

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 *

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)

v

Secretary of State for the Home Department

and

M. E. (C-493/10),

A. S. M.,

* Language of the case: English.

M. T.,

K. P.,

E. H.

v

Refugee Applications Commissioner,

Minister for Justice, Equality and Law Reform,

intervening parties:

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),

United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),

Equality and Human Rights Commission (EHRC) (C-411/10),

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),

United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský and U. Löhms, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, T. von Danwitz, A. Arabadjiev, C. Toader and J.J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2011,

after considering the observations submitted on behalf of:

- N. S., by D. Rose, QC, M. Henderson and A. Pickup, Barristers, and by S. York, Legal Officer,
- M.E. and Others., by C. Power, BL, F. McDonagh, SC, and G. Searson, Solicitor,
- Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (Case C-411/10), by S. Cox and S. Taghavi, Barristers, and J. Tomkin, BL,
- Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (Case C-493/10), by B. Shipsey, SC, J. Tomkin, BL, and C. Ó Briain, Solicitor,
- The Equality and Human Rights Commission (EHRC), by G. Robertson, QC, J. Cooper and C. Collier, Solicitors,
- The United Nations High Commissioner for Refugees (UNHCR) (UK), by R. Husain, QC, R. Davies, Solicitor, and S. Knights and M. Demetriou, Barristers,
- Ireland, by D. O'Hagan, acting as Agent, assisted by S. Moorhead, SC, and D. Conlan Smyth, BL,

- the United Kingdom Government, by C. Murrell, acting as Agent, and D. Beard, Barrister,
- the Belgian Government, by C. Pochet and T. Materne, acting as Agents,
- the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,
- the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
- the Government of the Hellenic Republic, by A. Samoni-Rantou, M. Michelogi-annaki, T. Papadopoulou, F. Dedousi and M. Germani, acting as Agents,
- the French Government, by G. de Bergues, and by E. Belliard and B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
- the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

- the Austrian Government, by G. Hesse, acting as Agent,
- the Polish Government, by M. Arciszewski, B. Majczyna and M. Szpunar, acting as Agents,
- the Slovenian Government, by N. Aleš Verdir and V. Klemenc, acting as Agents,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the European Commission, by M. Condou-Durande and by M. Wilderspin and H. Kraemer, acting as Agents,
- the Swiss Confederation, by O. Kjelsen, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011,

gives the following

Judgment

- ¹ The two references for preliminary rulings concern the interpretation, first, of 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 (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').
- ² The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

- 3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.
- 4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.
- 5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

'No Contracting State shall 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.'

The Common European Asylum System

- 6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.
- 7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say, maintaining the principle of non-refoulement.
- 8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.
- 9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No 343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

¹⁰ Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

¹¹ The European Union legislation of relevance to the present cases includes:

— (1) Regulation No 343/2003;

— (2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

— (3) 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 (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

— (4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

¹² It is also appropriate to mention 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 (OJ 2001

L 212, p. 12). As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

- 13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).
- 14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.
- 15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

¹⁶ Article 1 of 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.

¹⁷ Article 3(1) and (2) of that regulation provide:

‘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.’

¹⁸ In order to determine which is ‘the Member State responsible’ for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

- 19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.
- 20 According to Article 17 of Regulation No 343/2003, 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, call upon the other Member State to take charge of the applicant.
- 21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.
- 22 Article 19 of Regulation No 343/2003 is worded as follows:

‘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.

...

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.

...

- ²³ The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.
- ²⁴ The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.
- ²⁵ The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).
- ²⁶ The European Community has similarly concluded an Agreement with 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,

approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to 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, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

²⁷ Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

²⁸ Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

²⁹ Directive 2004/83 lays down 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. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the

conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

³⁰ Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

³¹ Article 36(1) of Directive 2005/85, under the heading ‘The European safe third countries concept’ states:

‘Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.’

³² The conditions laid down in Article 36(2) include:

— ratification of and compliance with the provisions of the Geneva Convention;

— the existence of an asylum procedure prescribed by law;

- ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

³³ Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-411/10

³⁴ N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an asylum application.

³⁵ According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

- ³⁶ On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No 343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.
- ³⁷ On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.
- ³⁸ On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.
- ³⁹ The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.
- ⁴⁰ On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under

European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

- 41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.
- 42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).
- 43 The appellant in the main proceedings appealed to that court on 21 April 2010.
- 44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:
 - (1) asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

- (2) the proportion of asylum applications which are granted is understood to be extremely low;

- (3) judicial remedies are stated to be inadequate and very difficult to access;

- (4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

⁴⁵ The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

⁴⁶ Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and ... that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

- 47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.
- 48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, *inter alia*, Article 3 of the ECHR, which might lead to a different outcome in the present case.
- 49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.
- 50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does 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 fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter ...?’

If Question 1 is answered in the affirmative:

- (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) [of Regulation No 343/2003] 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 European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9 ..., 2004/83 ... and 2005/85 ...?
- (4) Alternatively, is a Member State obliged by European Union 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 [asylum] 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 Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?
- (5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union 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 ECHR?

- (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 Regulation [No 343/2003], 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 [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?
- (7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?

Case C-493/10

- ⁵¹ This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.
- ⁵² Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of

the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

- ⁵³ In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

- ⁵⁴ Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

- ⁵⁵ By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

- ⁵⁶ N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.
- ⁵⁷ N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

- 58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.
- 59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.
- 60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-8965). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State, which will be bound by the procedural obligations of the European Union and by the directives.
- 61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a ‘sovereignty’ clause or ‘discretionary clause’ in the Commission documents, the *raison d’être* of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.
- 62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since

they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

- ⁶³ The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

- ⁶⁴ Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.
- ⁶⁵ Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.
- ⁶⁶ As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

- 67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.
- 68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.
- 69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

- 70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State,

with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

- ⁷¹ By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned directives.
- ⁷² By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?
- ⁷³ Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.
- ⁷⁴ Those questions should be considered together.

- ⁷⁵ The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).
- ⁷⁶ As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.
- ⁷⁷ According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also 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 European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).
- ⁷⁸ Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

- 79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.
- 80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.
- 81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.
- 82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.
- 83 At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

⁸⁴ In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish, as is apparent *inter alia* from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

⁸⁵ If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

⁸⁶ By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

- 87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90 % of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.
- 88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, *inter alia*, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S. v. Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).
- 89 The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.
- 90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees

(UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S. v Belgium and Greece*, § 347-350).

⁹¹ Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

⁹² The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

⁹³ In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

- 98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.
- 99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, 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 duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.
- 100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.
- 101 That would be the case, *inter alia*, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.
- 102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

- 103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.
- 104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.
- 105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.
- 106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.
- 107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S. v. United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a

number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

- 112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S. v Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.
- 113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.
- 114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.
- 115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

- ¹¹⁶ By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).
- ¹¹⁷ As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.
- ¹¹⁸ Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.
- ¹¹⁹ According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter 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. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

- 120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.
- 121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).
- 122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

Costs

- 123 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The decision adopted by a Member State on the basis of 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 an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

- 2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.**

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

- 3. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.**

- 4. In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.**

[Signatures]