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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

JUDICIAL REVIEW

ALJ and A, B and C's Application for Judicial Review [2013] NIQB 88

IN THE MATTER OF AN APPLICATION BY ALJ and A, B and C FOR JUDICIAL REVIEW

STEPHENS J

Anonymisation

[1] I have anonymised the names of the applicants by the use of initials. I have done so for two reasons. The first is that children are involved. I make an order under Article 170(7) of the Children (Northern Ireland) Order 1995 providing that no person shall publish any material which is intended, or likely, to identify any child involved in these proceedings or an address or school as being that of a child involved in these proceedings except in so far (if at all) as may be permitted by direction of the court. The second reason is that this is an asylum application and the circumstances of the application may impact (a) on relatives of the applicants who are in the applicant's country of origin and (b) on the applicants if in the event they are to be returned to their country of origin.

Introduction

[2] ALJ, a mother, now 37 and A, B and C, her three children, who are now respectively 18, 16 and 12 years old, all Sudanese nationals challenge:-

(a) a decision of the UK Border Agency to remove them to Ireland under Council Regulation (EC) No. 343/2003 ("Dublin II Regulation") ("the removal decision"). The applicant contends that the UK Border Agency's Operational Guidance Note of August 2011 (C/23 and C/25) provides that anyone who is a non-Arab Darfuri, as they contend that they are, should not be

returned to Sudan and could not reasonably be expected to relocate elsewhere in the Sudan on the basis that Sudan is not a safe country for those of that ethnic origin. However the applicant contends that if they are removed from the United Kingdom to Ireland then there is a real risk that the Irish authorities do not have a similar view and have already determined that the applicants should be returned to Sudan (in breach of Article 4 of the Charter of Fundamental Rights (the "Charter") (Prohibition of torture and inhuman or degrading treatment or punishment)) and in addition that the conditions in which they will be required to live in Ireland are in breach of Article 1, (Human dignity is inviolable. It must be respected and protected), Article 4 and Article 7 (Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications) of the Charter.

(b) conversely the applicant asserts that there has been a failure to exercise discretion to determine the applicants' asylum claims in the United Kingdom under Article 3(2) of Dublin II Regulation on the basis that the applicants will wrongly be refouled to Sudan if returned to Ireland and also on the basis of the conditions to which the applicants will be subjected if they are returned to Ireland. That in such circumstances the respondent was *obliged* to exercise its powers under article 3(2) of the Dublin II Regulation and assume responsibility to examine the applications for asylum within the United Kingdom. If the respondent did not do so then the applicants would be exposed to a serious risk of violation of their fundamental rights enshrined in Article 4 of the Charter and also for instance Article 1 and Article 7.

(c) that in circumstances where there is no *obligation* to exercise its powers under article 3 (2) that the exercise of the residual discretion under that article ought to be exercised in accordance with a clear consistent and publicly expressed policy and the applicants seek a declaration that the acknowledged absence of any policy to guide the exercise of discretion vitiates the failure to exercise discretion in this case.

(d) that in deciding to return the applicants to Ireland the respondent incorrectly took into account that Ireland complies with Council Directive 2003/9/EC laying down the minimum standards for the reception of asylum seekers ("the minimum standards directive") when in fact Ireland has opted out of that directive and the evidence is that they do not meet the standards set out in that directive.

(e) that there has been a failure by the Secretary of State to properly discharge the statutory duty under Section 55 of the Borders, Immigration and Citizenship Act 2009 which provides that the Secretary of State must make arrangements for ensuring that any function of the Secretary of State in relation to immigration, asylum or nationality is discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". The applicants assert that there has been a failure to have regard to the need to safeguard and promote the welfare of B and C and also A when he was a child. That the Secretary of State has failed to approach her decision in a lawful way in that she failed to determine, as a necessary first step, what would be in the best interests of each child and this failure made it impossible to accurately balance the competing interests. Furthermore the respondent failed to take into account the children's country of origin and the real risk of refoulment to Sudan and the detrimental effect upon A's mental health of return to Ireland.

[3] In addition the applicants contend that there has been a failure to address A's human rights claim under Article 3 ECHR regarding the risk of suicide/self-harm by return to Ireland. However this challenge was no longer pursued by the applicant as in the period between the issue of these proceedings and the hearing the issue was addressed by the UK Border Agency on 31 July 2012.

[4] In making the removal decision under the Dublin II Regulation and in declining to assume responsibility to examine the applications for asylum within the United Kingdom the respondent contends, and the applicants agree, that there is a presumption that Ireland will comply with its international obligations which presumption is rebuttable. The respondent contends that the sole ground on which that presumption can be rebutted and the sole ground on which it is obliged to exercise discretion under Article 3(2) of Dublin II Regulation not to return the applicants to Ireland and to determine their asylum claims in the United Kingdom, is that the source of risk to the applicants is a systemic deficiency, known to the authorities in the United Kingdom, in the Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland. Short of this, even powerful evidence of individual risk is of no avail. The applicants contend that there should be no need to establish a systemic deficiency if the applicants establish a real individual risk to them and also that the systemic deficiency need not be nor should it be restricted to Article 4 of the Charter. That for instance it would be sufficient to establish systemic deficiency in Ireland's compliance with its obligations under Article 7 of the Charter, respect for private and family life.

[5] Mr Scoffield QC and Mr McQuitty, appeared on behalf of all of the applicants including the children and accordingly there was compliance with the obligation under Article12(2) of the United Nations Convention on the Rights of the Child to provide the children with the opportunity to be heard in these proceedings. Mr McGleenan QC and Ms Murnaghan appeared on behalf of the respondent.

Factual background

(a) Factual background: The applicants' evidence as to their circumstances in Sudan

[6] It is the evidence of ALJ that she and her children A, B and C, who are now respectively 18, 16 and 12 years old, are non-Arab Darfuris.

[7] In her affidavits ALJ states that she received a university education in Sudan and that after leaving university her main employment would not have brought her into conflict with the Sudanese authorities. However she was active as a political journalist and a writer (60-61). She states that she married her husband in 1991 and that her husband helped her in her political activities (14).

[8] ALJ states that she had been subjected to genital mutilation at the age of 5. That she protested against the Government and against genital mutilation and rape (14). That she was arrested on a number of occasions and assaulted. That on 16 February 2010 she was assaulted and as a result miscarried (14, 58 and 61). That she was in danger as was her husband (14) that if she remained in Sudan she and her children will be killed (69), that they had to leave Sudan (14), that the danger in Sudan was because of a fear of persecution by reason of her ethnicity/race (non-Arab Darfuris) because of her political activities and involvement (especially as a journalist and a writer) against discrimination and oppression by the ruling regime (political opinion) (5/10).

(b) Factual background: The applicants' evidence as to the journey from Sudan to Ireland

[9] ALJ states that the first method by which the family planned to leave Sudan was to obtain a Visa from the Saudi Arabian Authorities so that they could leave the country on the pretence that they were going on a pilgrimage (69). That ALJ gave her Sudanese passport to a smuggler but it was not returned to her and accordingly she was not able to go through with this plan.

[10] ALJ states that she and the children left Sudan by boat. That the family had sold all their belongings, their car and their house to pay to board the boat but when they arrived at the Port they were told that they did not have enough

money to pay for the whole family. Accordingly ALJ's husband remained behind in Sudan. ALJ and her children state that they have not heard from him since and they do not know whether he is alive or dead. ALJ states that when she and A, B and C embarked they had no travel documentation, that she did not know where she was going, and she did not ask. She was told to be quiet. The operators of the boat were described to me in court, without objection from the respondent, as equivalent to traffickers. The evidence of ALJ was that they spent more than 3 weeks on the boat unsure as to where they were going (10, 69). That she changed ship once but she does not know where, as it was dark. That on 4 May 2010 she disembarked in Dublin (70).

(c) Factual background: The applicants' evidence as to the conditions in Ireland

[11] ALJ states that the first accommodation for her and for her children was in a small caravan in Balseskin Reception Centre, Finglas, Dublin, allocated by the State (B/6/13). ALJ states that there was very little room for her and the children and that they had to eat in a communal canteen. She states that there was a Nigerian security guard who tried to take advantage sexually of her daughter B, who thereafter became afraid of going out of the caravan. It is not clear for how long they were in this accommodation.

[12] The second accommodation was in the Hibernian Hotel, Portlaoise. ALJ and B shared one small room and A and C shared a bed in another small room. The hotel was very dirty and there was an infestation of rats and prevalent, cold and damp making for unsanitary conditions. ALJ states that she and C developed asthma in that accommodation and she was hospitalised twice as a result of severe asthma. The family were in the Hibernian Hotel for a period of one year until it was closed down. ALJ states that she was told by a staff member that it was closed because it was not fit for human habitation.

[13] At about the time of the closure of the Hibernian Hotel ALJ was advised to move to accommodation in Cork. She visited the accommodation which was hostel accommodation. The family was offered one room to share between the four of them. (7/16) ALJ rejected this offer of alternative housing.

[14] By letter dated 30 June 2011 from the Reception and Integration Agency ALJ and her children were offered accommodation in Co West Meath. The letter explained that it was not possible to accommodate her nearer to the children's schools and/or college due to the size of the family (35/7).

[15] A, B and C availed of education in Ireland. ALJ recounts that she was informed by the Head Master of a school that education was not available after the age of 16 to those seeking asylum. She recounts that this advice was confirmed to her by the Education Department in the Government Offices. There is no evidence on behalf of the respondent to contradict ALJ's evidence.

