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EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 22 September 2011 ¹

Case C-493/10

**M. E.,
A. S. M.,
M. T.,
K. P.,
E. H.**

v

**Refugee Applications Commissioner,
Minister for Justice, Equality and Law Reform**

(Reference for a preliminary ruling from the High Court (Ireland))

(Regulation No 343/2003 – Transfer of asylum seekers to the Member State responsible for examining the asylum application – Obligation to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 – Compatibility of the transfer of an asylum seeker with the Charter of Fundamental Rights – Article 18 of the Charter of Fundamental Rights – Right to asylum)

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

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I – Introduction

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

2. However, in the light of the current crisis affecting the Greek asylum system, the question arises, for the other Member States, whether asylum seekers may be transferred to Greece pursuant to Regulation No 343/2003 if it can no longer be guaranteed that those asylum seekers will be treated and their applications will be examined in Greece in accordance with the requirements laid down in European Union law. Given that Article 3(2) of Regulation No 343/2003 accords the Member States the right, by way of derogation from the normal rules governing responsibility, to assume the examination of an asylum application lodged in their territory, rather than the Member State primarily responsible, the question also arises whether the Member States' 'right to assume responsibility for the examination themselves' may become a 'duty to assume responsibility for the examination' if the Member State with primary responsibility is no longer able to treat asylum seekers in accordance with the requirements laid down in European Union law.

3. The referring court is required to rule on these questions in the main proceedings, in which five asylum seekers who entered the European Union illegally via Greece, but claimed asylum in Ireland, are challenging their return from Ireland to Greece.

4. The present case is closely connected with Case C-411/10 *N.S.*, in which I deliver my Opinion on the same day as in the present case. In *N.S.* the central issue is the transfer of asylum seekers from the United Kingdom to Greece pursuant to Regulation No 343/2003 and that case has been joined with the present case, by order of the President of the Court of Justice, for the purposes of the written and oral procedure and the judgment. For reasons of clarity, however, I am delivering separate Opinions in the present case and in *N.S.* The present Opinion nevertheless contains several references to the Opinion in *N.S.*

² – OJ 2003 L 50, p. 1.

II – Legislative framework

A – European Union law

1. Charter of Fundamental Rights of the European Union

5. Article 1 of the Charter of Fundamental Rights provides, under the heading ‘Human dignity’:

‘Human dignity is inviolable. It must be respected and protected.’

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

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

7. Article 18 of the Charter of Fundamental Rights provides, under the heading ‘Right to asylum’:

‘The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.’

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

‘1. Collective expulsions are prohibited.

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

2. Secondary law

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

10. The measures adopted to implement the Tampere Conclusions included the following regulation and the following directives:³

- Regulation No 343/2003,
- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,⁴
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,⁵
- 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,⁶
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.⁷

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

a) Regulation No 343/2003

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

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

³ – In addition to the regulation and the directives mentioned here, there are many other instruments of secondary legislation which relate to the creation of a common asylum system, the policy of legal immigration, and the fight against illegal immigration, such as Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ 2010 L 132, p. 11) or Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

⁴ – OJ 2001 L 212, p. 12.

⁵ – OJ 2003 L 31, p. 18.

⁶ – OJ 2004 L 304, p. 12.

⁷ – OJ 2005 L 326, p. 13.

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

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

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

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

14. Article 4(1) of Regulation No 343/2003 states:

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

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

...’

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...'

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

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

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

...'

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

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

...

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

21. Article 19 of Regulation No 343/2003 provides 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.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be

carried out in accordance with the national law of the first Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.

...

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

...'

b) Directive 2001/55

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

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

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

c) Directive 2003/9

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

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

27. Article 21 of Directive 2003/9 provides, under the heading 'Appeals', that Member States are to ensure that negative decisions relating to the granting of benefits under that directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review before a judicial body must be granted.

