsibility expires 12 months after the illegal entry.

36 — Accordingly, Article 25(1) of Directive 2005/85 provides that Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83 where they are required to do so in accordance with Regulation No 343/2003.

State responsible for examining an asylum application and for the transfer of the asylum seeker to that Member State does not expressly take into consideration any differences in the organisation or in the management of the asylum systems and asylum procedures in the different Member States. Specific reference is made to the (expected) treatment of the asylum seeker in the Member State primarily responsible for his asylum application neither in the context of fixing the criteria for determining the responsible Member State nor in connection with the mechanism for the transfer of asylum seekers between the Member States.

96. The absence of a specific reference to the treatment of the asylum seeker in the Member State which is primarily responsible can be explained by the interaction between Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 and by the interaction between that regulation and obligations on the individual Member States under international law. Because, under those directives, the treatment of asylum seekers and the examination of their asylum applications must satisfy substantive minimum standards in each Member State and because all the Member States have acceded to the ECHR and to the Geneva Convention, it is ensured, from a legal point of view, that the treatment of asylum seekers in each Member State satisfies the requirements of the Charter of Fundamental Rights, the Geneva Convention and the ECHR. [37]

37 — See point 92 of this Opinion.

97. Seen from this perspective, neither the Charter of Fundamental Rights nor the Geneva Convention or the ECHR preclude the system introduced by Regulation No 343/2003, which lays down the rules for determining the Member State in which asylum seekers are to be received for the purpose of examining their asylum applications and for the transfer of asylum seekers to that Member State without express reference to the specific organisation and management of the asylum system and asylum procedures there. [38]

(d) Interim conclusion

98. In summary, it must be stated, in the light of the foregoing, that the rules of secondary

38 — Against this background, reference is also made in the recitals in the preamble to Regulation No 343/2003 to the conclusion of the Tampere European Council, according to which the Common European Asylum System to be developed is to be based on the full and inclusive application of the Geneva Convention (see recital 2 in the preamble to Regulation No 343/2003). It is also stressed that the Member States are bound by the instruments of international law to which they are party with respect to the treatment of persons falling within the scope of that regulation (see recital 12 in the preamble to Regulation No 343/2003) and that the regulation observes the fundamental rights and principles which are acknowledged in the Charter of Fundamental Rights (see recital 15 in the preamble to Regulation No 343/2003).

law on the treatment of asylum seekers and on the examination of asylum applications which stem from the interaction between Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003 are, in principle, consistent with the provisions of the Charter of Fundamental Rights, the Geneva Convention and the ECHR, both in their objective and in their legal structure.

2. The overloading of the Greek asylum system

99. Regulation No 343/2003 does not contain any express provision in the case that Member States – on account of their geographical location for example – are faced with a number of asylum seekers exceeding the capacities of their asylum system, with the result that they can no longer, in practice, guarantee that those asylum seekers will be treated and their asylum applications will be reviewed in accordance with Directives 2003/9, 2004/83 and 2005/85 and with their obligations stemming from fundamental rights and from international law. [39]

100. Such an urgent situation appears to have arisen in Greece.

101. A clear indication to this effect is provided by the judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, [40] in which the European Court of Human Rights dealt with the case of an Afghan national who had illegally entered the European Union from Turkey via Greece, and had then been detained in Greece. Without applying for asylum there, he left Greece following his release and eventually applied for asylum in Belgium. Because, after examining the Afghan asylum seeker's particulars, the Belgian authorities for foreign nationals concluded that, on account of the illegal first entry by the asylum seeker, Greece was responsible for examining his asylum application in accordance with Article 3(1) in conjunction with Article 10(1) of Regulation No 343/2003,

39 — On the other hand, the Commission's Proposal for a Regulation of the European Parliament and of 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 (COM(2008) 820 final), by which Regulation No 343/2003 was to be recast, provides for a mechanism for the temporary suspension of transfers of asylum seekers to Member States faced with a particularly urgent situation which places an exceptionally heavy burden on their reception capacities, asylum systems or infrastructures (Article 31). According to the Commission's Explanatory Memorandum, the proposal is aimed at addressing situations of particular pressure on Member States' reception capacities and asylum systems.

40 — Cited above in footnote 3.

Belgium instituted the procedure for the transfer of the asylum seeker to Greece pursuant to Regulation No 343/2003 and, upon the conclusion of that procedure, transferred him to Greece. Before his transfer, however, the Afghan asylum seeker had lodged an application with the European Court of Human Rights.

102. In its judgment, the European Court of Human Rights found that the conditions of detention and the living conditions of the Afghan asylum seeker in Greece were to be regarded as a violation of Article 3 of the ECHR. With reference to the deficiencies in the examination of the asylum seeker's application, the risk of direct or indirect *refoulement* to his home country without any serious examination of the merits of his asylum application, and the absence of an effective remedy, the European Court of Human Rights also established a violation of Article 13 in conjunction with Article 3 of the ECHR. It also found that Belgium had also violated Article 3 of the ECHR because, by sending the Afghan asylum seeker back to Greece, it had exposed him to the risks linked to the identified deficiencies in the Greek asylum system, and to detention and living conditions that were in breach of Article 3 of the ECHR. Lastly, the European Court of Human Rights also found that Belgium had violated Article 13 in conjunction with Article 3 of the ECHR.

103. The national courts of the individual Member States have also taken a critical view of the Greek asylum system and of detention and living conditions for asylum seekers in Greece in the context of Regulation No 343/2003 and the transfer of asylum seekers to Greece. For example, in its judgment of 7 October 2010, [41] the Austrian Verfassungsgerichtshof (Constitutional Court) found, in connection with a review of the constitutionality of the transfer to Greece under Regulation No 343/2003 of an Afghan single woman with three children, that whilst there is, in principle, the possibility of State provision where vulnerable persons are returned to Greece in order to implement the asylum procedure, this cannot be automatically assumed without a specific individual assurance on the part of the competent authorities.

104. The findings of fact made by the lower court, which are reproduced by the referring court as the appeal court in the order for reference, give a similar picture. [42] Furthermore, in its written observations in the present case, the Commission pointed out that on 3 November 2009 it sent Greece a letter of formal notice under Article 226 EC and on 24 June

41 — Judgment No U694/10, available on the internet in the Legal Information System of the Republic of Austria (http://www.ris.bka.gv.at).

42 — Order for reference of 12 July 2010, paragraph 13 et seq.