Ireland has opted out of the minimum standards directive which requires those who comply with it to grant minor children of asylum-seekers access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. A return order to Ireland would deprive A, B and C of an education between the ages of 16 and 18.

(d) Factual background: The application for refugee status in Ireland

[16] ALJ applied in Ireland for refugee status for both herself and for her children. In relation to that application and on 12 May 2010 ALJ completed a questionnaire (43-58). In answer to question 9 (45) she identified her ethnic group tribal race by reference to a particular non-Arab Darfuri tribe. In answer to question 21 (49) she stated that:

> "Since year 2003 the Sudanese Government has done everything (to carry out) organised genocide against those of Darfurian origin in Sudan. Its policy in ruling Sudan was oppressive and totalitarian ruling. … I, *based on my African Darfurian roots from the … tribe*, feel deep sorrow for the suffering of people of Darfur and their suffering in Omdurman after 10/05/2008 – the famous attack on Omdurman. I opposed oppressing freedoms and opposite opinions and demanded freedom, fought corruption and (tried to put) a stop to the genocide, (illegible), burning and displacement of citizens in Darfur and the neighbouring villages."

I have added emphasis to the part of this passage which refers to ALJ's African as opposed to Arab Darfuri roots. I have deleted the actual name of the tribe as part of the anonymisation of this judgment. However ALJ did state the name of her tribe and that tribe is a non-Arab Darfuri tribe.

[17] The reference in that passage to ALJ's non-Arab Darfuri roots is in the context of feeling deep sorrow for the suffering of people of Darfur though implicit in the passage is the risk to her by virtue of her ethnic origin of genocide, burning and displacement. In addition in the questionnaire supporting the application for refugee status in Ireland the applicant expressly stated that the grounds on which she claimed to have a fear of persecution included Race as well as Political opinion, (50) and she later stated (57):

> "But arrests and torture began reaching everyone who had a racial connection with any tribe from Darfur either from … or … (and here she specified

> two tribes) or … (and here she specified her own tribe)."

Again I have for the purposes of anonymisation deleted the names of the tribes but all of them were named by ALJ and all of them including her own tribe were non-Arab Darfuri tribes. ALJ was expressly making the case that arrests and torture in Sudan were occurring by virtue of her ethnic origin. She was relying on her ethnicity, her non-Arab Darfuri roots as a reason for fearing persecution.

[18] After ALJ had completed the questionnaire she was interviewed (60).

[19] By her report dated 29 September 2010 pursuant to Section 13(1) of the Refugee Act 1996 (as amended) Caroline McGlinchey for the Refugee Applications Commissioner concluded that the applicants had not established a well-founded fear of persecution as required by Section 2 of the Refugee Act 1996 (as amended). She recommended that the applicants should not be declared refugees (65). In the introduction to the report dated 29 September 2010 it is stated that:

> "The applicants' case is based on a stated fear of persecution in Sudan for reasons of their political opinion and race." (59)

The report then refers to nationality stating that, despite any documentation establishing that ALJ was Sudanese, it is accepted for the purposes of the report that she is Sudanese. There is no discussion in the report as to whether she was a non-Arab Darfuri. That issue was not addressed in the report. Accordingly, no conclusion was reached as to whether the applicants had a well-founded fear of persecution on the grounds that they were non-Arab Darfuris. Rather the author of the report, Caroline McGlinchey, concentrated on that part of the application which asserted that the applicant was a political activist critical of the Sudanese Government. Caroline McGlinchey concluded that there were numerous credibility issues in relation to the applicant's assertions that she was an activist politically opposed to the Sudanese Government. For instance it is stated in the report (63) that:

> "The applicant claims to have been detained on two separate occasions by the security forces. She states she was released both times. Since the security forces did not kill her when they had the opportunity to do so, the applicant's claimed fear of being killed by them if she were to return is not credible."

[20] It was on the basis that the report concluded that there were serious issues as to ALJ's credibility as to her political activity that she had not

established a well-founded fear of persecution and recommended (65) that the applicants should not be declared refugees. The decision did not refer to the UK Border Agency guidance on Sudan that non-Arab Darfuris should not be returned to Sudan nor was there any reference to the decision in *AA v Secretary of State for the Home Department* [2009] UKAIT 00056 given on 4 November 2009. There is reference at paragraph 3.3.5 (62) to UK Border Agency country of origin information report, April 2010). There is also reference in conjunction to this country of origin information to appendix A but whether this was an appendix to the report or to some other document is not clear. The copy of the report available to this court does not have an appendix A. If this country of origin information was referred to by the Commissioner there is no reason why reference could not also have been made to the UK border agency Guidance Note of 2 November 2009 which Guidance Note is published on line. If the country of origin information was available then so also should have been the Guidance Note. In the event the report dated 29 September 2010 concluded that there was no individual threat of persecution directed against the applicants. However the report did not consider and made no findings as to whether the applicants were non-Arab Darfuris and if so whether there was a threat of persecution based on their ethnicity.

[21] The applicant ALJ appealed against the recommendation of the Refugee Applications Commissioner to the Refugee Appeals Tribunal. The appeal was heard on 20 January 2011. This involved an oral hearing at which ALJ was represented by her then solicitor, John Carroll, of Carroll, Kelly & O'Connor. An interpreter in Sudanese Arabic assisted the tribunal. A, B and C being dependants of ALJ were included in her appeal (7). The decision of the Refugee Appeals Tribunal signed by Anne Tait is dated 28 February 2011 (94). The decision recorded that the applicant claimed to have a well-founded fear of persecution on the grounds of her political opinions *and her membership of a particular social group.* (emphasis added). The Tribunal considered the applicants credibility and stated:

> "The Tribunal repeats that the applicant is not found plausible that she would be specifically targeted as a writer/journalist and/or that she is well known as such or that she is a member of a particular social group as a writer and/or a female writer in Sudan. In this Tribunal's view she ranks with the rest of the population in Sudan and is not at particular risk, if returned, over and above the rest of the population in that country." (89)

The Tribunal affirmed the recommendations of the Refugee Applications Commissioner that the applicants should not be declared refugees.

[22] There was some equivocation as to whether the Refugee Appeals tribunal referred to the 2 November 2009 UK Border Agency Guidance Note on Sudan. The conclusion of the Refugee Appeals tribunal refers to having considered amongst other matters "all Country of Origin Information submitted pre-hearing and at hearing …" (94). Also the Tribunal noted the presenting officer produced Country of Origin Information on ID documentation in Sudan to the Tribunal at hearing (70). There is also reference to Country of Origin Information at page 89 internal page 24. The Refugee Appeals Tribunal did not specify the Country of Origin information which it had considered. There are two distinct categories of documents produced by the UK authorities. One is country of Origin Information which is a substantial document. The second are short focussed Guidance Notes. If the Refugee Appeals tribunal was referring to the November 2009 UK Border Agency Guidance Note then the Tribunal did not apply that guidance without giving any reasons. Accordingly on the balance of probabilities I consider that the country of Origin Information referred to by the Tribunal could not have been the November 2009 UK Border Agency Guidance Note on Sudan. I consider that the Tribunal did not refer to the UK Border Agency Guidance Note on Sudan that non-Arab Darfuris should not be returned to Sudan nor was there any reference by the Refugee Appeals tribunal to the decision in *AA v Secretary of State for the Home Department.* The decision of the Tribunal did not address the question as to whether the applicants were non-Arab Darfuris and if so whether on that basis alone there was a well-founded fear of persecution if they were returned to Sudan.

[23] It is not clear as to the reasons why the Tribunal did not address the questions as to whether the applicants were non-Arab Darfuris and if so whether on that basis alone there was a well-founded fear of persecution if they were returned to Sudan. The solicitor for the applicants in Northern Ireland is different from the solicitor for the applicants before the Tribunal. It is suggested by the respondent that the reason why the matter was not addressed by the tribunal was because the legal representatives did not place sufficient emphasis on the point and did not refer the Tribunal to *AA v Secretary of State for the Home Department* or to the UK Borders Agency Guidance Notes of November 2009. However that suggestion was not based on any affidavit evidence from the Irish Naturalisation and Immigration Services but rather was based on an inference from the contents of the decision of the Tribunal. The inference being that if the issue had been emphasised then it would have appeared in the decision. It is not clear what evidence was produced before the Tribunal. I conclude that it is a distinct *possibility* that the legal representatives did not place sufficient emphasis on the point that the applicants were non-Arab Darfuris and did not refer the Tribunal to *AA v Secretary of State for the Home Department* or to the UK Borders Agency Guidance Notes of November 2009. I also conclude that *may* be the reason why the Tribunal did not deal with the issue in its decision despite the fact that it was raised by the applicants in their application for refugee status. However whatever the reason the fact

remains that the issues as to whether the applicants were non-Arab Darfuris and as to whether on that basis alone there was a well-founded fear of persecution if they were returned to Sudan was before the Tribunal and ought to have been decided by the Tribunal. I consider that the applicants would in Ireland have strong grounds for contending that the Tribunal left out of account a relevant factor and accordingly could apply for remedies by way of judicial review in Ireland.