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

d) Directive 2004/83

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

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

e) Directive 2005/85

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

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

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

III – Facts and reference for a preliminary ruling

34. The main proceedings concern actions brought by five asylum seekers against the decisions of the Refugee Applications Commissioner ('the first respondent in the main proceedings') to have those asylum seekers transferred to Greece pursuant to Regulation No 343/2003 for purposes of examination of their asylum applications.

35. Each of the claimants, who have no connection with each other, travelled through Greece and was arrested there for illegal entry. They are all adult men and do not claim any particular vulnerability or disability. Each claimant left Greece without claiming asylum and travelled to Ireland, where each applied for asylum.

36. The five claimants claim to be from Afghanistan, Iran and Algeria. Each of the claimants resists return to Greece. They argue that there are inadequate procedures and conditions for asylum seekers in Greece and that Ireland is for that reason under an obligation to exercise its discretion under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and determining their asylum applications.

37. The first respondent in the main proceedings declined to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 and the Minister for Justice, Equality and Law Reform ('the second respondent in the main proceedings') issued transfer orders in the five cases in accordance with Regulation No 343/2003. However, those transfers have been stayed pending the determination of judicial proceedings before the referring court which challenge the validity of the refusal by the first respondent in the main

proceedings to exercise the right to assume responsibility for the examination under Article 3(2).

38. As the referring court has doubts with regard to the interpretation and application of Article 3(2) of Regulation No 343/2003 in a case such as the main proceedings, it stayed the main proceedings and made reference to the Court for a preliminary ruling on the following questions:

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

IV – Procedure before the Court

39. The order for reference was lodged at the Registry of the Court of Justice on 15 October 2010. By order of the President of the Court of Justice of 9 November 2010, Cases C-411/10 and C-493/10 were joined for the purposes of the written procedure and, by order of the President of the Court of Justice of 16 May 2011, for the purposes of the oral procedure and the judgment.

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

V – Arguments of the parties

41. The first question, which asks whether the transferring Member State under Regulation No 343/2003 is obliged to assess the compliance of the receiving Member State with Article 18 of the Charter of Fundamental Rights, Directives

2003/9, 2004/83 and 2005/85 and Regulation No 343/2003, must be answered in the affirmative in the view of the *claimants in the main proceedings, Amnesty International Limited* and the *AIRE Centre*. *Amnesty International Limited* and the *AIRE Centre* also stress that the transferring Member State must assess the compliance of the receiving Member State with all relevant provisions of the Charter of Fundamental Rights.

42. The *Belgian, German and French Governments*, the *Commission* and the *United Nations High Commissioner for Refugees* state in this regard that, in applying Regulation No 343/2003, the transferring Member State may presume that the Member State responsible for examining an asylum application will act in accordance with European Union law, although that presumption must be rebuttable. The *United Kingdom Government* stresses that an obligation to assess the compliance of the receiving Member State with Article 18 of the Charter of Fundamental Rights and the provisions of Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003 may arise only under extraordinary circumstances, namely where the presumption that the responsible Member State will act in accordance with human rights and European Union law has been clearly rebutted.

43. In the view of *Ireland* and the *Italian, Netherlands, Czech, Polish and Finnish Governments*, the first question should be answered in the negative. In this connection, the *Greek and Polish Governments* argue that under European Union law a Member State may not review the conformity, with that law, of the action of another Member State.

44. The *Austrian Government* argues that the Member State which examines the lawfulness of a transfer to the Member State responsible under Regulation No 343/2003 must take into consideration whether, in principle, the receiving Member State observes the minimum standards, compliance with which would give grounds to presume that a transfer is compatible with the Charter of Fundamental Rights.

45. The second question, which asks whether the transferring Member State is obliged to accept responsibility for examining an asylum application under Article 3(2) of Regulation No 343/2003 where the receiving Member State does not comply with Article 18 of the Charter of Fundamental Rights or with one or more provisions of Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003, must be answered in the affirmative, in the view of *Amnesty International Limited* and the *AIRE Centre*. *Amnesty International Limited* and the *AIRE Centre* also stress that the obligation to exercise the right to assume responsibility for the examination is applicable in all cases in which there is a risk of non-compliance with one of the relevant provisions of the Charter in the receiving Member State.