2010 a supplementary letter of formal notice, in which Greece was alleged, inter alia, to have infringed various provisions of Directives 2003/9, 2004/83 and 2005/85. [43]

105. It follows from these findings that the Greek asylum system is under considerable pressure as a result of overloading, as a result of which it can no longer always be guaranteed that asylum seekers will be treated and their applications will be reviewed in accordance with Directives 2003/9, 2004/83 and 2005/85. Under these conditions, it cannot be ruled out that asylum seekers who are transferred from another Member State to Greece in accordance with the rules and mechanisms under Regulation No 343/2003 will experience treatment, after their transfer, which is incompatible with the provisions of the Charter of Fundamental Rights, the Geneva Convention and the ECHR.

3. Consideration of the overloading of the Member States' asylum systems in connection with the application of Regulation No 343/2003

106. In the light of the overloading of the Greek asylum system and the effects of that overloading on the treatment of asylum seekers and on the examination of their applications, the referring court faces the question whether a Member State may transfer an asylum seeker to Greece, having regard to the provisions of Regulation No 343/2003, even if it were established that such a transfer would expose the asylum seeker to a risk of violation of his fundamental rights and human rights. The referring court expands on this question of principle in the second, third and fourth questions.

107. With the second and third questions, the referring court essentially asks the Court for clarification whether, in applying Regulation No 343/2003, the Member States may proceed from the conclusive presumption that, after the transfer of the asylum seeker, the Member State responsible for examining an asylum application will observe both the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85 and the asylum seeker's fundamental rights (third question), with the result that a transfer of asylum seekers under Regulation No 343/2003 is always to be regarded as compatible with EU fundamental rights, regardless of the situation in the responsible State (second question).

108. In the event that these questions were to be answered in the negative, the referring court would like to know, with its fourth question, whether, and if so in what circumstances, a Member State is obliged, in applying

43 — These letters of formal notice are attached to the Commission's written observations as Annexes 1 and 2.

Regulation No 343/2003, to take responsibility for reviewing an asylum application under Article 3(2) of that regulation, where transfer to the Member State which is primarily responsible would expose the asylum seeker to a risk of violation of his fundamental rights and/or to a risk that the minimum standards set out in Directives 2003/9, 2004/83 and 2005/85 will not be applied to him.

109. I will begin by considering the fourth question. I will then turn to the second and third questions.

(a) Fourth question: The duty to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 where transfer to the Member State which is primarily responsible would expose the asylum seeker to a serious risk of violation of his fundamental rights

(i) The problem of a serious risk of violation of fundamental rights where an asylum seeker is transferred to the Member State which is primarily responsible

110. Should a Member State be unable, for any reason, to comply with the rules of Directives 2003/9, 2004/83 or 2005/85 or its obligations under international law with regard to the treatment of asylum seekers or the examination of their asylum applications, there is a *de facto* risk that if asylum seekers are transferred to that Member State, they will be exposed to treatment which violates their fundamental rights and their human rights.

111. In this connection, there could be fears, for example, of violations of the right to respect for and protection of human dignity enshrined in Article 1 of the Charter of Fundamental Rights or of the prohibition of torture and inhuman or degrading treatment contained in Article 4 of the Charter in the Member State which is primarily responsible. [44]

112. If there were a serious risk in a Member State of a violation of the human dignity within the meaning of Article 1 of the Charter

44 — The question whether, and if so in what circumstances, Article 1 of the Charter of Fundamental Rights can apply autonomously, in addition to Article 4 of the Charter, does not need to be examined in any greater depth for the purposes of the present case. It should be pointed out, however, that, according to the prevailing opinion in German legal literature, an examination of Article 4 of the Charter of Fundamental Rights should be carried out first. If interference in the protection afforded by this specific fundamental right were to be taken to exist, this specific fundamental right would prevail and rule out Article 1 of the Charter as an isolated or supplementary basis for assessment; see Jarass, D., *Charta der Grundrechte der Europäischen Union*, Munich 2010, Article 1, paragraph 4; Borowsky, D., in *Charta der Grundrechte der Europäischen Union* (ed. Meyer, J.), 3rd edition, Baden-Baden 2011, Article 1, paragraph 33; Höfling, W., in *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (ed. Tettinger, J./ Stern, K.), Munich 2006, Article 1, paragraph 18.

of Fundamental Rights of the asylum seekers transferred there, or inhuman or degrading treatment within the meaning of Article 4 of the Charter, the transfer of asylum seekers to that Member State would also be incompatible with Article 1 or Article 4 of the Charter of Fundamental Rights. Under Article 1 of the Charter, human dignity must not only be 'respected', but also 'protected'. Such a positive protective function is also inherent in Article 4 of the Charter. [45] In addition, Article 19(2) of the Charter expressly provides in this connection that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. [46]

113. The complete overloading of a Member State's asylum system may also mean, in certain circumstances, that it is necessary to examine the compatibility of the transfer of an asylum seeker to that Member State with Article 18 of the Charter of Fundamental Rights.

114. Under Article 18 of the Charter, the right to asylum is guaranteed with due respect for the rules of the Geneva Convention, the EU Treaty and the FEU Treaty. [47] One of the central elements of the Geneva Convention is the prohibition of direct or indirect expulsion or return of a refugee to a persecuting State laid down in Article 33 of that Convention, the principle of *non-refoulement*. Even though the precise scope of this prohibition on return is disputed, it must be assumed that it grants refugees [48] not only protection from

45 — See Höfling, W., loc. cit. (footnote 44), Article 4, paragraph 3; Borowsky, D., loc. cit. (footnote 44), Article 4, paragraph 20.

46 — The question whether, and if so in what circumstances, Article 1 and/or Article 4 of the Charter of Fundamental Rights can apply autonomously, in addition to Article 19(2) of the Charter of Fundamental Rights, does not need to be examined in any greater depth for the purposes of the present case. It should be pointed out, however, that, according to the prevailing opinion in German legal literature, in the event of an overlap with Article 1 and/or Article 4 of the Charter of Fundamental Rights, Article 19(2) of the Charter prevails as the specific provision for the examination. See Jarass, D., loc. cit. (footnote 44), Article 19, paragraph 4.

47 — With the finding that the right to asylum is guaranteed with due respect for the rules of the EU Treaty and the FEU Treaty, reference is made, inter alia, to Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU Treaty and the FEU Treaty. Because, however, under Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom took part in Directives 2003/9, 2004/85 and 2005/85 and in Regulation No 343/2003, the question of the effective force of Article 18 of the Charter of Fundamental Rights vis-à-vis the United Kingdom does not arise in the main proceedings.

