Neutral Citation Number: [2007] EWHC 1548 (Admin)

Case No: CO/8303/2005

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2007

Before :

The Honourable Mr. Justice McCOMBE

- -

Between :

Javad NASSERI	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr. Mark HENDERSON (instructed by **Refugee Legal Centre**) for the **Claimant**
Miss Lisa GIOVANNETTI & Mr. Alan PAYNE (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 19 – 21 June 2007

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr. Justice McCombe:

(A) Introduction

1. In this case the Claimant seeks a declaration under Section 4 of the Human Rights Act that the provisions of paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"), applied by Section 33 of that Act, is incompatible with a "Convention right" arising under the European Convention of Human Rights. Paragraph 3 provides as follows:

> "(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed -
>
> (a) from the United Kingdom, and
>
> (b) to a State of which he is not a national or citizen.
>
> (2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place -
>
> (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
>
> (b) from which a person will not be sent to another State in contravention of his Convention rights, and
>
> (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention."

By paragraph 2, the relevant part of Schedule 3 applies to the States

there listed. Greece is one such State.

2. The Claimant is a national of Afghanistan who entered the United Kingdom illegally on 5 September 2005, concealed in a lorry. When detected he claimed asylum. He claimed to be a minor but was assessed by an Immigration Officer as being over 18 years of age. He was then detained. His fingerprints were found to match those of a person who, in December 2004, had claimed asylum in Greece. The Immigration Service put in train procedures for inviting Greece to take responsibility for the Claimant's asylum claim and for his return to Greece accordingly under the terms of the Dublin Regulation. In late September or early October 2005 the Claimant consulted the Refugee Legal Centre ("RLC") which sought his release from detention because he was a minor. The Defendant rejected the Claimant's assertion that he was a minor. The Defendant refused to release the Claimant and on 3 October 2005 the Defendant informed the Claimant by letter that Greece had accepted responsibility for the asylum claim. It was further stated that, by virtue of paragraph 3(2) of Part 2 of

Schedule 3 to the 2004 Act, Greece was to be treated as a place where his life and liberty would not be threatened within the meaning of the Refugee Convention and from which he would not be sent to another State in breach of his rights under the Human Rights Convention. On 5 October 2005 Removal Directions were set for the removal of the Claimant to Greece on 14 October.

3. By letter of 12 October to the Immigration and Nationality Directorate the RLC contended that removal of the Claimant to Greece would be a breach of article 3 of the Convention because the Claimant had not and would not have access to fair asylum determination processes there. The RLC referred in the letter to a note dated November 2004 from the United Nations High Commission for Refugees ("UNHCR") pointing out that asylum seekers who left Greece and subsequently returned may be subject to immediate removal without substantive examination of their claims. The UNHCR requested that sending states would obtain assurances from the Greek authorities that such persons would be given fair examination of their claims. In the alternative it was suggested that sending States could assume responsibility for such claims themselves as foreseen by Article 3(2) of the Dublin II Regulation.

4. The Defendant responded by letter of 13 October stating as follows:

> "A State may breach Article 3 by expelling a person where substantial grounds are shown for believing that the person faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. A "real risk" requires more than a mere possibility. The potential ill-treatment must attain a minimum level of severity. Where the source of the ill-treatment is not at the hands of the receiving State a high threshold is applied.
>
> The practices and procedures of Member States are routinely and closely monitored, including Greece, in the implementation of the ECHR in order to be satisfied that Greece's obligations are fulfilled. Your client will be able to raise with the authorities in Greece any concerns that he may have under the provisions of the 1951 United Nations Refugee Convention and the ECHR, and he will not be subjected to inhuman or degrading treatment in Greece. "

On that day, the present proceedings, initially only for judicial review of the defendant's decision to proceed with removal, were brought, and Mr. Justice Penry-Davey granted an injunction restraining the defendant from removing the Claimant from the jurisdiction pending determination of the claim. On 24 October the London Borough of Hillingdon assessed the claimant to be a minor, as he had contended at the outset. For the purposes of the present proceedings that assessment is not disputed and it has been assumed for the purposes of this hearing that he is now 17 years old or thereabouts.