[24] After the decision of the Refugee Appeals Tribunal a letter, (a proposal to deport letter) (98B) was sent to ALJ informing her that the Minister for Justice and Equality has decided to refuse to give her and her children refugee status. It has not been possible to determine the date of this letter as the last page is missing. The letter went on to tell ALJ that her entitlement to remain in the State has expired and what were her options. In relation to the legal background to the Ministers decision it recounted that there had been an application for refugee status. That the application was investigated by the Refugee Applications Commissioner. That that Commissioner had recommended the applications be refused. That the Refugee Appeals Tribunal agreed with the recommendation and that the Minister had accepted the recommendation. The letter stated that the Minister now proposed to make deportation orders in respect of ALJ and her children. That there were 3 options available to ALJ and her children as follows:

(a) Leave the State before the Minister decides on a deportation order. If they chose this option deportation orders would not be issued. This would mean that ALJ and her children may apply to come back to Ireland legally in the future, for example on a tourist visa, work permit or study permit. Further if they chose this option they may be able to get help to purchase air tickets.

(b) Consent to a deportation order covering both ALJ and her children. If they chose this option then deportation orders will be made, arrangements will be made for departure, and she and her children must leave Ireland and remain outside the State.

(c) Apply for subsidiary protection and/or submit representations to the Minister under Section 3 of the Immigration Act, 1999 (as amended) setting out the reasons as to why deportation orders should not be made.

If the application for subsidiary protection was successful then ALJ and her children would be allowed to remain in the State for 3 years with a review at

the end of that period. ALJ was told that applications for subsidiary protection and, or representations under Section 3 of the Immigration Act 1999 (as amended) are not appeals against the refusal of refugee status.

[25] It is the contention of the Irish Naturalisation and Immigration Services that an individual who chooses option (a) will be leaving the state voluntarily. The applicants contend, and I accept, that it is incorrect to describe any removal in such circumstances as voluntary when the individuals concerned are faced with the consequences of a deportation order as set out in the letter.

[26] The applicant chose the third option and on 29 April 2011 she applied for subsidiary protection and made representations to the Minister under Section 3 of the Immigration Act 1999 (as amended) in respect of herself and her children (34). Those applications remain outstanding.

(e) Factual background: The applicants move to Northern Ireland their circumstances in Northern Ireland

[27] ALJ and her children travelled to Northern Ireland on 11 July 2011. On 25 July 2011 she and her children applied for asylum in the United Kingdom (34). A routine fingerprint check confirmed that ALJ had previously sought asylum in Ireland and on 19 August 2011 the United Kingdom Border Agency requested that Ireland take back ALJ and her children so that her asylum claim could be concluded in accordance with the terms of the Dublin II Regulation. On 25 August 2011 the authorities in Ireland accepted the request of the United Kingdom Border Agency in respect of the return of ALJ and her children. On 21 October 2011 directions were made by the UK Border Agency for the applicant and her children to return to Ireland. These judicial review proceedings were commenced on the same day. (8)

[28] Since coming to Northern Ireland ALJ and A, B and C all live in a private rented house of which they are the sole occupants. They are not obliged to live in hostel accommodation sharing that accommodation with other asylum-seekers as they would be in Ireland. They are not provided with full board but rather they are provided with benefits of some £173 per week together with rent, heating and electric bill allowances, free transport to school, and allowances for school uniforms together with free prescriptions and access to the National Health Service. The independence of their finances allows ALJ to organise her own family affairs. A, B and C are all attending schools in Northern Ireland.

(f) Factual background: A's mental health

[29] ALJ states that A has developed serious mental health issues when it became apparent that the UK Border Agency was intending to return the family to Ireland. Her evidence is that he has a fear of returning to Dublin and

ultimately to Sudan. That he would do anything not to go back to Sudan. That he would die or jump off a building or jump in front of a car (5). In September 2011 A was 17 years of age and still a child. He was seen by a Consultant Clinical Psychologist who in a report dated 27 September 2011 stated that:

> "Clinically, I have significant concerns presently for (A's) psychological wellbeing. … I feel that (A's) symptoms may increase further if deportation leads to no further access to education or meaningful work for him. This additional disruption alone, I fear, will be quite negative for (A's) emotional wellbeing and he would likely need psychological treatment." (22)

[30] A was also seen on 6 December 2011 by a Consultant Child and Adolescent Psychiatrist who provided a detailed report (483). The Consultant concluded that A's thoughts to self-harm over recent months were linked strongly in his thinking with his desire to escape a possible return to Dublin and ultimately to Sudan. The consultant stated that objectively A presented as extremely low in mood with essentially no eye contact throughout a lengthy interview. That A's speech was slowed, monotonous and his responses apparently laboured and at times painful. He concluded that A appears to be suffering from a depressive episode of moderate to severe degree. With regard to prognosis he was of the view that there had been severe and on-going stresses on A and his family. He appears to have feelings of responsibility for his mother and siblings welfare and indeed sees his studying and academic success as their only hope of remaining in Northern Ireland avoiding return to Sudan. The consultant concluded that he believed that A's thoughts to self-harm were genuine and significant and that as A links return to Ireland with return to Sudan that he would be concerned that A would consider that ending his life would be a viable alternative. The Consultant advised that both his mood difficulties and his thoughts to self-harm should be taken seriously by his mother and family. He finally stated that

> "if it transpires that A and his family are to be returned to the jurisdiction of the Republic of Ireland, I believe that this should trigger an immediate reassessment of A's risk and if transfer of responsibility is to occur to clinical services in the South of Ireland this would need to be seamless with clear communication of risk and concern in order that A would be supported throughout this process"

Legal Context

[3] Council Directive 2004/83/EC of 29 April 2004 on the minimum standards for the qualification 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 ("the qualification directive") includes the definition of

i) a refugee,

ii) a person eligible for subsidiary protection and

iii) acts of persecution.

[3] The meaning of a refugee includes a third country national who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. It can be seen that the well-founded fear of persecution has to be for particular reasons. In addition there has to be a connection between the persecution and those reasons.

[3] The definition of persecution is contained in Article 9 and is that:

> "Acts of persecution within the meaning of Article 1A of the Geneva Convention must:-
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) an accumulation of various measures, including a violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

Article 9(2) goes on to state that acts of persecution can take a number of different forms including for instance the form of acts of physical and mental violence, including acts of sexual violence.

[34] Subsidiary protection means a third country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned if returned to his or her country of origin, … would face a real risk of suffering serious harm as defined in Article 15 … and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. In order to qualify for subsidiary protection an individual does not have to establish that the real risk of suffering serious harm was for one of the reasons. However the definition of serious harm is narrower than persecution in that serious harm consists of:-

> "(a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

[35] *Council Regulation (EC) No 343/2003 (Dublin II Regulation)* provides for asylum claims to be processed and acted on by the first Member State in which the asylum-seeker arrives and for asylum-seekers and refugees to be returned to that State if they then seek asylum or take refuge elsewhere in the EU. To that general principle there is an exception in that Member States retain discretion by Article 3(2) (which is referred to as the "sovereignty clause").

> "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. …."

[36] The sovereignty clause has to be seen in the context of mutual confidence and the presumption of compliance. The Court of Justice stated in *NS v Secretary of State for the Home Department* [2011] EUECJ C-411/10 and C-493/10

> "… the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, (is) based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."

Accordingly the circumstances in which a state is *obliged* to assume responsibility under Article 3(2) of Dublin II Regulation are limited.

[37] Schedule 3 Part 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 contains a list of safe countries. Under that part and for the purposes of the determination by any court as to whether a person who has made an asylum claim or a human rights claim may be removed from the United Kingdom to a State of which he is not a national or citizen, Ireland and Greece amongst other States shall be treated as a place from which a person will not be sent to another State in contravention of his Convention rights, and from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention. The doctrine of the supremacy of Community Law means that the statutory presumption that Ireland and Greece are safe countries can be read down but the same does not apply to the rights under ECHR where the only remedy is a declaration of incompatibility.

[38] The Charter of Fundamental Rights (the "Charter") contains the relevant provisions of Community Law. Article 1 of the Charter provides:

> "Human dignity is inviolable. It must be respected and protected."

Article 3 refers to the right to the integrity of the person and Article 4 refers to the prohibition of torture and inhuman or degrading treatment or punishment:

> "*Article 3*
>
> Right to the integrity of the person
>
> 1. Everyone has the right to respect for his or her physical and mental integrity.
>
> 2. ….
>
> *Article 4*
>
> 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."

In Chapter 2 of the Charter, under the heading of 'Freedoms', Articles 7, 18 and 19 provide:

"*Article 7*

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.
…

Article 18

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 establishing the European Community.

Article 19

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."

[39] The circumstances in which a challenge can be mounted to a decision to remove an asylum-seeker under Dublin II regulation was considered by the Court of Appeal in England and Wales in *EM (Eritrea) and Others v Secretary of State for the Home Department [2012] EWCA Civ 1336.* That litigation involved four separate cases, EH, EM, AE and MA. In two of the cases, AE and MA, refugee status had been granted in Italy. In the other two cases EH and EM there had not been a concluded refugee application in Italy. In all four cases the claimants having first arrived within the EU in Italy had then moved to the United Kingdom. The Dublin II Regulation provides for asylum claims to be processed and acted on by the first Member State in which the asylum-seeker

arrives and for asylum-seekers and refugees to be returned to that State if they then seek asylum or take refuge elsewhere in the EU. Accordingly in relation to each of the claimants the Secretary of State issued removal directions returning them to Italy. The claimants asserted that there was a real risk of inhuman or degrading treatment if they were returned to Italy in violation of Article 3 of ECHR. AE gave evidence as to what she had experienced in Italy before she left. She asserted that she:-

> "was given accommodation in crowded and insanitary premises which had to be vacated during the day. She was given food vouchers which ran out, leaving her dependent on charitable hand-outs. After three months even this accommodation was withdrawn. After a spell of living in cramped accommodation, shared with men, she left Italy and made her way to the United Kingdom, arriving on 19 January 2010. From here she was returned in October 2010 to Italy. AE then found herself destitute in Milan, living in a squat where she was repeatedly raped by a number of men who threatened her with reprisal if she reported them. She had no money and relied on charity for food."