48 — Because the prohibition on return under Article 33 of the Geneva Convention applies to refugees, the scope of the protection afforded by Article 18 of the Charter of Fundamental Rights in this regard is influenced by the notion of 'refugee' in the Geneva Convention (see Jarass, D., loc. cit. (footnote 44), Article 18, paragraph 5). In the context of the prohibition on return under Article 33 of the Geneva Convention, the notion of 'refugee' covers not only those who have already been recognised as refugees, but also those who fulfil the conditions for recognition as a refugee. See Lauterpacht, E./Bethlehem, D., 'The scope and content of the principle of non-refoulement: Opinion', in *Refugee Protection in International Law* (ed. Feller, E./Türk, V./Nicholson, F.), Cambridge 2003, p. 87, 116 et seq.

direct deportation to the persecuting State, but also protection from chain deportation, where a transfer is made to a State in which there is a risk of deportation to a persecuting State. [49]

115. If the overloading of a Member State's asylum system were to mean that the refugees in that Member State were at risk of direct or indirect return to a persecuting State, Article 18 of the Charter of Fundamental Rights therefore prohibits the other Member States from transferring refugees to that Member State.

(ii) The duty to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003

116. It follows from my above observations that, first of all, the overloading of a Member State's asylum system may result in an environment in which one or more of the asylum seekers' rights enshrined in the Charter of Fundamental Rights may be violated. Secondly, I have concluded that the transfer of asylum seekers to a Member State in which there is a serious risk of violation of the asylum seekers' fundamental rights is incompatible with the Charter of Fundamental Rights.

117. Against this background, the question arises whether Regulation No 343/2003 can be interpreted in such a way that transfers of asylum seekers which violate fundamental rights can be ruled out.

118. The fact that Regulation No 343/2003 must, as far as possible, be interpreted in a manner consistent with fundamental rights follows, first, from the Court's settled case-law, according to which the Member States must make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law. [50] Secondly, an interpretation of Regulation No 343/2003 in a manner consistent with fundamental rights is necessary in particular since it is expressly stated in Article 63(1) EC, which serves as an enabling legal basis for that regulation in primary law, that EU measures on asylum must be in accordance with the Geneva Convention and

49 — See Lauterpacht, E./Bethlehem, D., loc. cit. (footnote 48), p. 122; Hailbronner, K., *Asyl- und Ausländerrecht*, 2nd edition, Stuttgart 2008, paragraph 655.

50 — See Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 34; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28; and Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87.

with other relevant treaties.[51] Recital 15 in the preamble to Regulation No 343/2003 also confirms that that regulation observes the fundamental rights and principles which are acknowledged in the Charter of Fundamental Rights.[52]

119. In my view, Article 3(2) of Regulation No 343/2003 allows the Member States a margin of discretion which is sufficiently wide to enable them to apply that regulation in a manner compatible with the requirements of the protection of fundamental rights where transfer to the Member State which is primarily responsible would expose the asylum seeker to a serious risk of violation of his fundamental rights as enshrined in the Charter of Fundamental Rights.

120. Article 3(2) of Regulation No 343/2003 accords the Member States the right to examine the asylum application lodged by an asylum seeker in that Member State even where, under Article 3(1) in conjunction with the provisions contained in Chapter III of the regulation, another Member State is primarily responsible. Where a Member State exercises this right to assume responsibility for the examination, it becomes the responsible Member State under Article 3(2) of Regulation No 343/2003, which must assume the obligations associated with that responsibility.

121. If transfer to the Member State which is primarily responsible would expose the asylum seeker to a serious risk of violation of his fundamental rights as enshrined in the Charter of Fundamental Rights, the Member State in which the asylum seeker has lodged an asylum application can therefore eliminate that risk entirely by exercising its right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003.

122. Taking particular account of the fact that the Member States are required to apply Regulation No 343/2003 in a manner consistent with fundamental rights and that a transfer of asylum seekers to a Member State in which there is a serious risk of violation of one or more fundamental rights of those asylum seekers must, as a rule, be regarded as an infringement of the Charter of Fundamental Rights by the transferring Member State, the Member States are obliged, in my view, to exercise the right to assume responsibility for the examination themselves under Article 3(2) of Regulation No 343/2003 where there is a risk in the Member State which is primarily responsible of violation of the rights of the asylum seeker to be transferred, as enshrined in the Charter of Fundamental Rights.

51 — See also, in this connection, Lenaerts, K., 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice', ICLQ 2010, p. 255, 298, who concludes, after a rigorous analysis of the Court's most recent case-law, that in its rulings the Court is concerned with respecting the fundamental rights dimension of the European asylum system.

52 — See also *Salahadin Abdulla*, cited above in footnote 32, paragraph 54, and *Bolbol*, cited above in footnote 32, paragraph 38, with regard to the similarly worded recital 10 in the preamble to Directive 2004/83 and the resulting duty to interpret the provisions of the directive in a manner consistent with fundamental rights.

123. Serious risks of infringements of individual provisions of Directives 2003/9, 2004/83 and 2005/85 in the Member State primarily responsible which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred, as enshrined in the Charter of Fundamental Rights, are not sufficient, on the other hand, to create an obligation on the part of the transferring Member State to exercise the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003.

124. It should be stated, first of all, in this connection that an interpretation of Regulation No 343/2003 in a manner consistent with fundamental rights cannot require the exercise of the right to assume responsibility for the examination under Article 3(2) where the host Member State infringes individual provisions of Directives 2003/9, 2004/83 or 2005/85, but without infringing the Charter of Fundamental Rights. Furthermore, the transfer of an asylum seeker to a Member State in which there is no risk of violation of the rights of that asylum seeker, as enshrined in the Charter of Fundamental Rights, does not normally lead to an infringement of the Charter by the transferring Member State.