(B) The development of the rival contentions and the procedural history

5. The grounds of claim served by the Claimant on 18 November 2005, following the receipt of the defendant's letter of 13 October already mentioned, stated that the defendant did not appear to dispute that the provisions of the 2004 Act now in issue were inconsistent with the Human Rights Act 1998 in so far as it required or entitled the defendant to remove the claimant without substantive consideration of whether the removal would violate Article 3 of the Convention. The solicitors pointed to the passage in the defendant's letter asserting that practices in Greece were routinely and closely monitored in order to be satisfied that that country's obligations were fulfilled which they considered indicated the defendant's willingness to assess the case "on the merits".

6. In the summary grounds of defence served on 25 November 2005 the defendant argued that the provisions of paragraph 3 of Schedule 3 to the 2004 Act (hereinafter called "the deeming provision") prevented further scrutiny of the decision. It was stated that "the Defendant takes the view that he is entitled to regard Greece as a safe third country" by reason of those provisions. In the light of that stance the claimant served amended grounds of claim dated 1 December 2005. In paragraph 22 of those grounds the claimant asserted that,

> "The Human Rights Act obliged him to make a proper and lawful decision on C's human rights claim. It would be incompatible with human rights for D to argue that the deeming provision mandated (or entitled) him to shut his eyes to any evidence that may emerge at any time to the effect that the removal of any particular claimant will place the United Kingdom in breach of the ECHR. The result of such a construction would be that Parliament had prohibited D from acting in accordance with Article 3, the most fundamental and absolute of the Convention rights, by acting upon evidence that the proposed removal would lead to indirect refoulement."

Although formal amendment was not made to the claim form at that stage, to claim the declaration of incompatibility now sought, the argument as to incompatibility was, in my judgment, clearly stated.

7. On 1 March 2006 Mr Justice Langstaff granted permission to apply for judicial review. The defendant sought time for the lodging of detailed grounds of defence to deal with the incompatibility claims.

8. On 18 April 2006 the defendant wrote a further letter which it was said replaced the letter of 13 October 2005, the letter challenged in these proceedings. The new letter invoked the deeming provision and continued:

> "5. The Secretary of State is aware of the concerns expressed by the UNCHR, upon which your client seeks to rely, regarding asylum practices and procedures in Greece. He is also aware, however, that the UNCHR Athens continued to work closely with the Greek authorities and closely monitor asylum claims and procedures in Greece. It is also his understanding, through

> contact with the Dublin Unit in Athens, that an asylum seeker returned to Greece under the Dublin ll Regulation will be given an opportunity to present any further information to the Greek authorities in support of his asylum claim and the authorities will give full and proper consideration to such information within the context of Greece's international obligations."

Detailed grounds of defence were then eventually served in July 2006. Paragraph 30 of those grounds maintained that the deeming provisions,

> "…implement an absolute bar preventing the Secretary of State from considering whether countries such as Greece will return asylum seekers in contravention to their Human Rights."

In paragraph 35 the defendant claimed that he…,

> "…simply has no discretion to consider whether Greece will remove the Claimant in breach of his human rights."

9. In anticipation of a final hearing in January 2007 the Claimant's counsel, Mr. Mark Henderson, served a skeleton argument, on which he has continued to rely thereafter, outlining the Claimant's case on incompatibility. The hearing was vacated for the defendant to formulate further arguments on the incompatibility points and the case was to be listed for the first available date after 31 January. It was re-listed for 1 May. On 23 April 2007 the defendant served amended detailed grounds and a witness statement made by Mr. Richard Pulham, a Senior Executive Officer in the London and South East Asylum Region of the Border and Immigration Agency and a Senior Caseworker of the Third Country Unit. He states that that is the Unit responsible for the certification of asylum cases on third country grounds under the provisions of the Dublin Regulation.

10. The new documents addressed no further argument on the issue of incompatibility. Rather they adduced new factual material directed to an argument that the claimant's claim was academic since…

> "having regard to the Greek procedure and the evidence that the Greek authorities will give the Claimant 30 days (starting with the date when the decision is served) to appeal against the refusal of his application for asylum, the Claimant faces no risk of refoulement…" (paragraph 4)

(Here, therefore, the Defendant appeared to be addressing the merits of the Claimant's concerns once more.)