[40] As I have indicated all the claimants resisted return relying on Article 3. The Home Secretary certified that their claims that return would violate their human rights were clearly unfounded. The claimants sought to judicially review those certificates. The Home Secretary submitted evidence describing Italy's system for the processing, reception, accommodation and support of asylum seekers and refugees. That evidence conflicted with the evidence of the claimants and if the matters stopped there then the Court of Appeal would have been bound to conclude that there was a triable issue in all four cases as to whether return to Italy entailed a real risk of exposing each claimant to inhuman or degrading treatment contrary Article 3 of the ECHR. On that basis it would follow that the Home Secretary's certificates that the human rights claims were clearly unfounded would be of no effect. However, the Home Secretary contended that it had to be shown that Italy was in systemic rather than sporadic breach of its international obligations. That absent such proof the Home Secretary's certificates should stand. The Court of Appeal considered the judgments in *KRS v United Kingdom* [2008] ECHR 1781, *MSS v Belgium and Greece* [2011] ECHR 108, *Hirsi v Italy* (27765/09; 23 February 2012) and *NS v Secretary of State for the Home Department* [2011] EUECJ C-411/10 and C-493/10 and concluded:

> "47. It appears to us that what the CJEU has consciously done in *NS* is elevate the finding of the ECtHR that there was in effect, in Greece, a systemic

> deficiency in the system of refugee protection into a sine qua non of intervention. What in *MSS* was held to be a sufficient condition of intervention has been made by *NS* into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the State's system, cannot prevent return under Dublin II."

The Court of Appeal went on in paragraphs [61] to [62] to state:-

> "61. …. The decision of the CJEU in NS v United Kingdom has set a threshold in Dublin II and cognate return cases which exists nowhere else in refugee law. It requires the claimant to establish that there are in the country of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] *amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment* …. (emphasis added)
>
> 62. In other words, the sole ground on which a second State is required to exercise its power under Article 3(2) Regulation 343/2003 to entertain a re-application for asylum or humanitarian protection, and to refrain from returning the applicant to the State of first arrival, is that the source of risk to applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures. Short of this, even powerful evidence of individual risk is of no avail."

[41] The decision in *EM (Eritrea) and Others v Secretary of State for the Home Department* is authority for the proposition that the only question which this court should examine is whether it has been established that there is a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland.

[42] The requirement that the applicants establish that the source of risk to them is a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland creates significant difficulties for the applicants. Mr Scoffield invited this court not to

follow or to distinguish the decision of the Court of Appeal in England and Wales in *EM (Eritrea) and Others v Secretary of State for the Home Department*. It is not a binding authority in this jurisdiction. In relation to the need for a systemic deficiency he contended that such a requirement would produce the surprising result that even if it was established that there was a real risk of death to an individual by for instance removal to Ireland followed by almost certain refoulment to Sudan that individual should still be removed to Ireland unless there was a systemic deficiency in Ireland's asylum or reception procedures. He also contended that *EM (Eritrea) and Others v Secretary of State for the Home Department* misapplies the principles enunciated in *NS v Secretary of State for the Home Department* in that there was no requirement in *NS v Secretary of State for the Home Department* that systemic failure has to be established. That such a requirement is erecting a hurdle to applicants relying on their fundamental rights in their individual case of not being exposed to inhuman and degrading treatment. He suggested that the test was whether there was a real risk to the applicants of being subjected to a violation of their fundamental human rights under the charter. Paragraph 82 of the judgment contemplates infringements of a fundamental right not being a bar to a removal under Dublin II Regulations but Mr Scoffield sought to distinguish between infringement and violation as a method of maintaining the test that he proposed. In paragraph 82 of the judgment in *NS v Secretary of State for the Home Department* the court stated that:

> "Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003."

I consider the distinction between infringement and violation advanced by Mr Scoffield to be a distinction without a difference. In paragraph 86 of the judgment in *NS v Secretary of State for the Home Department* the court also stated

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

Mr Scoffield contended that in this paragraph the court was only providing an example by way of illustration rather than providing an exhaustive definition of the circumstances in which transfer would be incompatible with the human rights under the charter of an applicant. In advancing these arguments

Mr Scoffield relied on the opinion of Advocate General Trstenjak delivered on 22 September 2011 in *N S v Secretary of State for the Home Department* Case C-411/10. However I consider that the court was drawing a distinction between Article 4 and other breaches of Charter rights such as Article 7. Accordingly I consider that the test to be applied is whether there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland.

[43] The issue as to whether there is also a requirement to demonstrate a systemic failure has been further addressed by the Court of Appeal in England and Wales in *AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 921. The Court of Appeal considered the decisions of the European Court of Human Rights in *Mohammed Hussein v Netherlands* (Application no. 27725/10) (2 April 2013) and *Daytegova v Austria* (Application no: 6198/12) (4th June 2013). In both of those cases the ECtHR referred to the need to establish systemic failure. I consider that a systemic failure has to be established.

[44] The burden of establishing a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland is on the applicants. However in certain circumstances the United Kingdom has an obligation to make its own enquiries of the authorities in Ireland. In *KRS v United Kingdom* the Grand Chamber at paragraphs 352 stated

> "In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof."

Also at paragraph 359:

> "The Court considers, however that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3 (ECHR)"

[45] In establishing a systemic deficiency the views of the UNHCR are of particular importance. The reasons for this and the importance to be attached

are explained in paragraph 41 of *EM (Eritrea) and Others v Secretary of State for the Home Department*

> "It seems to us that there was a reason for according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit."

However the Court of Appeal in *EM (Eritrea) and Others v Secretary of State for the Home Department* made it clear that a systemic deficiency could be established by other means. Sir Stephen Sedley stated in paragraph 42:

> "This said, we also take note of what the Grand Chamber of the ECtHR said recently in *Hirsi v Italy* (27765/09; 23 February 2012), at para 118:
>
> > '[A]s regards the general situation in a particular country, the court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources . . . .'"

I do not consider that list to be definitive but rather all the evidence including personal experience must be examined and assessed.

[46] Mr Scoffield also relied on the passage in *EM (Eritrea) and Others v Secretary of State for the Home Department* which at paragraph 63 states that what amounts to systemic deficiency must to a considerable degree be a matter of judgment, perhaps even of vocabulary in support of the proposition that this court has a wide ambit when deciding whether there is systemic deficiency in Ireland's asylum or reception procedures. I do not consider that there is a wide ambit. As a matter of appropriate vocabulary and appropriate judgment a deficiency affecting the system as a whole has to be demonstrated. He also contended that because the concept of systemic deficiency is hard to define that the requirement of systemic deficiency is incorrect and contrary to the community law principle of legal certainty. Again I do not consider that contention to be justified. The concept can and has been applied.

The Guidance of the UK Border Agency in relation to Sudan and non-Arab Darfuris

[47] The decision of the Asylum and Immigration Tribunal in *AA v Secretary of State for the Home Department* [2009] UKAIT 00056 which refers to the UK Border Agency's November 2009 Guidance Note on Sudan together with the UK Border Agency's August 2011 and August 2012 Guidance Notes on Sudan gives insight as to the conditions in that country for non-Arab Darfuris. The decision in *AA v Secretary of State for the Home Department* is brief given that it was common ground that the appeal should be allowed. It was a case in which a Sudanese applicant for asylum did not have an individual threat of persecution against him but claimed asylum based on a general threat by virtue of ethnicity as a non-Arab Darfuri. The decision of the Tribunal referred to the UK Border Agency's Operational Guidance Note on Sudan dated 2 November 2009 which at paragraph 3.8.9 stated:-

> "In light of the fact that we do not yet have sufficient information to allay the concerns raised in the reports, case owners should not argue that non-Arab Darfuris can relocate internally within Sudan."

Paragraph 3.8.10 of the 2 November 2009 Guidance Note stated:-

> "Conclusion
>
> All non-Arab Darfuris, regardless of their political or other affiliations, are at real risk of persecution in Darfur and internal relocation elsewhere in the Sudan is not currently to be relied upon. Claimants who establish that they are non-Arab Darfuris and who do not fall within the exclusion clauses will therefore qualify for asylum."

The Tribunal ruled that the political or other affiliations of the applicant did not matter but rather based purely on the ethnic origin of the applicant he should not be returned to Sudan.

[48] The reasons for this guidance can also be discerned from the decision in *AA v Secretary of State for the Home Department* as including arbitrary arrests by the Sudanese authorities, extrajudicial executions, ill-treatment of detainees, torture, and unofficial places of detention.

[49] The Operational Guidance Note in relation to the Republic of the Sudan was updated in August 2012. Paragraph 3.10 to 3.10.14 gives guidance in relation members of non-Arab ethnic groups from the Darfur states. In essence the guidance remains the same as in the November 2009 and August 2011 Guidance Notes.

[50] On the basis of the Operational Guidance Notes and the decision in *AA v Secretary of State for the Home Department* I find and it was not contested by the respondent that if the applicant's had made an asylum application in the United Kingdom then provided that it was established that they are non-Arab Darfuris it is certain that their asylum applications would succeed on the basis of a well-founded fear of being persecuted for reason of race (the concept of race including membership of a particular ethnic group).