125. Furthermore, it would be difficult to reconcile with the aims of Regulation No 343/2003 if any failure to comply with Directives 2003/9, 2004/83 or 2005/85 were sufficient to prevent the transfer of an asylum seeker to the Member State which is primarily responsible. [53] Regulation No 343/2003 is intended to establish a clear and workable method for determining the Member State responsible for the examination of an asylum application, which also makes it possible to determine rapidly the Member State responsible. [54] In order to achieve that objective, Regulation No 343/2003 lays down a provision under which responsibility for examining each asylum application lodged in the European Union rests with a single Member State, which is determined on the basis of objective criteria. In the case of an illegal entry into the European Union, the Member State of first entry is responsible for examining the asylum application under Article 10 of Regulation No 343/2003. [55]

126. If any failure to comply with individual provisions of Directives 2003/9, 2004/83 or 2005/85 on the part of the Member State of illegal first entry were now to mean that the Member State in which the asylum seeker lodged an asylum application was required to exercise its right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003, a new, far-reaching exclusion criterion would be created, in addition to the objective criteria for determining the responsible Member State laid down in Chapter III of the regulation, under which even minor infringements of Directives 2003/9, 2004/83 or 2005/85 in individual Member States could mean that those Member States would be relieved

53 — According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part; see Case C-19/08 *Petrosian and Others* [2009] ECR I-495, paragraph 34.

54 — See recital 3 et seq. in the preamble to Regulation No 343/2003.

55 — Article 10 of Regulation No 343/2003.

of their responsibilities under Regulation No 343/2003 and the associated duties. This could result not only in the rules on responsibility formulated in Regulation No 343/2003 being completely undermined, but could also jeopardise the aim of those rules, which is to determine rapidly the Member States responsible for examining asylum applications lodged in the European Union.

as enshrined in the Charter of Fundamental Rights, are not sufficient, on the other hand, to create an obligation on the part of the transferring Member State to exercise the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003.

(iii) Interim conclusion

(b) Second and third questions: Recourse to conclusive presumptions in the context of the exercise of the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003

127. In the light of foregoing, the fourth question asked by the referring court must be answered to the effect that a Member State in which an asylum application has been lodged is obliged to exercise its right to examine that asylum application itself under Article 3(2) of Regulation No 343/2003 where transfer to the Member State primarily responsible under Article 3(1) in conjunction with the provisions contained in Chapter III of Regulation No 343/2003 would expose the asylum seeker to a serious risk of violation of his fundamental rights as enshrined in the Charter of Fundamental Rights. Serious risks of infringements of individual provisions of Directives 2003/9, 2004/83 and 2005/85 in the Member State primarily responsible which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred,

128. With the second and third questions, the referring court is seeking to ascertain whether, in applying Regulation No 343/2003, the Member States may proceed from the conclusive presumption that, after the transfer of the asylum seeker, the Member State primarily responsible for examining the asylum application will observe the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85 and the asylum seeker's fundamental rights (third question), with the result that a transfer of asylum seekers under Regulation No 343/2003 is always to be regarded as compatible with EU fundamental rights, regardless of the situation in the responsible State (second question).

129. In my view, these questions should be answered in the negative.

130. As I have already explained above, the risk that transfer of asylum seekers to another Member State for the purpose of examining their asylum applications will expose them *de facto* to treatment which violates fundamental rights and human rights can never be completely ruled out. If there were a serious risk of violation of the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, in the Member State primarily responsible for examining an asylum application, the Member State in which that asylum seeker has lodged his asylum application is obliged to exercise the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003.

131. It is immediately clear from these findings that an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the Member State's duty to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights. [56] In that case, the Member State in which the asylum seeker has lodged his asylum application would never be obliged to exercise the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003, and it could not therefore be ruled out that asylum seekers would be transferred to another Member State despite the serious risk of violation of their rights as enshrined in the Charter of Fundamental Rights.

132. For the same reason, an application of Regulation No 343/2003 on the basis of the conclusive presumption that *all* the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85 will be observed in the host Member State must also be rejected as contrary to EU law. The conclusive presumption that all the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85 will be observed is no different, in practice, from the conclusive presumption that the asylum seekers' fundamental rights, as enshrined in the Charter of Fundamental Rights, will be observed in the Member State which is primarily responsible.

133. This does not mean, however, that, the Member States are barred, in principle, from proceeding from the rebuttable presumption, in applying Regulation No 343/2003, that the asylum seeker's human rights and fundamental rights will be observed in the Member State primarily responsible for his application. It should be borne in mind in this connection that the treatment of asylum seekers and the examination of their applications under Directives 2003/9, 2004/83 and 2005/85 must satisfy substantive minimum standards in each Member State and that all the Member States must observe the Charter of

56 — See point 118 of this Opinion.

Fundamental Rights [57] and – as Contracting States – the ECHR and the Geneva Convention. In view of the high level of protection which is thus (legally) ensured, it seems reasonable, in connection with the transfer of asylum seekers, to proceed from the rebuttable presumption that those asylum seekers will be treated in a manner consistent with human rights and fundamental rights in the Member State which is primarily responsible. [58] Accordingly, recital 2 in the preamble to Regulation No 343/2003 expressly states that Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals. [59]

134. If the Member States were to decide to operate such a rebuttable presumption, however, they must observe the principle of effectiveness, according to which the realisation of the rights conferred by EU law may not be rendered practically impossible or excessively difficult. [60]

135. If the Member States thus decide to introduce the rebuttable presumption that the asylum seeker's human rights and fundamental rights will be observed in the Member State which is primarily responsible, the asylum seekers must be given the possibility, procedurally, actually to rebut that presumption. Having regard to the principle of effectiveness, the specific form of the available evidence and the definition of the rules and principles governing the assessment of evidence are, in turn, a matter for the national legal orders of the individual Member States.

136. In the light of foregoing, the second and third questions must be answered to the effect that the obligation to interpret Regulation No 343/2003 in a manner consistent with fundamental rights precludes the operation of

57 — With regard to the content and scope of Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, see point 165 et seq. of this Opinion.

58 — For example, in its decision of 2 December 2008, *K.R.S. v. United Kingdom* (Application No 32733/08), the European Court of Human Rights held that it must be presumed that Greece would comply with the obligations under Directives 2005/85 and 2003/9.

59 — See also, in this connection, Protocol (No 24) on asylum for nationals of Member States of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. That Protocol points out, first of all, that given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Against this background, the Protocol then states that any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only under the very restrictive conditions set out in the Protocol.

60 — With regard to the principle of effectiveness, see Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25; Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 57; Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43.

a conclusive presumption according to which the Member State primarily responsible for examining an asylum application will observe the asylum seeker's fundamental rights under EU law and all the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85. The Member States are not barred, on the other hand, from proceeding from the rebuttable presumption, in applying Regulation No 343/2003, that the asylum seeker's human rights and fundamental rights will be observed in the Member State primarily responsible for his asylum application.