46. In the view of the claimants in the main proceedings, the *Belgian and French Governments*, the *Commission* and the *United Nations High Commissioner for Refugees*, the transferring Member State is obliged to exercise its right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 where there is evidence of a serious risk of violation of the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, in the receiving Member State. The *Finnish Government* makes similar observations to the effect that the obligation to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 may arise exceptionally in cases where it is clear that a transfer of the asylum seeker would seriously violate that person's rights as enshrined in Article 18 of the Charter of Fundamental Rights.

47. In the view of *Greek and Netherlands Governments*, by contrast, the transferring Member State is not obliged to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 where the receiving Member State does not comply with Article 18 of the Charter of Fundamental Rights or with one or more provisions of Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003. In the view of the *Polish and Slovenian Governments*, too, it is not possible to infer from Article 3(2) of Regulation No 343/2003 a duty to exercise the right to assume responsibility for the examination. The *German* and the *Netherlands Governments* point out, however, that an asylum seeker may not be transferred to a Member State in which there is a serious risk of violation of his rights as enshrined in the Charter of Fundamental Rights.

48. Because *Ireland* and the *Italian Government* answered the first question in the negative, there is no need, in their opinion, to answer the second question. The *United Kingdom Government* also considers it unnecessary, in the light of its answer to the first question, to answer the second question.

49. In the view of the *Swiss Confederation*,⁸ Regulation No 343/2003 inherently contains a rebuttable presumption that the participating States will comply with the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, where that presumption is rebutted in a specific case and it is not guaranteed that the asylum seeker will be treated in accordance with international law in the responsible State, a transfer to that State is precluded and the right to assume

⁸ – On the basis of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ 2008 L 53, p. 5), the Swiss Confederation participates in the Union's system for establishing the States responsible for asylum applications. Under Article 5(2) of that Agreement, the Swiss Confederation has the right to submit statements of case or written observations to the Court of Justice in cases where a court in a Member State has applied to the Court of Justice for a preliminary ruling on the interpretation of Regulation No 343/2003.

responsibility for the examination under Article 3(2) of Regulation No 343/2003 exceptionally becomes a duty.

VI – Legal assessment

A – Introductory remarks

50. With its two questions, the referring court is essentially seeking to ascertain whether, and if so in what circumstances, a Member State is obliged to examine an asylum seeker's asylum application, exercising its right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003, where transfer to the Member State primarily responsible would expose the asylum seeker to a risk of violation of his rights as enshrined in Article 18 of the Charter of Fundamental Rights and/or to a risk that that Member State may not comply with its obligations under Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003.

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

52. In this connection, the referring court is of the view that it would be contrary to the spirit of Regulation No 343/2003 for a Member State or the domestic courts to examine the effectiveness of asylum systems in another Member State when applying Regulation No 343/2003. In the absence of any evidence that the transfer of an asylum seeker would raise a risk of treatment contrary to Article 3 of the ECHR, it is for the Member State, in principle, to decide whether it should exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003. It is not the function of the national courts to determine when and how the Member State should exercise its discretion.

53. The referring court takes the view that these findings are confirmed by the decision of the European Court of Human Rights of 2 December 2008 in *K.R.S. v United Kingdom*,⁹ in which the European Court of Human Rights was required to rule on an application under the ECHR by an Iranian national who was to be transferred from the United Kingdom to Greece pursuant to Regulation No 343/2003. The Iranian asylum seeker argued in particular that removal to Greece would infringe Article 3 of the ECHR. By its decision of 2 December 2008, the European Court of Human Rights rejected that complaint as manifestly ill-founded.

⁹ – Judgment of 2 December 2008, *K.R.S. v United Kingdom* (Application No 32733/08).