[51] This case was assigned to my list the day before the hearing. On the first day of the hearing and on a practical basis I was interested as to the answer to the short question as to whether the Irish authorities would return non-Arab Darfuris to the Sudan. The Irish Naturalisation and Immigration Services, which is a part of the Department of Justice and Equality, have resources and access to country of origin information so that they can form a view. It would be thought that from previous cases they already have done so. A policy can be discerned either from a policy document or from previous decisions. Given the vulnerable position of refugees I would anticipate that if it was their view that non-Arab Darfuris should not be returned to Sudan that they would so inform the Commissioner, the Tribunal and the Minister. To fail to so inform the Commissioner, the Tribunal and the Minister would lead to a risk that a person would be denied shelter in Ireland who was fleeing persecution. I asked the respondents to make enquiries of the Irish authorities in essence in relation to that central question. There is a considerable degree of co-operation between the immigration authorities in the United Kingdom and in Ireland, for which see "Operation Gull" referred to in paragraphs 17, 42 and 47 of the judgment in *the matter of an application by Fyneface Boma Emmanson for Judicial Review* [2008] NIQB 38. Also in this case the specific situation is known namely the applicants have had their refugee applications refused in Ireland in a situation where the question as to whether they are non-Arab Darfuris was not addressed and where if it had been found that they were non-Arab Darfuris asylum would

have been granted in this jurisdiction. The questions that I posed were as follows:-

(a) Is there a policy in Ireland as to whether non-Arab Darfuris are returned to the Sudan or is there a policy, as in the United Kingdom that a non-Arab Darfuri will not be returned to the Sudan?

(b) Could the Irish authorities assure this court that if the applicants were removed to Ireland that if they are found to be non-Arab Darfuris they would not be returned to Sudan.

(c) If the Irish authorities cannot give that assurance then is that on the basis that they disagree with the proposition that non-Arab Darfuris have a well-founded fear of being persecuted for reasons of race, that is membership of a particular ethnic group. If they do disagree then on what basis do they do so?

(d) Can a fresh application for refugee status be made by the applicants if they are removed to Ireland?

(e) Has a deportation order been made in Ireland in relation to the applicants after they left Ireland?

(f) Could a copy of the file of the Irish Authorities in relation to the applicants be made available to this court so that it could be determine what information was given to the Commissioner and to the Tribunal by both the applicants and by the Irish Naturalisation and Immigration Services?

(g) Was there any reasonable prospect of the application for subsidiary protection being successful in Ireland given that the applicants have had their refugee application refused.

[52] Contact was made on behalf of the respondent with the Irish Department of Justice. Ms Chamberlain in her affidavit of 25 January 2013 set out their response. Those responses did not directly address all the questions raised but stated that there is no deportation order in existence in relation to any of the applicants. That the applicants have an extant application for subsidiary protection which is considered by the Irish Authorities to be live. That the Irish Naturalisation and Immigration Service do not routinely use or adopt UK Border Agency Operational Guidance. An asylum seeker may refer the Refugee Appeal Tribunal to UK Country Guidance or Operational Guidance Notes for consideration in his or her appeal. Equally, in an application for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and/or in written representations

under Section 3(4) Immigration Act 1999, an asylum seeker may refer to UK Country Guidance or Operational Guidance notes for consideration. Any country of origin information submitted by an applicant will be considered. In short there was no response to the short question as to whether the Irish Immigration authorities would return non-Arab Darfuris to the Sudan.

Irish legislation in relation to refugee applications

[53] The Refugee Act 1996 as amended contains provisions in relation to applications for refugee status in Ireland. Section 5 prohibits refoulment so that a person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race. Section 6 establishes the Refugee Application's Commissioner ("the Commissioner"). A person who arrives at the frontier of the State who seeks asylum may apply to the Minister for a declaration. The application is investigated by the Commissioner. In assessing the credibility of the applicant the Commissioner is enjoined to have regard to a number of factors. The Commissioner makes a recommendation. There is provision for an appeal to the Refugee Appeals Tribunal. The Minister can grant or refuse a declaration that the applicant is a refugee. Section 17(7) provides that a person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister. Accordingly the applicants, having been refused a declaration, cannot make a fresh application in Ireland without the consent of the Minister. No application has been made to the Minister to permit a fresh application and there is no evidence as to whether the Minister would consent to a fresh application being made. *C.O.I. Applicant v The Minister for Justice, Equality and Law Reform* [2007] IEHC 180 is an Irish authority which sets out the test to be applied by the court on a judicial review application of a refusal by the Minister to permit a further application. The reason for making a fresh application in this case would be that the Commissioner and the Tribunal failed to address the applicants' case that they were non-Arab Darfuris and for that reason alone had a well-founded fear of persecution. That reason for seeking a fresh application does not sit easily within any of the categories set out at paragraphs 6-8 of the judgment in *C.O.I. Applicant v The Minister for Justice, Equality and Law Reform* but may be encompassed within the concept of anxious scrutiny as set out at paragraph 12 so as to enable any decision of the Minister to refuse a fresh application to be judicially reviewed in Ireland.

[54] The Immigration Act 1999 covers the making of deportation orders. Under section 3(6) in determining whether to make a deportation order in relation to a person the Minister shall have regard to a number of factors including humanitarian considerations and any representations duly made by or on behalf of the person.

[55] The statutory regime in Ireland has been the subject of adverse comment in the Irish Supreme Court in cases such as *Nawaz v Minister for Justice, Equality and Law Reform* [2012] IESC 58 and *Okunade v Minister for Justice Equality and Law Reform* [2012] IESC 49

Systemic deficiency

[56] The applicants contend that there are systemic deficiencies in Ireland's asylum and reception procedures. They assert that:-

(a) the absence of any proper policy or country of origin information in relation to Sudan and in particular non-Arab Darfuris is evidence of a systemic deficiency. They state that there is a duty to have a policy and for those policies to be published so that there is a transparent statement by the immigration authorities in Ireland as to the circumstances in which the broad statutory criteria will be exercised.

(b) the exceptional low recognition rates in Irish asylum claims is evidence of a culture of disbelief and a lack of adequate protection for refugees in the Irish immigration system.

(c) the poor living conditions for asylum seekers combined with the endemic delays in the processing of immigration claims in Ireland and any related judicial review proceedings which leads to those conditions having to be endured for years.

Lack of a policy in Ireland in relation to whether to return non-Arab Darfuris to Sudan

[57] On the evidence before me Ireland does not have a policy in relation to whether to return non-Arab Darfuris to Sudan. No State is obliged to follow the guidance notes issued by any other State. Guidance notes of any State would be admissible in the United Kingdom as evidence of a particular risk. That is the position also in Ireland. It is clear that reputable country of origin information is admissible before the Commissioner, the Tribunal and can be taken into account by the Minister. Whether the absence of a distinct policy in Ireland is a deficiency is a matter for the courts in Ireland. The question for this court is whether it is a systemic deficiency. Given the evidence that the Guidance Notes issued by the authorities in other countries is admissible in evidence in Ireland I do not consider that the absence of any distinct policy in Ireland is a systemic deficiency. There may be other countries in the European Union that operate in exactly the same way. The applicants are at liberty to put before the Tribunal and the courts in Ireland country of origin information and guidance notes from other countries in relation to the return of non-Arab Darfuris to Sudan. For instance Guidance Notices emanating not only from the

United Kingdom but also for instance from Germany, France or Spain could be introduced in evidence. Indeed if all the published guidance notes from all other European countries were in terms identical to the United Kingdom Guidance Notes then if the applicants are non-Arab Darfuris there would be overwhelming evidence before the Tribunal, the Minister and the courts in Ireland.

Low recognition rates as evidence of systemic failure

[58] The EU's Statistic Agency, Eurostat, published figures in January 2011 which establish that the recognition rate in Ireland was 1.3% compared with an EU average of 27% of asylum claims being allowed. The Irish recognition rate is lower than the recognition rate in Greece of 2.8%. There is considerable concern as to how the Greek asylum system operates. The Irish recognition rate can also be contrasted to that in Italy where the rate is 37% and to the rate in the United Kingdom where it is 24%. The applicants submit that the profile of asylum seekers in the United Kingdom and in Ireland would not be radically different and that this is a particularly compelling contrast between recognition rates of 24% and 1.3%. That it is just implausible that Ireland has all the undeserving applicants arriving on its shores while the more deserving applicants arrive on the shores of the United Kingdom. The applicants contend that, even allowing for variability which they recognise must exist between different countries, these figures speak for themselves showing that claims within the Irish asylum system are routinely disallowed which ought to have been allowed with the inevitable consequence that on return to their country of origin many persons have been subjected to persecution. That the recognition rates establish that Ireland's asylum and reception procedures are systemically deficient in that applicants' just do not receive a fair hearing.

[59] The applicants refer to a press report that in 2010 the UNHCR criticised Irish acceptance rates as "low" and said it would engage with the authorities. There is no information available to this court as to the nature of that engagement. If letters have been written to the Irish authorities by the UNCHR then those letters have not been made available to this court.

[60] In 2011 and in the Irish Times the UNHCR was reported as calling on the Government to reform its asylum system as a matter of urgency. The document emanating from the UNHCR was not made available to this court rather the applicants relied on the press report. This means that this court cannot see the comments in context or form a view as to the accuracy of the press report or form an assessment as to the authorisation given to the individual to make the statement.