11. The new grounds and evidence were directed to a contention that there are adequate mechanisms in place at European Commission level to ensure the lawful operation of the Dublin Regulation. According to evidence, following the grant of permission in this and a similar case (but not apparently before then), Mr. Pulham had contacted the Greek Dublin office in Athens to verify their procedures regarding the removal of

failed asylum seekers. It was asserted, in the new amended grounds, that the Greek authorities have taken no action to enforce removal of failed Afghan asylum seekers. Further, it was stated that at a meeting of the "Dublin Regulation Contact Committee" in Brussels the European Commission had indicated that it was in ongoing discussions with the Greek authorities as to the UNHCR's concerns; it did not advise that returns to Greece should be stayed in the meantime.

12. The new material went on to assert that in May 2006 the Greek authorities confirmed to the defendant that no action was being taken to remove Afghan nationals who had been refused asylum; persons who had been refused asylum, before leaving Greece or in their absence, would be given the chance to make fresh applications on return. It was said that at a further meeting of the Contact Committee in November 2006 Greece provided confirmation that the procedures relating to those returned under the Dublin Regulation had been changed with effect from 8 June 2006 – 18 months after the UNHCR's concerns had been expressed in its note of November 2004.

13. Mr. Pulham's statement also provided the information that he had been advised by the Greek authorities that the claimant's own asylum claim had been rejected at first instance on 1 April 2005. However, he had also been told that the decision had not been formally notified to the claimant under Greek law and that, therefore, upon return to Greece and service on him of the decision he would have 30 days in which to lodge an appeal.

14. This new information prompted a series of enquiries on the claimant's behalf to the defendant as to details of the Greek processes that had now emerged (e.g. whether the appeal said to be available to the claimant was able to address the substance of the claim) and documents relating to the dismissal of the claimant's asylum claim in Greece in 2005. I was told at the hearing that even today neither the defendant nor, *a fortiori*, the claimant has had from the Greek authorities, a copy of the decision taken by the Greek tribunal or court in the claimant's case. Several of these requests for information remain outstanding.

15. There also ensued an argument as to whether the hearing, now scheduled for 19 June, could proceed without a full investigation of the factual background recently disclosed by the defendant. The claimant contended that the convenient course was for the court to consider the question of the compatibility of the legislation with the Human Rights Convention before any detailed investigation of the new factual material.

16. The defendant's skeleton argument for the present hearing did not reach the claimant's counsel until about 5 p.m. on 18 June 2007. It did not reach me until the morning of the hearing on the 19 June. The introduction section in the document referred to the application to review the defendant's decision of 13 October 2005, but it made no mention of the claim to the declaration of incompatibility. Indeed, no reference to the claim to such a declaration appears anywhere in the skeleton argument at all – almost as though that claim had never been made. The thrust of the argument appearing in paragraph 2 was that the challenge to the defendant's decision under review was "wholly academic" in the light of the information recently disclosed by the defendant as to the position in Greece. The arguments on incompatibility raised in the claimant's skeleton argument of January 2007 seemed to be addressed nowhere.

17. In the course of oral argument I asked Miss Giovanetti who appeared (with Mr. Payne) for the defendant, which part of the written argument (if any) was intended to address the issue of compatibility. Her answer was paragraph 14(b), coupled with the factual material set out in paragraphs 25-27, 51 and 52 and 56 to 58. Paragraph 14(b) reads as follows:

> "there are adequate mechanisms in place, at a European level, to ensure the lawful operation of the Dublin Regulation:- in particular, the supervisory role of the European Commission, in monitoring the practice and procedures adopted by MSs, when operating the Dublin Regulations, precludes any real risk of *refoulement* arising"

I do not see how those paragraphs address the compatibility point in any real sense.

18. In oral argument, Miss Giovennetti in her customarily careful fashion, made five principal points (not previously raised at all in the written pleadings or argument), after referring me to the precise terms of the deeming provision.