54. The referring court is unsure, however, whether, and if so in what way, its proposed interpretation of Regulation No 343/2003 is compatible with the right to asylum enshrined in primary law, since the entry into force of the Lisbon Treaty, in Article 18 of the Charter of Fundamental Rights. Against this background, it asks the Court for guidance on the application of Article 3(2) of Regulation No 343/2003 in cases where assertions are made and even supported by expert views of unfavourable reception conditions and/or ineffective asylum procedures.

55. Having particular regard to the statements made by the referring court on the case-law of the European Court of Human Rights, it should be pointed out, first of all, that the European Court of Human Rights has further developed its legal and factual assessment of transfers of asylum seekers to Greece, based on the decision of 2 December 2008, in *K.R.S. v United Kingdom*, since the order for reference was lodged. In the leading judgment of 21 January 2011 in *M.S.S. v Belgium and Greece*,¹⁰ the European Court of Human Rights found that the conditions of detention and the living conditions of an Afghan asylum seeker in Greece were to be regarded as a violation by Greece of Article 3 of the ECHR. In that case, the deficiencies identified in the examination of the asylum seeker's application, the risk of direct or indirect *refoulement* to his home country without any serious examination of the merits of his asylum application, and the absence of an effective remedy also led to the finding of a violation by Greece of Article 13, in conjunction with Article 3, of the ECHR. On the basis of those findings, the European Court of Human Rights also considered the transfer of the asylum seeker from Belgium to Greece under Regulation No 343/2003 to constitute a violation by Belgium of Article 3 of the ECHR and of Article 13, in conjunction with Article 3, of the ECHR.

56. For a discussion of the question of the way in which this development in the case-law of the European Court of Human Rights on the (in)compatibility with the ECHR of transfers of asylum seekers to Greece affects the judicial review of such transfers in the light of European Union law and, in particular, the Charter of Fundamental Rights, reference is made to the views expressed in my Opinion in *N.S.* In that Opinion, I stressed that under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. In so far as the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice.¹¹

¹⁰ – Judgment of 21 January 2011, *M.S.S. v Belgium and Greece* (Application No 30696/09).

¹¹ – See my Opinion of 22 September 2011 in Case C-411/10 *N.S.* (cited above in point 4), point 142 et seq.

57. In the light of these clarifications, I will examine the two questions referred for a preliminary ruling below. I shall begin by addressing the second question, which asks in what circumstances a Member State may be obliged, in the exercise of its right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003, to examine an asylum seeker's asylum application for which another Member State is primarily responsible. I will then, in answering the first question, consider the problem of the way in which a Member State is obliged in this connection to assess the compliance of the other Member States with the requirements of European Union law.

B – The duty to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 in the case of a serious risk of violation of fundamental rights if an asylum seeker is transferred to the Member State which is primarily responsible

58. By its second question, the referring court seeks clarification as to whether a Member State is obliged to exercise its right under Article 3(2) of Regulation No 343/2003, and thereby assume responsibility for the examination of an asylum application lodged in its territory, if it should be established that the Member State primarily responsible for examining that application cannot guarantee compliance with the requirements relating to the treatment of asylum seekers and the examination of their asylum applications contained in Article 18 of the Charter of Fundamental Rights and in Directives 2003/9, 2004/83 and 2005/85 or Regulation No 343/2003.

59. As I have already explained in my Opinion in *N.S.*, Regulation No 343/2003 makes specific reference to the treatment of asylum seekers and the examination of their applications in the receiving Member State neither in fixing the criteria for determining the Member State responsible for examining an asylum application nor in establishing the mechanism for the transfer of asylum seekers between Member States. This must be seen against the background of the fact that the Member States' asylum systems must satisfy substantive minimum standards under Directives 2003/9, 2004/83 and 2005/85 and that all the Member States have acceded to the ECHR and to the Geneva Convention, with the result that it is ensured, from a legal point of view, that the treatment of asylum seekers and the examination of their applications in each Member State satisfy the requirements of the Charter of Fundamental Rights, the Geneva Convention and the ECHR.¹²

60. Should a Member State be unable, for any reason, to comply with the rules set out in Directives 2003/9, 2004/83 or 2005/85 or with its obligations stemming from fundamental rights or international law with regard to the treatment of asylum seekers or the examination of their asylum applications, there will, however, be a *de facto* risk that, if asylum seekers are transferred to that Member

¹² – *Ibid.*, point 95 et seq.