C — *Fifth question: Relationship between the protection of asylum seekers under the Charter of Fundamental Rights and their protection under the ECHR*

137. By its fifth question, the referring court wishes to know whether Articles 1, 18 and 47 of the Charter of Fundamental Rights accord asylum seekers who are to be transferred to another Member State in accordance with Regulation No 343/2003 a wider scope of protection than Article 3 of the ECHR.

138. Although the referring court did not expressly examine the legal background to that question, the decision of the European Court of Human Rights in *K.R.S. v. United Kingdom* [61] appears to have played an important role in its referral. In that decision, the European Court of Human Rights was required to decide on an application under the ECHR by an Iranian national who was to be transferred from the United Kingdom to Greece pursuant to Regulation No 343/2003. The Iranian asylum seeker considered that removal to Greece would infringe Article 3 of the ECHR. In its decision of 2 December 2008, the European Court of Human Rights rejected that application as manifestly ill-founded.

139. At the time the order for reference was made, the referring court therefore faced the question of how it had to take into consideration the decision of the European Court of Human Rights in *K.R.S. v. United Kingdom*. It had to be clarified whether the view taken by the European Court of Human Rights, that the transfer of an Iranian asylum seeker to Greece does not infringe Article 3 of the ECHR, precludes a finding of an infringement of Articles 1, 18 and 47 of the Charter of Fundamental Rights in a case like the main proceedings.

140. As I have already explained, in its judgment of 21 January 2011 in *M.S.S. v. Belgium*

61 — Cited above in footnote 58.

and Greece,[62] i.e. after the order for reference was lodged, the European Court of Human Rights further developed its case-law and considered the transfer of an asylum seeker from Belgium to Greece pursuant to Regulation No 343/2003 to be a violation by Belgium of Article 3 of the ECHR and of Article 13 in conjunction with Article 3 of the ECHR.

141. In the light of this development in the European Court of Human Rights' case-law, it would appear that the referring court is no longer required primarily to address the question under what circumstances the transfer of asylum seekers to Greece could, despite the European Court of Human Rights' decision in *K.R.S. v. United Kingdom*, lead to a finding of a violation of that asylum seeker's rights as enshrined in the Charter of Fundamental Rights, but rather the question whether, having regard to the European Court of Human Rights' judgment in *M.S.S. v. Belgium and Greece*, a transfer of asylum seekers to Greece can actually still be found to be compatible with the Charter.

142. Against this background, the fifth question must therefore be construed as meaning that the Court is being asked to clarify the relationship between Articles 3 and 13 of the ECHR and the relevant provisions of the Charter of Fundamental Rights[63] and the way in which the case-law of the European Court of Human Rights on the (in)compatibility with the ECHR of transfers of asylum seekers to Greece affects the judicial review of the compatibility of such transfers with the Charter of Fundamental Rights.

143. In answering these questions, regard must be had to Article 52(3) of the Charter of Fundamental Rights. Under that provision, the rights contained in the Charter which correspond to rights guaranteed by the ECHR have the same meaning and scope as the corresponding rights laid down by the ECHR. It is also expressly provided in Article 52(3) of the Charter of Fundamental Rights that that provision does not prevent EU law providing more extensive protection.

62 — Cited above in footnote 3.

63 — Articles 3 and 13 of the ECHR have their counterpart in Articles 4 and 47(1) of the Charter of Fundamental Rights. In the Explanations relating to Article 4, it is stated that the right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording, with the result that, by virtue of Article 52(3) of the Charter, it has the same meaning and the same scope as the ECHR. The Explanations relating to Article 47(1) state that that provision is based on Article 13 of the ECHR, but nevertheless grants more extensive protection, since it guarantees the right to an effective remedy before a court.

144. In the Explanations relating to Article 52(3) of the Charter of Fundamental Rights it is stressed that that provision is intended to ensure the necessary consistency between the Charter and the ECHR. According to the Explanations, that reference should be construed not only as a reference to the text of the ECHR and the Protocols to it, but also to the clarification in the case-law of the European Court of Human Rights of the meaning and the scope of the guaranteed rights. This does not, however, adversely affect the autonomy of EU law and of that of the Court of Justice.

145. Under Article 52(3) of the Charter of Fundamental Rights, it must therefore be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the guarantees under the ECHR is no less than the protection granted by the ECHR. Because the protection granted by the ECHR is constantly developing in the light of its interpretation by the European Court of Human Rights, [64] the reference to the ECHR contained in Article 52(3) of the Charter of Fundamental Rights is to be construed as an essentially dynamic reference which, in principle, covers the case-law of the European Court of Human Rights. [65]

146. It should be borne in mind in this connection that the judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter. [66] This finding, admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with

64 — The European Court of Human Rights has confirmed in consistent case-law that the ECHR is to be construed as a 'living instrument'; see the judgments of the European Court of Human Rights of 25 April 1978, *Tyler v. the United Kingdom* (Application No 5856/72, paragraph 31), and of 16 December 1999, *v. v. the United Kingdom* (Application No 24888/94, paragraph 72).

65 — See also, in this connection, Rengeling, H.-W./Szczekalla, P., *Grundrechte in der Europäischen Union*, Cologne 2004, paragraph 468, who point out that Article 52(3) of the Charter of Fundamental Rights brings a high degree of dynamism to the development of EU fundamental rights. Naumann, K., 'Art. 52 Abs. 3 GrCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionsrechts', EuR 2008, p. 424, points out that, without taking into consideration the case-law of the European Court of Human Rights, it is not possible to state, in any case, the meaning and the scope of the rights under the ECHR, and that only a dynamic reference can prevent the case-law of the Court of Justice and the case-law of the European Court of Human Rights drifting apart.

66 — See also the Opinion of Advocate General Poiares Maduro of 9 September 2008 in Case C-465/07 *Elgafaji* [2009] ECR I-921, paragraph 23.

the result that it must be taken into consideration in interpreting the Charter. [67]

147. This view is confirmed in the case-law of the Court of Justice, which systematically takes into consideration the case-law of the European Court of Human Rights on the relevant provisions of the ECHR in interpreting the provisions of the Charter of Fundamental Rights. [68]

Because the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice.

148. In the light of the foregoing, the fifth question must be answered to the effect that under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR.