19. Miss Giovennetti's five points were these:

i) The deeming provision in paragraph 3 does not relate to all human rights problems or questions, only the issue of *refoulement*

ii) The provision does not relate to all third countries, only the states specified in the Act.

iii) The provision precludes a "case by case" consideration of the risk of *refoulement* in the context of a challenge to removal, and only in cases involving a challenge to removal

iv) The provision does not stop the UK authorities from monitoring the law and practice in any specified state for the purposes of deciding whether to keep that state on the statutory list.

v) The provision does not preclude the court from considering evidence of the law and practice in any specified state on an incompatibility challenge.

20. It was submitted, therefore, that an incompatibility challenge could only be mounted successfully when it is demonstrated on the facts that it is no longer compatible with Convention rights to leave a particular state on the statutory list. In other words, it was necessary to consider the merits of any removal challenge on an assessment of the law and practices of the country concerned when an issue of incompatibility arose. At the end of the defendant's oral submissions it was said that there were three "key points":

i) In so far as there had been a "protection gap" in Greece, the evidence showed that it was theoretical but not real. There was no evidence that the "gap" led to *refoulement* in practice.

ii) The theoretical "gap" had been closed since June 2006.

iii) There is no evidence of the Greek authorities having carried out returns to Afghanistan at any time.

(C) Discussion

21. From the recitation of the procedural history above it seems to me that the question of the compatibility of the deeming provision with the Human Rights Convention, and in particular with Article 3, was never substantively addressed by the defendant at any stage prior to the hearing when Miss Giovenetti made the oral submissions to which I have just referred. It seems rather that, after the objection to the Defendant's reliance on the deeming provision emerged in the Claimant's amended grounds in late 2005 and after the grant of permission to apply for Judicial Review, the argument that gradually evolved was that the making of a declaration was "academic" because the claimant's perceived concerns (arising as they did out of the UNHCR's concerns) had been addressed by the Greek authorities. It is now submitted that the court is *not* dealing with a determination of whether the claimant can be removed from the United Kingdom but with a compatibility challenge to which the deeming provision, on its true construction, does not apply at all.

22. I find the defendant's argument on this circular and unsustainable. The claimant *did* challenge the decision to remove him and continues to do so; that was and is the purpose of these proceedings. The defendant relied upon the deeming provision as precluding any inquiry into the merits or otherwise of the concerns that were being raised. When it was clear from the summary grounds of defence, at the latest, that that was indeed the defendant's case, the claimant raised the point that that contention was incompatible with the claimant's rights under Article 3 of the Convention. Therefore, the declaration was sought. The present claim to the declaration arose fairly and squarely in the context of the challenge to the Defendant's decision to remove the Claimant to Greece and that remains the basis of the present proceedings.

23. The argument for the Claimant is that the Defendant's reliance on the deeming provision in the face of that challenge is incompatible with Article 3. In my judgment, the distinction between a challenge to removal and an argument as to compatibility is wholly artificial in the context of the present proceedings, since the incompatibility argument only arises in the context of a question relating to the defendant's desire in the first place to remove the claimant from the country.

24. The provision in question could not be in clearer terms. It requires "any person, tribunal or court", that has to determine whether an asylum applicant or applicant for human rights protection may be removed from this country, to treat Greece (among other states) as a place "from which a person will not be sent to another state in contravention of his Convention rights". It seems to me that Parliament has precluded both the Secretary of State and this court from considering any such question as to the law and practice on *refoulement* in any of the listed countries. The exercise which the defendant urges that I should undertake to demonstrate that the claim is academic is, therefore, an impermissible one. That was the submission that was made by the defendant and accepted by the Court of Session in Scotland in **Nauroz Akhund** [2006] CSOH 62. There the defendant by Counsel suggested that the course open to the petitioner in that case was to seek a declaration of incompatibility. That is

precisely what this Claimant has done as part and parcel of his challenge to the Defendant's decision to remove him.

25. The danger that a provision, such as the deeming provision here in issue, would be found by the courts to be incompatible with the Convention was foreshadowed in authority and in pre-legislative commentaries available to Parliament at the time that the 2004 Act was passed.