State, they will be exposed to treatment which is incompatible with the Charter of Fundamental Rights.

61. The complete overloading of a Member State's asylum system may therefore mean, in certain circumstances, that the asylum seekers' rights enshrined in Article 18 of the Charter of Fundamental Rights are no longer guaranteed.

62. Under Article 18 of the Charter, the right to asylum is guaranteed with due respect for the rules of the Geneva Convention, the TEU and the TFEU. One of the central elements of the Geneva Convention is the prohibition of direct or indirect expulsion or return of a refugee to a persecuting State laid down in Article 33 of that Convention, which is referred to as the principle of *non-refoulement*. Even though the precise scope of this prohibition on return is the subject of dispute, it must be assumed that it grants refugees¹³ not only protection against direct deportation to the persecuting State, but also protection against chain deportation, where a transfer is made to a State in which there is a risk of deportation to a persecuting State.¹⁴ In view of this broad definition of the prohibition on return, it is immediately clear that the overloading of a Member State's asylum system and the ensuing deficiencies in the review of asylum application may give rise, in individual cases, to deportations which are incompatible with this prohibition on return, and thus also incompatible with Article 18 of the Charter of Fundamental Rights.

63. If a Member State's asylum system is overloaded, there could also be fears of violations of the asylum seekers' right to respect for and protection of human dignity enshrined in Article 1 of the Charter of Fundamental Rights or of the prohibition of torture and inhuman or degrading treatment of asylum seekers contained in Article 4 of the Charter.¹⁵

64. If there were a serious risk, in the Member State which is primarily responsible for examining an asylum application under Article 3(1), in conjunction with the provisions contained in Chapter III, of Regulation No 343/2003, of a violation of the asylum seekers' fundamental rights, as

¹³ – Because the prohibition on return under Article 33 of the Geneva Convention applies to refugees, the scope of the protection afforded by Article 18 of the Charter of Fundamental Rights in this regard is influenced by the notion of 'refugee' in the Geneva Convention (see Jarass, D., *Charta der Grundrechte der Europäischen Union*, Munich 2010, Article 18, paragraph 5). In the context of the prohibition on return under Article 33 of the Geneva Convention, the notion of 'refugee' covers not only those who have already been recognised as refugees, but also those who fulfil the conditions for recognition as a refugee. See Lauterpacht, E./Bethlehem, D., 'The scope and content of the principle of non-refoulement: Opinion', in *Refugee Protection in International Law* (ed. Feller, E./Türk, V./Nicholson, F.), Cambridge 2003, p. 87, 116 et seq.

¹⁴ – See Lauterpacht, E./Bethlehem, D., loc. cit. (footnote 13), p. 122; Hailbronner, K., *Asyl- und Ausländerrecht*, 2nd edition, Stuttgart 2008, paragraph 655.

¹⁵ – See point 111 et seq. of my Opinion in *N.S.* (cited above in point 4).

enshrined in Articles 1, 4 or 18 of the Charter of Fundamental Rights, the other Member States may not transfer asylum seekers to that Member State, but are obliged, in principle, to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003.

65. This obligation to exercise the right to assume responsibility for the examination follows, first, from the Member States' duty to apply Regulation No 343/2003 in a manner consistent with fundamental rights.¹⁶ Secondly, it follows from the fact that a transfer of asylum seekers to a Member State in which there is a serious risk of violation of their fundamental rights, as enshrined in Article 1, Article 4 or Article 18 of the Charter of Fundamental Rights, also constitutes, in principle, a violation of those fundamental rights by the transferring Member State.¹⁷ Where the Member States exercise their right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003, this risk of infringement of the Charter of Fundamental Rights is eliminated entirely.