[61] The United Nations Committee Against Torture and Inhuman and Degrading Treatment was reported in the Irish Times in May 2011 as having expressed serious concerns about Ireland's policy particularly the rapidly

declining recognition rates for refugees. The applicant did not produce the report of the Committee. It is not clear whether the report in the Irish Times accurately reflects what was said by the Committee.

[62] The Irish Refugee Council, an NGO, has also criticised Ireland's poor record on refugees (124). It doubted the explanation advanced by the Irish authorities for the low recognition rate that Ireland "didn't get the right type of refugees". The paper also compared the breakdown of applicant profiles as between Ireland, Italy and Switzerland and concluded that Italy and Switzerland who received applications from similar nationalities as those who applied in Ireland had recognition rates that were well above the European average (126) in comparison to Ireland's low recognition rate. The conclusion that the applicants' seek to draw from the Irish Refugee Council's Report is that quite simply the explanation that Ireland did not "get the right type of refugees" did not stand up to analysis.

[63] The applicants state that the reasons for the low recognition rate are explained by the factors highlighted in 2011 by Catherine McGuinness, a former judge of the Supreme Court in Ireland. She wrote in the Irish Times (129) that the decisions are overwhelming negative and that the Tribunal

> "… has been widely criticised for its questionable independence, lack of transparency and scant or poor reasoning. Firstly, Tribunal members are appointed by the Department of Justice so that, in essence, the Department acts as judge, jury and executioner in the asylum system. Secondly, the manner in which the Tribunal operates is opaque. There are no clear published guidelines for the allocation of cases to any particular member, some of whom have had 100% refusal rates. Nor are there procedural guidelines for the conduct of proceedings. Contrary to one of the basic principles of fair procedures, hearings are held behind closed doors. Thirdly, decisions of the Tribunal are made available only in a limited way and questions have been raised about the quality of the reasoning. Decisions have been criticised as 'cut and paste' rather than a serious attempt properly to determine the appeal. In the past, controversy over the lack of reasoned decision-making has led to certain members resigning on principled grounds."

[64] The Irish Refugee Council in a document entitled "Difficult to Believe" published in 2012 in effect stated that the low recognition rate in Ireland is explicable on the basis of a culture of disbelief by the Commissioners and within the Tribunal.

[65] I am wary of relying on statistics as to recognition rates without a detailed and authoritative analysis of those statistics even though the reasons for the low recognition rates have been supported and explained by the various press articles and reports to which I have been referred. The numbers of applications for asylum in other countries from for instance Eritrea or Afghanistan could substantially impact on recognition rates particularly if the numbers seeking asylum in Ireland are substantially less than in other European countries with which comparisons are being made. The cohort in Ireland is small being less than 1000 per annum. I am also wary of holding that the profile of asylum seekers in the United Kingdom is the same as in Ireland without evidence to that effect. It is the UNHCR that has access to all the information and who can form a view. There is no authoritative statement in this case from the UNHCR that asylum and reception procedures are systemically deficient. The figures and other reports are disturbing but I am not prepared to hold that they establish systemic failure.

Refoulment to Sudan

[66] It is the applicant's case that it is almost inevitable that a return of the applicants to Ireland will lead to them being refouled to Sudan. Accordingly the decision to return to Ireland is in effect a decision to refoul the applicants to Sudan. The claim for refugee status has already been determined in Ireland. Having failed to make out a claim for refugee status the applicants submit that it is inevitable that the claim for subsidiary protection will fail given that the applicants have to establish a higher threshold.

[67] The applicants rely on an undated letter received on 12 December 2011 in which the Irish Naturalisation and Immigration Services stated that they do not distinguish peoples ethnic origin in their statistics so that they cannot say whether any of the 12 Sudanese nationals who returned to Sudan between 2009 and 2012 were non-Arab Darfuris. The applicants argue that if the Irish Naturalisation and Immigration Services do not keep statistics it is just not possible to conclude that non-Arab Darfuris are not deported to the Sudan.

[68] There is evidence from Mr Dougan, solicitor, that his client is a non-Arab Darfuri, though he does not state the basis upon which that is established. He states that his client has claimed asylum and subsidiary protection in Ireland but the claims have been refused and a deportation order has been made. (517-518). That his client had in fact been removed from Northern Ireland to Ireland on 14 October 2011 under Dublin II Regulation and that steps are being taken by the police in Ireland to enforce the deportation order.

[69] Mr McGleenan on behalf of the respondent accepted that non-Arab Darfuris should not be returned to the Sudan. However he contended that the outcome in Ireland is not one of certainty that the applicants will be refouled to

Sudan. There is a distinction between a decision not to declare the applicants refugees and a decision to refoul the applicants to Sudan. There is a statutory prohibition on refoulment in the Refugee Act 1996. There are avenues available to the applicants to prevent refoulment. For instance they have brought applications for subsidiary protection which applications remain outstanding. On this occasion they can bring all the evidence to the attention of the Minister that appears either not to have been brought "sufficiently" to the attention of the Commissioner or the Tribunal that non-Arab Darfuris are subject to persecution in Sudan for reason of their ethnicity. That the courts in this jurisdiction should have trust in the future prospective disposal of those applications and that if there is a real risk of refoulment that this will be prevented either by way of judicial review or by subsidiary protection or by way of permission to bring a further application for refugee status.

[70] I have emphatic confidence that the High Court in Ireland, if it independently comes to the same conclusions that I have, namely that both the Commissioner and the Tribunal ought to have but failed to consider whether the applicants were non-Arab Darfuris and if so whether on that basis alone there was a well-founded fear of persecution if they were returned to Sudan, that relief will be granted to the applicants by way of judicial review and that given the context, namely the vulnerable status of refugees, the risk of persecution if relief is not granted that any time limit in relation to a judicial review application would not be enforced. Equally I have similar confidence that if the Minister for Justice and Equality comes independently to the same conclusions, he will permit the applicants, for instance, to make a fresh application for refugee status. In short I consider that there are adequate mechanisms in place for redress within Ireland and accordingly it cannot be said that there is systemic failure or that if the applicants are non-Arab Darfuris that there is a real risk of refoulment to Sudan.

Housing and other conditions for the applicants in Ireland

[71] No enquiries have been made by the respondents as to where the applicants will be accommodated and as to the educational facilities that will be available to the children upon a return to Ireland. There is no specific plan for the applicants and therefore a consideration of their conditions in Ireland involves a consideration of the provision that is made for any asylum seeker in Ireland.

[72] Asylum seekers and those seeking humanitarian leave to remain in Ireland are accommodated in what is termed Direct Provision accommodation. Direct Provision accommodation does not have to comply with the minimum standards set out in Council Directive 2003/9/EC laying down the minimum standards for the reception of asylum seekers ("the Minimum Standards Directive"). Ireland has opted out of that directive, see preamble clauses (19) and (20). The minimum standard as to education of minors is set out in article

10 of the Directive which provides that Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the Host State for so long as an expulsion measure against them or their parents is not actually enforced. Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority. The minimum standard as to preventing asylum seekers from gaining employment is set out in article 11 which provides a right to employment for an asylum seeker after a certain period has expired. Ordinarily this is a period of one year.

[73] Direct Provision accommodation is accommodation on a full-board basis in allocated accommodation centres around the country. Asylum seekers are legally required to "reside and remain" in the Direct Provision accommodation centre until a decision is taken on their asylum application. It is a criminal offence to breach this requirement. They are not permitted to work regardless as to the length of time that the asylum process takes and regardless as to whether the delays are solely attributable to the authorities in Ireland. They are not generally entitled to certain mainstream social welfare benefits. They are not regarded as satisfying a habitual residence condition for receiving social welfare benefits, including child benefit, which is described by the Government as a universal benefit. They are provided with a "residual income maintenance payment to cover personal requisites" of €19.10 per week and €9.60 per week for children. This allowance has not increased since 1999. Asylum seekers have access to free health care through the medical card system. Children of asylum seekers are not entitled to a state education once they are 16.

[74] The Government originally envisaged that a person would remain in the Direct Provision accommodation on a short-term basis (not more than six months). In practice however statistics from the Reception and Integration Agency indicate that in October 2009 32% of residents spent over three years in Direct Provision.

[75] There is now evidence that the asylum procedure can take up to five years in Ireland (394). There is also evidence that judicial review proceedings can take between 4-6 years. That an application for subsidiary protection takes on average two years (403). It is while these applications are being processed that the applicants are not able to work, have to live in the Direct Provision accommodation and the children, once 16, are not entitled to education. The respondents have not placed any evidence before the court to challenge these periods of time nor have they sought any assurances from the Irish authorities that this case, given its history, will be expedited. The applicants may conceivably be in Direct Provision accommodation which was designed for short-term use for many years. The applicants alleged that the conditions in

Direct Provision accommodation amount to a breach of Articles 1, 4 and 7 of the Charter.