D — *Sixth question: Judicial review of compliance with the Geneva Convention and the ECHR in the Member State primarily responsible under Regulation No 343/2003*

149. With its sixth question, the referring court wishes to know whether a national law under which, in their review of the application of Regulation No 343/2003, the courts must proceed from the conclusive presumption that the State primarily responsible for examining the asylum application is a safe country in which asylum seekers are not exposed to the risk of expulsion to a persecuting State, which is incompatible with the Geneva Convention or with the ECHR, is compatible with Article 47 of the Charter of Fundamental Rights.

67 — See also, in this connection, Von Danwitz, T., Article 52, in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, paragraph 57 et seq., who stresses, on the one hand, that the Charter of Fundamental Rights does not accord the European Court of Human Rights the exclusive power of interpretation of the relevant rights, but, on the other, concedes that the Court of Justice is bound by the interpretation by the European Court of Human Rights of the rights under the ECHR in so far as it may not fall short of the level of protection guaranteed by the European Court of Human Rights. See also Lenaerts, K./de Smijter, E., 'The Charter and the Role of the European Courts', *Maastricht Journal of European and Comparative Law* 2001, p. 90, 99, who appear to accept that the Court of Justice is required to respect and adopt the relevant case-law of the European Court of Human Rights.

68 — See, most recently, Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke* [2010] ECR I-11063, paragraph 43 et seq. See also *Elgafaji*, cited above in footnote 66, paragraph 44, in which the Court stressed as an *obiter dictum* that the interpretation given in that judgment of the relevant provisions of Directive 2004/83 was fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR. In Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 53, the Court expressly found, with regard to Article 7 of the Charter of Fundamental Rights, that that provision must be given the same meaning and the same scope as Article 8(1) of the ECHR, *as interpreted by the case-law of the European Court of Human Rights*.

150. In order to answer this question, I will first examine the relationship between the rights of asylum seekers under Article 47 of the Charter of Fundamental Rights and risk of expulsion to a persecuting State, which is incompatible with the Geneva Convention and with the ECHR and which may arise in the event of a transfer of asylum seekers to the Member State which is primarily responsible. On the basis of those observations I will then answer the sixth question asked by the referring court.

1. Article 47(1) of the Charter of Fundamental Rights and the risk of infringement of the Geneva Convention or of the ECHR following the transfer of an asylum seeker pursuant to Regulation No 343/2003

151. Under Article 47(1) of the Charter of Fundamental Rights, everyone whose rights and freedoms guaranteed by the law of the European Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

152. The basic condition for the applicability of Article 47 of the Charter of Fundamental Rights is therefore that rights and freedoms guaranteed by the law of the European Union are violated. Against this background, an infringement of the Geneva Convention or the ECHR can establish a right to an effective remedy under Article 47(1) of the Charter of Fundamental Rights only if that infringement is also to be regarded as a violation of rights and freedoms guaranteed by the law of the European Union.

153. Even though an infringement of the Geneva Convention or the ECHR in connection with the transfer of an asylum seeker to a Member State in which there is a serious risk of his expulsion to a persecuting State must be distinguished strictly, *de jure*, from any associated infringement of EU law, there is, as a rule, a *de facto* parallel in such a case between the infringement of the Geneva Convention or the ECHR and the infringement of EU law.

154. In assessing whether the transfer of an asylum seeker to a Member State in which there is a serious risk of his expulsion to another State in contravention of the Geneva Convention is consistent with EU law, regard must be had to Article 18 of the Charter of Fundamental Rights, under which the right to asylum is to be guaranteed with due respect for the rules of the Geneva Convention. [69] By virtue to this express reference to the Geneva Convention, Article 18 of the Charter of Fundamental Rights grants refugees who

69 — See point 114 et seq. of this Opinion.

have lodged an asylum application protection against transfers which are incompatible with the Geneva Convention. [70] Accordingly, the transfer of a refugee to the Member State primarily responsible for his asylum application is incompatible with the Charter of Fundamental Rights where there is a serious risk in that Member State of direct or indirect expulsion to a persecuting State, which is incompatible with the Geneva Convention.

155. In assessing whether the transfer of an asylum seeker to a Member State in which there is a serious risk of his expulsion to a third country in contravention of the ECHR is consistent with EU law, regard must be had to the principle laid down in Article 52(3) of the Charter of Fundamental Rights, according to which the protection of the rights enshrined in the Charter may be no less than the guarantees under the ECHR. [71]

156. In this connection, the European Court of Human Rights clarified the guarantees under the ECHR regarding the transfer of asylum seekers between Member States most recently in its judgment in *M.S.S. v. Belgium and Greece*. It held that the removal of an asylum seeker to an intermediary country, which is also a Contracting Party, leaves the responsibility of the transferring State intact, and that State is required, in accordance with Article 3 of the ECHR, not to deport a person where substantial grounds have been shown for believing that the person in question, if transferred to the intermediary country, would face a real risk of being exposed to a transfer to another State contrary to Article 3. [72]

157. Having regard to Article 52(3) of the Charter of Fundamental Rights, in the event that the transfer of an asylum seeker to the Member State primarily responsible under Regulation No 343/2003 were to infringe Article 3 of the ECHR because of the risk of indirect *refoulement*, there would generally also be an infringement of the Charter of Fundamental Rights. In this connection, there may be, in particular, a violation of the asylum seeker's fundamental rights as enshrined in Article 1, Article 4 and Article 19(2) of the Charter. [73]

70 — With regard to the reference to the Geneva Convention in Article 18 of the Charter of Fundamental Rights, see Bernsdorff, N., in *Charta der Grundrechte der Europäischen Union* (ed. Meyer, J.), 3rd edition, Baden-Baden 2011, Article 18, paragraph 10; Wollenschläger, M., in *Handbuch der Europäischen Grundrechte* (ed. Heselhaus/Nowak), Munich 2006, § 16, paragraph 32; Jochum, G., in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, Article 18, paragraph 6.

71 — See point 143 et seq. of this Opinion.

72 — *M.S.S. v. Belgium and Greece*, cited above in footnote 3, paragraph 342.

73 — With regard to the question whether Articles 1, 4 and 19(2) of the Charter of Fundamental Rights are applicable autonomously of one another in the case of a transfer of an asylum seeker to a Member State which is incompatible with those provisions, see above, footnotes 44 and 46.