66. Serious risks of infringements of individual provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003 in the receiving Member State which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred, as enshrined in the Charter of Fundamental Rights, are not, by contrast, sufficient to create an obligation on the part of the transferring Member State to exercise the right to assume responsibility for such an examination.

67. It should be stated, first of all, in this connection that an interpretation of Regulation No 343/2003 in a manner consistent with fundamental rights cannot require the right to assume responsibility for the examination under Article 3(2) to be exercised where the primarily responsible Member State infringes individual provisions of Directives 2003/9, 2004/83 or 2005/85 or of Regulation No 343/2003, but does not violate the asylum seekers' fundamental rights as enshrined in the Charter of Fundamental Rights. Furthermore, the transfer of the asylum seeker to a Member State in which there is no risk of violation of his fundamental rights, as enshrined in the Charter, will normally be regarded as consistent with fundamental rights.

¹⁶ – Ibid., point 117 et seq.

¹⁷ – For the asylum seekers' fundamental rights enshrined in Article 1 and in Article 4 of the Charter of Fundamental Rights this follows from the positive protective function inherent in those fundamental rights. For Article 18 of the Charter of Fundamental Rights this follows from the fact that that fundamental right protects not only against direct, but also against indirect return to a persecuting State. See point 112 et seq. of my Opinion in *N.S.* (cited above in point 4). Furthermore, Article 19(2) of the Charter expressly provides in this connection that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

68. Furthermore, it would be difficult to reconcile with the aims of Regulation No 343/2003 if any failure to comply with Directives 2003/9, 2004/83 or 2005/85 or Regulation No 343/2003 were sufficient to prevent the transfer of an asylum seeker to the Member State which is primarily responsible under Article 3(1), in conjunction with the provisions contained in Chapter III, of Regulation No 343/2003.¹⁸ Regulation No 343/2003 is intended to establish a clear and workable method for determining the Member State responsible for the examination of an asylum application, which also makes it possible to determine rapidly the Member State responsible.¹⁹ In order to achieve that objective, Regulation No 343/2003 lays down a provision under which responsibility for examining each asylum application lodged in the European Union rests with one single Member State, which is determined on the basis of objective criteria. Those objective criteria include, for example, the existence of a link, in relation to the law on asylum and foreign nationals, between the asylum seeker or a family member and a Member State.²⁰ In the case of an illegal entry into the territory of the European Union, the Member State of first entry is responsible for examining the asylum application under Article 10 of Regulation No 343/2003.²¹

69. If any failure to comply with individual provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003 on the part of the Member State with primary responsibility were now to mean that the Member State in which the asylum seeker lodged an asylum application was required to exercise its right to assume responsibility for the examination itself under Article 3(2) of Regulation No 343/2003, a new, far-reaching exclusion criterion would be created – in addition to the objective criteria for determining the responsible Member State laid down in Chapter III of the regulation – under which even minor infringements of Directives 2003/9, 2004/83 or 2005/85 or of Regulation No 343/2003 in individual Member States could mean that those Member States would be relieved of their responsibilities under Regulation No 343/2003 and the associated duties. This could result not only in the rules on responsibility formulated in Regulation No 343/2003 being completely undermined, but could also jeopardise the aim of those rules, which is to determine rapidly the Member State responsible for examining asylum applications lodged in the European Union.

¹⁸ – According to settled case-law, in interpreting a provision of European Union law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it forms part; see Case C-19/08 *Petrosian and Others* [2009] ECR I-495, paragraph 34.

¹⁹ – See recital 3 et seq. in the preamble to Regulation No 343/2003.

²⁰ – See Articles 6(1), 7 and 8 and Article 9(1) and (2) of Regulation No 343/2003.