[76] The applicants rely on a number of criticisms of Direct Provision accommodation. The impact of Direct Provision was considered by the Irish Refugee Council in a report entitled "State Sanction Child Poverty and Exclusion." In the executive summary of that report it is stated

> "Direct provision is an unnatural family environment that is not conducive to positive development in children.
>
> The key themes identified by previous reports, media and complaints regarding the system of Direct Provision relate to concerns over the safety and over-crowding of the physical environment, family life, social exclusion, barriers to accessing and participating in education, diet and access to play space. Children in Direct Provision are often alienated as a result of enforced poverty and social exclusion.
> …
>
> Direct provision is an example of a government policy which has not only bred discrimination, social exclusion, enforced poverty and neglect, but has placed children at a real risk.
>
> It is unlikely that an official inquiry into the treatment of asylum seekers' children in Direct Provision accommodation would be instigated due to a simple lack of political will. However, the question remains: does the sustained and prolonged restriction of human rights and civil liberties inherent in the Direct Provision system amount to child abuse? This report calls on the Irish Government to establish an independent inquiry to acknowledge and investigate the long list of complaints, grievances and child protection concerns reported by the residents, child, non-governmental organisations and support agencies herein. It also highlights the need for a Government commitment to protection of the best interests of the child in all the circumstances."

[77] In the body of the report there is a passage in the following terms:-

> "The ability of residents of Direct Provision to act as a family as defined in this Convention is severely limited by this government policy. Families do not enjoy a life without interference in these centres. There have been recorded instances of Department of Justice officials entering into family homes and rooms unannounced; forced transfers for 'bed management reasons'; set meal times where the centre, rather than the parents, severely limits the choice of what a child can eat; and families forced to share their family space with other adults or other families. Families in Direct Provision do not have meals together separate from other residents. Parents do not cook for their children. Children do not see their parents in the role they traditionally embody. Research shows children are disadvantaged by growing up in an institutional setting and Direct Provision is another example of this and a clear breach of the child's Article 8 rights."

[78] The foreword to the report was written by Catherine McGuinness, a retired Supreme Court Justice who welcomed the report as providing a

> "well researched analysis of the difficulties faced by children and families who reside for considerable periods of time in the Direct Provision accommodation provided for asylum seekers in this country".

[79] There have been other authoritative criticisms of Direct Provision accommodation. The Irish Human Rights Commission Report dated November 2010 indicates that the Irish Human Rights Commission is concerned at the low level of Direct Provision payments and the length of time which people remain in the system. The Irish Human Rights Commission is concerned as to the high incidence of mental health problems among persons in Direct Provision and the negative impact which the length of the asylum process, the prohibition on working and the resulting social isolation may be having on those in Direct Provision.

[80] It is not hard to envisage that Direct Provision accommodation leads to isolation and other problems. That is the evidence of the Irish Refugee Council which states that the combination of delay and the problems of Direct Provision

> "results in health and psychological problems, isolation and frustration that in certain cases lead to mental illness".

The Irish Refugee Council states that this impact on the mental health of asylum seekers has been recognised by the UN Committee on the Elimination of Racial Discrimination.

[81] The United Nations Human Rights Council issued a report on 17 May 2011 on the question of Human Rights and extreme poverty (287). Paragraphs 89-93 are relevant and are in the following terms.

> "[89] Ireland has historically displayed considerable solidarity towards asylum-seekers and refugees. While welcoming this generosity, the independent expert is concerned about some aspects of the situation of asylum-seekers.
>
> [90] The independent expert is concerned that today, more than one third of asylum seekers supported by the Direct Provision System (DPS) – which provides asylum-seekers with accommodation and support at all stages of the asylum process and beyond, up to resolution of the case, and which was originally designed to support asylum seekers for short periods of time (up to six months) only-, spend more than three years in such accommodations. While the facilities are generally reported to be in good condition and asylum seekers receive full-board accommodation and a small weekly allowance, the DPS limits the autonomy of asylum-seekers and impedes their family life as most accommodation centres have not been designed for long term reception of asylum-seekers and are not conducive to family life. Moreover, asylum-seekers under the DPS are denied access to social welfare (eg rent supplement and child benefit) and the right to work. Ensuring access to the labour market is an essential element of complying with the International Convention on Economic, Social and Cultural Rights (Article 6), which sets out compulsory obligations for all states and which should take priority over political concern such as the "pull factor" for new asylum-seekers.
>
> [91] Living under such conditions for an extended period of time severely affects the social inclusion of asylum-seekers, as well as their capacity to return to work (in Ireland or in their country of origin), and could have a major impact on the realisation of their

> right to physical and mental health. The independent expert reminds Ireland that asylum seekers and refugees must be guaranteed the enjoyment of all human rights, including the right to privacy and family life, an adequate standard of living, and adequate standards of physical and mental health, rights that complement the provisions of the 1951 Refugee Convention.
>
> [92] The independent expert calls on the Government to quickly adopt a single procedure for determining refugee and subsidiary protection claims with strong protection elements, and to ensure that asylum-seekers enjoy the full range of economic, social and cultural rights, including the right to work. She also calls on the State to fully implement the European Union Asylum Procedures Directive to ensure better protection of asylum-seekers.
>
> [93] The independent expert is also concerned about the impact that the consecutive cuts to the budget of the Irish Naturalisation and Immigration Service (INIS) may have on the status determination procedure for asylum-seekers. She calls on the State to ensure that it has the appropriate resources to deal with all cases in a timely and fair manner."

[82] The respondent states that asylum seekers are not required to remain in the accommodation during the course of the day. That is correct insofar as they are not prohibited from moving out of the accommodation but in practical terms their lives are confined to that accommodation. It is a full board system. They need to remain to eat. The subsistence allowance is so small they cannot afford to feed themselves otherwise than by remaining in the accommodation at meal times. In addition by virtue of the size of the subsistence allowance they cannot afford to travel. They are not permitted to work.

[83] The report of the United Nations Human Rights Council dated 17 May 2011 acknowledged that Ireland has historically displayed considerable solidarity towards asylum-seekers and refugees. It stated that the independent expert is concerned about *some aspects* of the situation of asylum-seekers. This is not the language of systemic failure such that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland. It is in sharp contrast to the letter from the UNHCR in April 2009 to the Belgian Minister in charge of immigration which contained an unequivocal plea for the suspension of transfers to Greece. The report of the Irish Refugee Council entitled "State Sanction Child Poverty and

Exclusion" concludes its executive summary by calling on the Irish Government to establish an independent inquiry. Again that is not the language of systemic failure such that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland. The Court of Justice of the European Union in its judgments relating to Ireland's asylum system have not made criticisms amounting to systemic failure, see *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, judgment of the Court (First Chamber) 22 November 2012. I do not consider that it has been established that there is a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland.

[84] It is not for the courts in this jurisdiction to determine whether the evidence of conditions in Direct Provision accommodation amounts to a breach of articles 1 and 7 of the Charter. Those are questions for the courts in Ireland.

The lack of a policy in relation to the exercise of discretion under Article 3 (2) of Dublin II Regulation.

[85] In the case of *Saeedi v Secretary of State for the Home Department* [2010] EWHC 705 it was established that there was no policy in existence in the United Kingdom in relation to the exercise of discretion under Article 3(2). Mr Justice Cranston stated at paragraph 142 of his judgment:

> "A useful starting point is to consider the Secretary of State's current approach as to the exercise of his discretion under art 3(2) of the Dublin Regulation. At the hearing I inquired as to that policy. Subsequently I was informed that the Secretary of State exercises his discretion to withdraw third country action, under art 3(2) of the Dublin Regulation, on a case by case basis. There is no policy or formal guidance. Through his officials the Secretary of State considers each case on its individual merits where an Applicant is returnable under the Dublin Regulation. Although there is no formal guidance, however, officials at executive officer level or above may recommend the exercise of the Secretary of State's discretion where it is considered unreasonable to remove an Applicant. But there is no formal policy that certain individuals, for example those over a certain age or with certain illnesses, fall into a category resulting in art 3(2) being exercised. However, the Secretary of State may take the view that an individual's circumstances are

> sufficiently exceptional so as to warrant exercising his discretion under art 3(2). All recommendations to exercise the Secretary of State's discretion under art 3(2) must be signed off by an official at senior executive officer level or above. Once approved the third country certificate, if one has been produced, is withdrawn and the individual's asylum claim is considered substantively in the United Kingdom."

That remains the position. There is no policy. Each case is considered on its individual merits.

[86] The lack of any policy in the United Kingdom was said by the applicants to be in contrast to other jurisdictions. At paragraph 143 of his judgment Cranston J stated

> "The Secretary of State's approach contrasts with that of some other Member States. The majority of Member States have restricted Dublin Regulation returns to Greece to certain categories of returnees. Thus Germany does not remove unaccompanied minors, asylum seekers with serious medical conditions, elderly persons or those considered vulnerable. The result seems to be that in 2008, of 800 formal requests made to Greece, 130 were considered on a substantive basis in Germany. In the period 1 January – 13 October 2009, of 1567 formal requests made, 497 had been accepted for substantive consideration in Germany. Other countries such as Austria, Belgium, Denmark, Hungary and Switzerland have adopted comparable approaches under which certain categories of asylum seekers are not returned to Greece. There is no suggestion in the evidence that Member States are adopting the same policy of non-return of Dublin Regulation asylum seekers to Member States other than Greece."

However it can be seen that the policies about which there was evidence related solely to Greece.

[87] The applicants argue that the respondent's *"ad hoc"* approach to the exercise of her discretion under Article 3(2) of the Dublin II Regulation is surprising given the very significant consequences of the exercise of that discretion for asylum seekers and their families. In reliance on paragraph 43 of *B v Secretary of State for Work and Pensions [2005] EWCA Civ 929*, the applicants

assert that the absence of any clear policy or guidance on the exercise of this discretion is, in and of itself, unlawful. At paragraph 43 Sedley LJ stated:

> "It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer. Among its first recipients (indeed, among the prior consultees, I would have thought) should be bodies such as the Child Poverty Action Group and the Citizens Advice Bureaux. Their clients are fully as entitled as departmental officials to know the terms of the policy on recovery of overpayments, so that they can either claim to be within it or put forward reasons for disapplying it, and so that the conformity of the policy and its application with principles of public law can be appraised, although two such policies were evidently described or shown to Newman J in *R (on the application of Larusai) v Secretary of State for Work and Pensions* [2003] EWHC 371 Admin: see para15 and 19."