26. In **R (Thangarasa) and (Yogathas) v Secretary of State for the Home Department** [2003] AC 920 the appellant, a Sri Lankan Tamil, sought to challenge a certificate by the Secretary of State authorising his removal to Germany. Section 6 of the Asylum and Immigration Appeals Act 1993 prohibited the removal from the UK of an asylum applicant until the Secretary of State had notified him of his decision on the claim. But, by Section 2 of the Asylum and Immigration Act 1996 it was provided that Section 6 of the 1993 Act did not prevent removal if the Secretary of State had certified that the conditions mentioned in section 2(2) were fulfilled, unless the certificate was under appeal. The conditions were:

> "(a) that the person is not a national or citizen of the country or territory to which he is to be sent; (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion nationality, membership of a particular social group, or political opinion and (c) that the government of that country or territory would not sent him to another country or territory otherwise than in accordance with the Convention".

(The reference to "the Convention" is there to the Refugee Convention not the Human Rights Convention.) Section 11(1)(b) of the Immigration and Asylum Act 1999 enacted a statutory presumption that a member state of the European Union, such as Germany, was to be regarded as a place from which an asylum applicant would not be sent to another country in breach of his rights under the Refugee Convention. (I.e. this was the precursor of paragraph 3(2)(a) and (c) of Schedule 3 to the 2004 Act, omitting what is now sub-paragraph (b).) However, Section 65 of the 1999 Act did preserve the possibility of a challenge on human rights grounds. In his speech in the House of Lords, Lord Bingham said that Section 65 was…

> "…no doubt necessary if that Act was to be compatible with the obligations of the United Kingdom under the European Convention on Human Rights"

(See [2003] AC at p. 928D, paragraph 11.)

27. Section 65 is not repeated in the 2004 Act and that Act does precisely the opposite in the deeming provision, by enacting an irrebuttable statutory presumption that an asylum applicant will not be subject unlawful *refoulement* by a specified state in contravention of the Human Rights Convention. It is clear, in my judgment, that Lord Bingham considered that a provision such as that now in issue would be incompatible with the ECHR. Of course, the remark was very much *obiter dictum*, but it came from a source whose *dicta* are very highly persuasive. Miss Giovennetti was constrained to argue, in the most respectful terms, that Lord Bingham's dictum was simply wrong. I do not think that it was.

28. Warnings of potential incompatibility were also given, from sources knowledgeable in this field, first in evidence to the Select Committee on Constitutional Affairs by Mr Justice Ouseley, then President of the Immigration Appeal Tribunal, and secondly, by the Joint Committee of both Houses on Human Rights (see the Scrutiny of Bills: Sixth Progress Report, 13th Report of Session 2003-4)[1].

29. The Bill contained the required statement by the Minister under section 19(1)(a) of the Human Rights Act that, in his view, the provisions of the Bill were compatible with Convention rights. The government's view on the deeming provision was provided (in reply to Mr. Justice Ouseley's evidence) in the following terms, perhaps foreshadowing Miss Giovannetti's argument which emerged very belatedly in these proceedings:

> "We cannot simply assume that our obligation, in relation to Article 3, will be met by another State. That is, that another State would have procedures in place to ensure that a person would not be removed improperly from that state to another country. Nor can we simply assume that a person would not face a real risk of treatment there contrary to Article 3. However, provided that we are satisfied as a matter of fact, after detailed and diligent enquiry, that the procedures and situation in another State are such that there is no real risk that a breach of an individual's Convention rights will occur, we believe that such a provision is lawful."

30. The problem with that argument is that, when the defendant is faced with a claim to asylum and a claim alleging a potential breach of Article 3 by unlawful *refoulement,* the deeming provision precludes the defendant making any such enquiry at the point of removal as he is required by law to do. Even if the defendant was faced with clear and compelling evidence of such *refoulement* in an individual case, he is directed by this provision to deem the third country safe and to ignore the evidence of his own eyes and understanding. A mere generalised enquiry, made years earlier, that led to the country being included on the statutory list, would conclude the matter against the asylum claimant. It is also instructive to note that, as Mr. Henderson for the claimant pointed out, the Act confers no discretion on the Minister to remove a State from this particular list by statutory instrument or order. Primary legislation is required for that: see Schedule 3 paragraph 20.