158. In the light of the foregoing, it must be stated, in summary, that the transfer of an asylum seeker to the Member State primarily responsible under Regulation No 343/2003 is, as a rule, incompatible with EU law where the asylum seeker is exposed in that Member State to the serious risk of expulsion to a persecuting State which is incompatible with the Geneva Convention or with the ECHR. If the transfer of the asylum seeker infringes EU law, Article 47 of the Charter of Fundamental Rights is applicable.

2. Incompatibility with Article 47 of the Charter of Fundamental Rights of the conclusive legal presumption that the asylum seeker will not be exposed, in the Member State which is primarily responsible, to the risk of expulsion to another State, which is incompatible with the Geneva Convention and with the ECHR

159. Under Article 47(1) of the Charter of Fundamental Rights, everyone whose rights and freedoms guaranteed by the law of the European Union are violated has the right to an effective remedy before a tribunal in order to review that violation. Because that remedy is intended to clarify whether rights or freedoms actually guaranteed by the law of the European Union are violated, this right to an effective remedy arises from the time that an arguable complaint relating to the infringement is made. [74]

160. The specific procedural form of the effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights is largely left to the Member States. However, this margin of discretion enjoyed by the Member States is limited by the requirement that the effectiveness of the remedy must always be guaranteed. It must also be borne in mind in this connection that, under Article 52(1) of the Charter, any limitation on the exercise of the right to an effective remedy must be provided for by law [75] and respect the essence of that right and the principle of proportionality.

161. The minimum content of the right to an effective remedy includes the requirements that the remedy to be granted to the beneficiary must satisfy the principle of

74 — See Jarass, D., loc. cit. (footnote 44), Article 47, paragraph 11; Alber, S., in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, Article 47, paragraph 25; Nowak, C., loc. cit. (footnote 19), § 51, paragraph 32. See also the consistent case-law of the European Court of Human Rights relating to Article 13 of the ECHR, according to which the right to an effective remedy enshrined therein is applicable where there is an arguable complaint that the ECHR has been infringed. See *M.S.S. v. Belgium and Greece*, cited above in footnote 3, paragraph 288, and judgment of 26 October 2000 in *Kudła v. Poland* (Application No 30210/96, paragraph 157).

75 — Because of this statutory limitation on restrictions of fundamental rights, limitations of the rights enshrined in the Charter of Fundamental Rights must be provided for either by the EU legislature or by the national legislature. Where the fundamental right is limited in the national legal order, however, that statutory limitation is to be given a broad interpretation with the result that – having particular regard to the different legal traditions of the Member States – it can also include customary law or judge-made law; see: Jarass, D., loc. cit. (footnote 44), Article 52, paragraph 28; Borowsky, D., loc. cit. (footnote 44), Article 52, paragraph 20.

effectiveness.[76] According to that principle, the realisation of the rights conferred by EU law may not be rendered practically impossible or excessively difficult.[77]

162. In my view, it is immediately evident from these comments on the essence and the minimum content of the right to an effective remedy under Article 47 of the Charter of Fundamental Rights that a national law under which, in their review of the transfer of an asylum seeker to the Member State primarily responsible under Regulation No 343/2003, the courts must proceed from the conclusive presumption that that Member State will not expel the asylum seeker to another State in contravention of the ECHR or the Geneva Convention is incompatible with Article 47 of the Charter of Fundamental Rights.

163. The crucial factor in this connection is that such a presumption renders excessively difficult or even precludes *de facto* the judicial review of the risk of chain deportation to a persecuting State, which is incompatible with the Charter of Fundamental Rights. It would logically be difficult to understand if a national court rejected the risk of chain deportation to a persecuting State from the perspective of the ECHR and the Geneva Convention, but accepted the coextensive risk of chain deportation to a persecuting State from the perspective of the Charter of Fundamental Rights. For that reason, the conclusive presumption at issue, under which the Member State which is primarily responsible will not expel the asylum seeker to a persecuting State in contravention of the ECHR and the Geneva Convention, is incompatible with Article 47 of the Charter of Fundamental Rights.

164. In the light of the foregoing, the sixth question must be answered to the effect that a national law under which, in examining whether an asylum seeker may be lawfully transferred to another Member State pursuant to Regulation No 343/2003, the courts must proceed from the conclusive presumption that that Member State is a safe country in which asylum seekers are not exposed to the risk of expulsion to a persecuting State, which is contrary to the Geneva Convention or with the ECHR, is incompatible with Article 47 of the Charter of Fundamental Rights.

76 — With regard to the role of the principle of effectiveness in the application of Article 47 of the Charter of Fundamental Rights, see Alber, S., loc. cit. (footnote 74 above), Article 47, paragraph 34; Jarass, D., 'Bedeutung der EU-Rechtsschutzgewährleistung für nationale und EU-Gerichte', NJW 2011, p. 1393, 1395. See also the consistent case-law of the European Court of Human Rights relating to Article 13 of the ECHR, according to which the right to an effective remedy enshrined therein must be construed as meaning that the remedy must be available to the beneficiary in practice as well as in law, allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. See *M.S.S. v. Belgium and Greece*, cited above in footnote 3, paragraph 290 et seq.

77 — See the case-law cited in footnote 60.

E — *Seventh question*

165. By its seventh question, the referring court asks the Court to clarify the content and scope of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. It essentially asks whether, having regard to that Protocol, the provisions of the Charter of Fundamental Rights which are relevant to the present case can take full effect in the legal order of the United Kingdom.

166. With this question, the referring court thus wishes to ascertain whether, and if so to what extent, Protocol No 30 can be regarded as an 'opt-out' from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland.

167. In my view, the question whether Protocol No 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative.[78] This conclusion is suggested by an analysis of the wording of Protocol No 30, having particular regard to its recitals.

168. Under Article 1(1) of Protocol No 30, the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

169. According to its wording, Article 1(1) of Protocol No 30 therefore makes clear that the Charter of Fundamental Rights does not have the effect of either shifting powers at the expense of the United Kingdom or Poland or of extending the field of application of EU law beyond the powers of the European Union as established in the Treaties. Article 1(1) of Protocol No 30 thus merely reaffirms the normative content of Article 51 of the Charter of Fundamental Rights, which seeks to prevent precisely such an extension of EU powers or

78 — See also: House of Lords – European Union Committee, The Treaty of Lisbon: an impact assessment. Volume I: Report (10th Report of Session 2007-08), http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf, paragraphs 5.87 and 5.103. See also Pernice, I., The Treaty of Lisbon and Fundamental Rights, in Griller, S./Ziller, J. (ed.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Vienna 2008, p. 235, 245.

of the field of application of EU law.[79] Article 1(1) of the Protocol does not therefore, in principle, call into question the validity of the Charter of Fundamental Rights for the United Kingdom and for Poland.[80]

170. This view is confirmed in the recitals in the preamble to the Protocol, which confirms, in several places, the fundamental validity of the Charter of Fundamental Rights in the Polish and the English legal orders.[81] For example, the third recital states that under Article 6 TEU the Charter is to be *applied* and *interpreted* by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. Reference is made in the eighth and ninth recitals to the wish of Poland and the United Kingdom to clarify *certain aspects of the application of the Charter* and the *application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom*.