²¹ – Article 10 of Regulation No 343/2003. However, that responsibility expires 12 months after the illegal entry.

70. These observations lead me to conclude that an infringement of the provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003 in the Member State which is primarily responsible can create an obligation to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 only in the case where that infringement of secondary law would also constitute a violation of the asylum seeker's rights enshrined in the Charter of Fundamental Rights.

71. In the light of the foregoing, the second question must be answered to the effect that a Member State is obliged to exercise its right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 if it should be established that transfer to the Member State which is primarily responsible under Article 3(1), in conjunction with the provisions contained in Chapter III, of Regulation No 343/2003 would expose the asylum seeker to a serious risk of violation of his rights enshrined in the Charter of Fundamental Rights. Serious risks of infringements of individual provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003 in the Member State which is primarily responsible which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred, as enshrined in the Charter of Fundamental Rights, are not, by contrast, sufficient to create an obligation to exercise the right to assume responsibility for that examination.

C – The transferring Member State is obliged, before the transfer of an asylum seeker pursuant to Regulation No 343/2003, to assess whether the rights of that asylum seeker, as enshrined in the Charter of Fundamental Rights, are guaranteed in the receiving Member State

72. By its first question, the referring court wishes to know whether the Member State in which an asylum seeker has lodged an asylum application for the examination of which another Member State is primarily responsible under Article 3(1), in conjunction with the provisions contained in Chapter III, of Regulation No 343/2003 must assess, before the transfer of that asylum seeker to the Member State which is primarily responsible, whether the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, are guaranteed in that Member State and whether that Member State complies with the requirements under Directives 2003/9, 2004/83 and 2005/85 and Regulation No 343/2003.

73. It is clear from my foregoing observations, first, that the transfer of asylum seekers to a Member State in which there is a serious risk of violation of that asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, is incompatible with the Charter of Fundamental Rights, with the result that the Member State in which the asylum seeker has lodged his asylum application is obliged, in such a case, to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003. Secondly, I concluded that a (serious risk of) infringement of individual provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003 in the receiving Member

State can create an obligation on the part of the transferring Member State to exercise the right to assume responsibility for the examination under Article 3(2) of Regulation No 343/2003 only where that infringement of secondary law would also constitute a violation of the asylum seeker's rights enshrined in the Charter of Fundamental Rights.

74. It is immediately clear from these findings that the transferring Member State is obliged, prior to the transfer of an asylum seeker, to assess whether the asylum seeker is exposed to a serious risk of violation of his rights, as enshrined in the Charter of Fundamental Rights, in the Member State which is primarily responsible. Only in this way can it be guaranteed that Regulation No 343/2003 will be applied by the transferring Member State in a manner consistent with fundamental rights. A distinct obligation to assess whether the receiving Member State complies with the individual provisions of Directives 2003/9, 2004/83 and 2005/85 and of Regulation No 343/2003 must, however, be rejected.

75. The Member State's duty to assess whether the transfer of asylum seekers to another Member State is consistent with fundamental rights does not mean, however, that the transferring Member State must actively ascertain, prior to the transfer of any asylum seeker, that the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, are actually guaranteed in the receiving Member State. In assessing whether there is a risk that the asylum seeker's fundamental rights will be violated in the Member State having primary responsibility, the Member States may proceed on the basis of the rebuttable presumption that the asylum seeker's fundamental rights will be observed in the Member State which is primarily responsible.

76. The legitimacy of such a rebuttable presumption under European Union law is suggested, first, by the fact that the treatment of asylum seekers and the examination of their applications under Directives 2003/9, 2004/83 and 2005/85 must satisfy substantive minimum standards in each Member State. Furthermore, all the Member States must observe the Charter of Fundamental Rights²² and – as Contracting States – the ECHR and the Geneva Convention, and they must therefore also respect the asylum seekers' fundamental rights and human rights enshrined therein. In view of the high level of protection which is thus (legally) ensured, it seems reasonable, in connection with the transfer of asylum seekers, to proceed from the rebuttable presumption that those asylum seekers will be treated in a manner consistent with human rights and fundamental rights in the Member State responsible for their asylum application.²³ Accordingly, recital 2 in the

²² – With regard to the content and scope of Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, see point 167 et seq. of my Opinion in *N.S.* (cited above in point 4).