31. The Bill as originally presented allowed amendment, by way of addition or deletion of States, by order made by the Minister. However, that was changed by a government amendment, no doubt to remove any possibility of conferring on the Minister a reviewable discretion to delete a country from the Bill as enacted. Miss Giovennetti's fourth point, set out above, was that the deeming provision did not stop the United

[1] The Committee's view was as follows: "We consider that there is a significant risk of incompatibility with the UK's obligations under the ECHR in enacting an automatic statutory deeming provision, precluding any individual consideration of the facts of a particular claimant's case and conclusively ousting the jurisdiction of the courts to hear a claim that removal to a third country on the First List would breach the claimant's Convention rights because of the risk of onward removal. We draw this matter to the attention of each House." (paragraph 1.126)

Kingdom authorities from monitoring the specified States for the purpose of deciding whether to keep any one or more of them on the list of "safe" countries. This "monitoring" facility is in reality illusory in the light of paragraph 20 as enacted. It amounts to no more than a facility to monitor for the purposes of deciding whether to promote primary legislation to remove any particular state from the list.

32. In the passage of the defendant's skeleton argument, which Miss Giovennetti identified as the primary source of the defendant's case on compatibility, namely paragraph 14, reliance is placed on the procedures put in place under the Dublin Regulation (Council Regulation (EC) No 343/2003). Paragraph 14(b) is quoted above. In paragraph 14(a) the additional submission is made that the defendant is required by the deeming provision and the Dublin Regulation to consider Greece as a place where the claimant will not be subjected to unlawful *refoulement*. In paragraph 54 it is suggested that the claimant's case requires the defendant to act in a manner which is inconsistent with the United Kingdom's obligations under the Regulation.

33. It does not seem to me that the consequence of the claimant's case is as the defendant suggests. The claimant recognises that by the deeming provision the defendant and the court are each precluded from considering whether there is a risk of unlawful *refoulement* on removal of an asylum applicant to Greece. He merely claims a declaration that that preclusion of such consideration is incompatible with the Human Rights Convention. Moreover, it has not been pointed out to me how any breach of the Dublin Regulation would occur in the absence of the deeming provision; no specific article of the Regulation is relied upon in this respect by the defendant. Further, the UNHCR itself suggested that in view of the potential "protection gap" which it pointed out States could, consistently with the Regulation, assume responsibility under Article 3(2) for asylum claimants who might be prejudiced by this. Although the terms of the Regulation were not substantially argued before me, it seems to me that this is correct and no relevant breach of obligation under the Regulation would arise if a country adopted the suggestion of the UNHCR.

34. It is clear, moreover, that a State cannot in any event rely upon arrangements such as the Dublin Regulation as providing automatic exoneration from obligations under the Human Rights Convention. I was referred to the decision of the European Court of Human Rights in **T.I. v United Kingdom** 7 March 2000 Application No. 43844/98 where the Court said this:

> "In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.
>
> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.

> Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v Germany judgment of 18 February 1999, *Reports* 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered. The English Courts themselves have shown a similar concern in reviewing the decisions of the Secretary of State concerning the removal of asylum-seekers to allegedly safe third countries (see Relevant Domestic Law and Practice above, United Kingdom case-law).
>
> The Court has therefore examined below whether the United Kingdom have complied with their obligations to protect the applicant from risk of torture and ill-treatment contrary to Article 3 of the Convention."

35. The defendant submits (see Miss Giovennetti's fifth point) that the deeming provision does not preclude the court from examining the law and practice of the relevant country on an incompatibility challenge. It followed, therefore, that the court should examine the material now produced as to the state of affairs prevailing in Greece to determine whether the deeming provision was indeed compatible with rights under the Human Rights Convention. If necessary, it was argued, the proceedings should be adjourned to enable the full material on this to be gathered, including so far as necessary the additional material sought by the claimant since April this year when the defendant's new amended grounds and Mr. Pulham's statement were provided.

36. I have already expressed my difficulty in comprehending how, in the light of the deeming provision, the court can engage in this enquiry in the context of proceedings such as these challenging a decision to remove the claimant. It also gives rise to the difficulty that the legislation would be capable in some circumstances of being compatible with Convention rights and in others not so compatible. For example, it might be that, prior to the changes to procedures said to have been adopted by the Greek authorities in June 2006, the legislation was incompatible with the Convention, but that after the changes it became compatible. That, to my mind, is an impossible contention. The legislation is either compatible with Convention rights or it is not. As Mr. Henderson submitted, the Minister made his statement in the Bill that this provision was compatible with the Convention. That statement was either correct or incorrect; it cannot be right that such a statement is correct at one moment and yet

capable of being rendered incorrect by a change of factual circumstances after the Bill is enacted.