171. Whilst Article 1(1) of Protocol No 30 does not call into question the validity of the Charter of Fundamental Rights, but should merely be regarded as an express confirmation of the normative content of Article 51 of the Charter of Fundamental Rights, Article 1(2) of Protocol No 30 appears to seek to clarify the validity of individual provisions of the Charter in the legal orders of the United Kingdom and Poland. Under Article 1(2) of Protocol No 30, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as such rights are provided for in their respective national laws.

172. Article 1(2) of Protocol No 30 relates to the social fundamental rights and principles grouped together under Title IV of the Charter of Fundamental Rights (Article 27 to 38). That title, entitled 'Solidarity', is regarded as one of the most controversial areas in the evolution of the Charter. There was dispute not only over the fundamental question whether social rights and principles should be incorporated into the Charter, but also how many social rights should be included, how they should be organised in detail, what binding force they should have, and whether they should be classified as fundamental rights or as principles.[82]

79 — See point 71 et seq. of this Opinion. See also Craig, P., *The Lisbon Treaty*, Oxford 2010, p. 239; Pernice, I., loc. cit. (footnote 78), p. 246 et seq.

80 — See also House of Lords – European Union Committee, loc. cit. (footnote 78), paragraph 5.103.a.; Dougan, M., 'The Treaty of Lisbon 2007: winning minds, not hearts', CMLR 2008, p. 617, 669. See also Craig, P., loc. cit. (footnote 79), p. 239, who rightly states, in this connection, that Article 1(2) of Protocol No 30 would be meaningless if Article 1(1) of the Protocol contained a general opt-out.

81 — See House of Lords – European Union Committee, loc. cit. (footnote 78), paragraph 5.102.

82 — See Riedel, E., in *Charta der Grundrechte der Europäischen Union* (ed. Meyer, J.), 3rd edition, Baden-Baden 2011, before Title IV, paragraph 7 et seq.

173. With the statement that Title IV of the Charter of Fundamental Rights does not create justiciable rights applicable to Poland or the United Kingdom, Article 1(2) of Protocol No 30 first reaffirms the principle, set out in Article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals. However, Article 1(2) of Protocol No 30 also appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland. [83]

174. Because the contested fundamental rights in the present case are not among the social fundamental rights and principles set out in Title IV of the Charter of Fundamental Rights, however, there is no need to examine in any greater detail here the question of the precise validity and scope of Article 1(2) of Protocol No 30. It is sufficient to refer to the 10th recital in the preamble to Protocol No 30, according to which references in that protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter.

175. Article 2 of Protocol No 30 provides, lastly, that where a provision of the Charter refers to national laws and practices, it only applies to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

176. In the light of the abovementioned recitals, it is not possible to infer from Article 2 of Protocol No 30 a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland. Moreover, Article 2 of Protocol No 30 applies solely to provisions of the Charter of Fundamental Rights which make reference to national laws and practices. [84] That is not the case with the provisions of the Charter which are relevant in the present case.

177. In the light of the foregoing, the seventh question must be answered to the effect that the interpretation of Protocol No 30 has not produced any findings which could call into question the validity for the United Kingdom of the provisions of the Charter of Fundamental Rights which are relevant in the present case.

83 — See House of Lords – European Union Committee, loc. cit. (footnote 78), paragraph 5.103(b), in whose view Article 1(2) of the Protocol prevents the Court, in interpreting individual Title IV 'rights', concluding that those 'rights' represent legally enforceable rights which could be relied upon against the United Kingdom.

84 — See also Dougan, M., loc. cit. (footnote 80), p. 670; House of Lords – European Union Committee, loc. cit. (footnote 78), paragraph 5.103(c); Pernice, I., loc. cit. (footnote 78), p. 248 et seq.

VII — Conclusion

178. In the light of the above considerations, I propose that the Court answer the questions asked by the Court of Appeal (England and Wales) as follows:

(1) A decision made by a Member State under Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the regulation constitutes a measure implementing European Union law for the purposes of Article 51(1) of the Charter of Fundamental Rights.

(2) A Member State in which an asylum application has been lodged is obliged to exercise its right to examine that asylum application under Article 3(2) of Regulation No 343/2003 where transfer to the Member State primarily responsible under Article 3(1) in conjunction with the provisions contained in Chapter III of Regulation No 343/2003 would expose the asylum seeker to a serious risk of violation of his fundamental rights as enshrined in the Charter of Fundamental Rights. Serious risks of infringements of individual provisions of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member State primarily responsible which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred are not sufficient, on the other hand, to create an obligation on the part of the transferring Member State to exercise

the right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003.

(3) The obligation to interpret Regulation No 343/2003 in a manner consistent with fundamental rights precludes the operation of a conclusive presumption according to which the Member State primarily responsible for examining an asylum application will observe the asylum seeker's fundamental rights under European Union law and all the minimum standards laid down in Directives 2003/9, 2004/83 and 2005/85. The Member States are not barred, on the other hand, from proceeding from the rebuttable presumption, in applying Regulation No 343/2003, that the asylum seeker's human rights and fundamental rights will be observed in the Member State primarily responsible for his asylum application.

(4) Under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') is no less than the protection granted by the ECHR. Because the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice.

(5) A national law under which, in examining whether an asylum seeker may be lawfully transferred to another Member State pursuant to Regulation No 343/2003, the courts must proceed from the conclusive presumption that that Member State is a safe country in which asylum seekers are not exposed to the risk of expulsion to a persecuting State, which is contrary to the Geneva Convention or

with the ECHR, is incompatible with Article 47 of the Charter of Fundamental Rights.

(6) The interpretation of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom has not produced any findings which could call into question the validity for the United Kingdom of the provisions of the Charter of Fundamental Rights which are relevant in the present case.