²³ – For example, in its decision of 2 December 2008, *K.R.S. v United Kingdom* (cited above in footnote 9), the European Court of Human Rights held that it had to be presumed that Greece would comply with the obligations under Directives 2005/85 and 2003/9.

preamble to Regulation No 343/2003 expressly states that Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals.²⁴

77. If the Member States were to decide to operate such a rebuttable presumption, however, they must comply with the principle of effectiveness, according to which the realisation of the rights conferred by European Union law may not be rendered practically impossible or excessively difficult.²⁵ If the Member States thus decide to introduce a rebuttable presumption, asylum seekers must be given the possibility, procedurally, actually to rebut that presumption. Having regard to the principle of procedural autonomy of the Member States,²⁶ the specific form of the available evidence and the definition of the rules and principles governing the assessment of evidence are, in turn, a matter for the national legal orders of the individual Member States, in which connection the enforcement of the rights enshrined in the Charter of Fundamental Rights may not be rendered practically impossible or excessively difficult.

78. In the light of the foregoing, the first question must be answered to the effect that a Member State which, in the application of Regulation No 343/2003, wishes to transfer an asylum seeker to the Member State which is primarily responsible for examining the asylum application is obliged to assess whether there is a serious risk of violation of the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, in that Member State having primary responsibility. The transferring Member State does not have a distinct obligation to assess whether the receiving Member State complies with the individual provisions of Directives 2003/9, 2004/83 and 2005/85 and of Regulation No 343/2003. In assessing whether there is a risk that the asylum seeker's fundamental rights may be violated in the Member State which is primarily responsible, the Member States may proceed on the basis of the rebuttable presumption that the asylum seeker's fundamental rights will be respected in the Member State which is primarily responsible.

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

²⁵ – Case C-246/09 *Bulicke* [2010] ECR I-0000, paragraph 25; Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 57; Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43.

²⁶ – With regard to the importance of this principle for the application of the provisions of Regulation No 343/2003, see *Petrosian and Others* (cited above in footnote 18), paragraphs 47 and 52.

VII – Conclusion

79. In the light of the foregoing considerations, I propose that the Court answer the questions referred as follows:

- 1) A Member State is obliged to exercise its right to assume responsibility for the examination under Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national if it should be established that transfer to the Member State which is primarily responsible under Article 3(1), in conjunction with the provisions contained in Chapter III, of Regulation No 343/2003 would expose the asylum seeker to a serious risk of violation of his rights enshrined in the Charter of Fundamental Rights. Serious risks of infringements of individual provisions of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, of 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, of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, or of Regulation No 343/2003 in the Member State which is primarily responsible which do not also constitute a violation of the fundamental rights of the asylum seeker to be transferred, as enshrined in the Charter of Fundamental Rights, are not, by contrast, sufficient to create an obligation to exercise the right under Article 3(2) of Regulation No 343/2003 to assume responsibility for that examination.
- 2) A Member State which, in the application of Regulation No 343/2003, wishes to transfer an asylum seeker to the Member State which is primarily responsible for examining the asylum application is obliged to assess whether there is a serious risk of violation of that asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, in that Member State with primary responsibility. The transferring Member State does not have a distinct obligation to assess whether the receiving Member State complies with the individual provisions of Directives 2003/9, 2004/83 and 2005/85 or of Regulation No 343/2003. In assessing whether there is a risk that the asylum seeker's fundamental rights may be violated in the Member State which is primarily responsible, the Member States may proceed on the basis of the rebuttable presumption that the asylum seeker's fundamental rights will be respected in the Member State which is primarily responsible.