37. In parallel to her main submissions, Miss Giovennetti raised an additional argument in her oral submissions that was not advanced in any of the earlier written materials. The point was that the claimant's complaint in this case did not arise out of any breach or potential breach of Article 3 of the ECHR, but out of an alleged breach of Article 13 in failing to afford to the claimant an adequate remedy for a substantive breach of other Convention rights. Article 13 is not, of course, one of the Articles incorporated into our law by the 1998 Act.

38. Reliance was also placed upon the speech of Lord Nicholls of Birkenhead in **In re S** [2002] UKHL 10 at paragraphs 59 and 60. That was a case where the House examined the provisions of the Children Act 1989 relating to the discharge of local authorities' obligations when operating under care orders. The complaint was that the Act provided no "adequate and timely" remedy if a local authority failed to carry out its obligations and a breach of Article 8 of the Convention arose. Lord Nicholls pointed out that failure to provide a remedy for breach did not amount to a breach of the substantive Convention right. He noted that no infringement was compelled by the 1989 Act, infringement would only flow from the authority's failure properly to perform its functions under it: see paragraph 57.

39. In this case, however, in my judgment, it is the Act itself that compels the breach of Article 3. Unlawful *refoulement* is itself a breach of Article 3. Failure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading treatment is a breach of the substantive Article and it is that investigation that the deeming provision impedes. It is clear from (among other sources) **Assenov v Bulgaria** 28 October 1998 (90/1997/874/1086) in the European Court of Human Rights that the right to an adequate investigation of an asylum claim is an aspect of the substantive right under Article 3.

> "The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation…. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity."

This passage is to be found within the part of the Court's judgment dealing with the alleged substantive breach of Article 3. The judgment deals later with the points taken under Article 13 as an entirely separate aspect of the case: see p. 26 et seq. of the judgment. (See also **Jabari v Turkey** 11 July 2000 Application No. 40035/98, at paragraphs 38 to 41.)

(D) Conclusion

40. In the present case, the deeming provision can only work to prevent an investigation of a potential breach of Article 3. It does so in absolute terms. In the words of the defendant's written argument it is "mandatory" and "…the Secretary of State simply has no discretion to consider whether Greece will remove the Claimant in breach of his Human Rights…" (see paragraph 50). This is not simply a denial of a remedy; it directs the defendant not to comply with the substantive obligation of investigation arising under Article 3.

41. Miss Giovennetti frankly conceded that the deeming provision was an "unattractive" one. With respect for the care with which Miss Giovennetti presented a difficult argument, I find that the provision is incompatible with a Convention right and, for these reasons (which are essentially the same as those ably advanced by Mr. Henderson) I will make the declaration sought.

[Listing Note – not forming part of the Judgment

In advance of the hearing the List Office wrote to both parties' solicitors advising that the case had been given a time estimate of 2 ½ hours. This was clearly inadequate, but Counsel were unable to point to any objection to this estimate having been lodged by either party. There was no written time estimate from Counsel, no reading list (save for a general reference to the citations in the Claimant's skeleton argument) and no time estimate for preliminary reading. The result was that this case, raising as it does an important point as to the compatibility of primary legislation, was listed at the end of a general list of applications for permission and the like, where the pre-reading was also substantial, with inadequate arrangements for pre-hearing preparation having been made.

It was most disappointing that two sets of solicitors (the Treasury Solicitor and the Refugee Legal Centre), both regularly involved in Administrative Court cases, should have failed to respond to the Court Office's clearly inadequate listing estimate.

I write this note to draw attention to the continuing problem of litigants failing to lodge accurate time estimates with the result that time has to be allotted by the best guess that can be made in the Court Office. It is most important, in fairness to the parties, that accurate time estimates are lodged by the advocates appearing in the case. This note is added with the concurrence of the Judge in charge of the Administrative Court List.]