[88] The applicants argue that there is a real need to publish a policy in relation to Article 3(2) not only to maintain consistency across the United Kingdom's spectrum of cases but also to allow informed representations which asylum-seekers have a right to make in relation to the exercise of the discretion. The applicants suggest that what has to be published is that which will allow a person who was affected by the operation of the policy to make informed and meaningful representations to the decision-maker before a decision is made.

[89] It was suggested by the applicants that a policy should include matters such as not returning an asylum seeker to the initial state under Dublin II Regulation if they were seriously ill. However, the whole concept of Dublin II Regulation, is that member states should have trust and confidence in the other member state's systems. So it is submitted by the respondent that if an individual was seriously ill that ordinarily it would then be a matter for the other member state to provide medical assistance and that there should be confidence in that provision. That mutual confidence will affect all the discretionary aspects suggested by the applicants and accordingly that the area is not one that is appropriate for a policy but rather is one for retaining a degree of flexibility on an ad hoc basis for the wholly exceptional.

[90] I consider that this is an area where it is proper for a public authority to leave discretion open without the necessity for a policy given the context of mutual confidence between member States of the European Union and having regard to the requirement not to fetter the discretion so that there is degree of flexibility for the wholly exceptional. Also the need for a policy is obviated by the careful definition which has been brought to the issue as to when discretion is obliged to be exercised.

Section 55 of the Borders, Immigration and Citizenship Act 2009

(a) Consideration of the legal impact of Section 55

[91] Section 55(1) provides that "the Secretary of State must make arrangements for ensuring that" any function of the Secretary of State in relation to immigration, asylum or nationality is "discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom." Both the removal decision and the decision not to exercise discretion under Article 3(2) of Dublin II Regulation is such a function and accordingly the Secretary of State was under an obligation to ensure that those functions were discharged having regard to the need to safeguard and promote the welfare of A, B and C. This means that if these decisions were taken without having regard to the need to safeguard and promote the welfare of A, B and C then they were not taken "in accordance with the law" for purposes of article 8(2) ECHR.

[92] The welfare of the children is a much wider enquiry than an enquiry as to whether there is a real risk of a breach of a fundamental right under either the Charter or ECHR. The welfare of the children may be to remain in Northern Ireland even though the applicants are unable to establish a real risk of a breach of a fundamental right if they were returned to Ireland.

[93] In contrast to the statutory presumption as to safe countries there is no statutory presumption as to welfare of the children. It is not presumed by statute that welfare of the children will be equally accommodated in Ireland as in the United Kingdom.

[94] Article 3(1) of the United Nations Declaration on the Rights of the Child 1959 provides that in "all actions concerning children, … the best interests of the child shall be a primary consideration." Section 55 refers to the welfare of children and this is interpreted as the best interests of the children. The requirement to have regard is interpreted as a requirement to have regard to the best interests of the children as *a primary consideration*. Not *the primary consideration*, not *the paramount consideration* but as *a* primary consideration thereafter asking whether the force of any other consideration outweighs it.

[95] The best interests of the children is not an overriding factor in the decision making process but the impact of the best interests of children being a primary consideration was emphasized by Lord Kerr In *ZH (Tanzania).* He stated that:

> "It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

[96] In support of the proposition that the decision maker has first to identify the best interests of the children Mr Scoffield relied on paragraph 26 of the judgment of Lady Hale in *ZH (Tanzania)* where after referring to a decision of the Federal Court of Australia she stated:

> "This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. *The important thing, therefore, is to consider those best interests first*. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia." (emphasis added)

The concept that one has first to identify the best interest of the children was returned to by Lady Hale at paragraph 33 in which she stated:

> "We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. *This means that they must be considered first*. They can, of course, be outweighed by the cumulative effect of other

> considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created." (emphasis added)

I consider that logically the starting point for a decision maker is first to identify where the best interests of the children lie. Having identified where the best interests of the children lie, the decision maker then asks the question as to whether the force of any other consideration or considerations outweigh it. In approaching the facts of this case I do not seek to elevate form over substance and I bear in mind that it might be that this sequence is not followed but that the correct questions are asked and answered.

[97] Lady Hale posed the question as to what is encompassed in the "best interest of the child"? In the context of *ZH (Tanzania)* she stated:

> "As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

[98] The balancing exercise of best interests against countervailing factor of the Dublin II Regulation has to recognise that the Regulation has a strong procedural rather than substantive element. At its core Dublin II Regulation provides a structure as to which State makes the substantive decision. Accordingly the countervailing factor of maintaining the integrity of the practical application of Dublin II Regulation has to be kept in proportion, it is not a trump card and it has to be recognised that it is not as strong a countervailing factor as maintaining the integrity of the ultimate decision and therefore of maintaining control of the borders of the State. Whether it amounts to a sufficient consideration to countervail the best interests of children will require very careful consideration given that the countervailing factors have to be "of substantial moment" to permit a different result than that indicated by best interests.

(b) The submissions of the parties in respect of section 55

[99] The applicants' case under Section 55 is on the following grounds:-

(a) It is asserted that the respondent did not approach the assessment of welfare in the proper way. The applicants say the respondent failed to come to any conclusion as to where the welfare of the children actually lay before assessing any of the countervailing factors. It is argued that this makes it impossible to accurately balance the competing interests involved. In reliance on *ZH (Tanzania)* [2011] UKSC 4, *Nkhoma* [2011] EWHC 2367 (Admin) and *Mansoor* [2011] EWHC 832 (Admin) the applicants contend the starting point must always be to identify what is in the child's welfare as a primary consideration so that the decision maker knows whether she is promoting or compromising welfare. If compromising whether it is required or proportionate. The applicants assert the respondent has not done so in this case.

(b) The applicants submit that section 55 of the 2009 Act creates a duty on the respondent to consider not just the welfare of any dependent children in respect of a so-called "safe country" such as Ireland but also to consider their welfare in the likely ultimate destination of those children, especially in the circumstances of this case, as their mother has already applied unsuccessfully for asylum in Ireland and taking into account the low recognition rate in Ireland.

(c) The applicants submit the respondent did not treat A's best interests, especially regarding his mental health, as a primary consideration when considering his removal under the Dublin II Regulation.

[100] The respondent's case is that all the family members will be returned to Ireland as a family unit so that the family unit will not be disturbed. That the ties that they have formed in the brief period they have resided in this jurisdiction are not familial in nature and are not suggestive of any deep integration into the life of this jurisdiction. It is asserted that the respondent has properly identified that comparable arrangements for accommodation, health care and education can be made in the Republic of Ireland, though Mr McGleenan accepts that "there is scope for debate at the margin." The respondent identifies the countervailing consideration that the applicants have no lawful basis for residence in the United Kingdom and will always have understood the precarious nature of their presence in this country. The respondent asserts that a possible impact on the best interests of the children must on a fair examination be no more than minimal given that they will be relocated as a family unit to another part of the island of Ireland where many of the linguistic cultural, social and economic arrangements are both familiar to the children and comparable to those they have briefly experienced in Northern Ireland.

(c) The evidence in this case in relation to section 55

[101] The UK Border Agency in its letter of 14 September 2011 stated that:-

> "It is considered that your client and her family will have the same opportunities for development, and will receive the same level of support, in Ireland. Your client has not demonstrated any circumstances or raised any issues which lead me to believe that this is not the case.
>
> Your client and her children have been in the United Kingdom for only a short time, less than three months, but were in the Ireland for over a year and therefore Ireland will not be unfamiliar to them. I note that your client and her youngest child suffer from asthma but this is an internationally recognised condition for which treatment will be available in Ireland as will it be available for your client's depression. There is nothing in the information you have provided to suggest that your client has not received adequate medical treatment during the time she has spent in Ireland before travelling to the United Kingdom …"

[102] The assertion in that letter that:

> "It is considered that your client and her family will have the same opportunities for development, and will receive the same level of support, in Ireland" ("the assertion")

either fails to address the first question namely what is in the best interest of the children or it is an assertion that the best interests of the children are equally met in Ireland and in Northern Ireland. If it is the former then the decision maker has failed to address an essential question. If it is the latter then it cannot stand up to any analysis. No specific plan individual to this family has been formulated in Ireland for their reception on removal. ALJ, the children's primary carer, has no prospect of working in Ireland but has the prospect of working in Northern Ireland. The well-being both emotionally and financially of the primary carer and the importance of that to the well-being of the children in her care would point significantly to the best interests of the children being to remain in Northern Ireland. The children, most significantly A, has no prospect of working in Ireland but he has that prospect in Northern Ireland. In Northern Ireland the family is in a separate house of their own which they can

call their home. In Ireland they are required to live in hostel accommodation and prevented from living in their own accommodation. In Northern Ireland the family are not bound to remain in close proximity to a hostel in order to eat regular meals. In Northern Ireland being in their own home they can interact with each other as a normal family without interference by other asylum seekers or by hostel staff. The children by virtue of being brought up in their own home can develop a sense of belonging and separate identity. In Ireland there are problems with enforced isolation and poverty. In Northern Ireland between the ages of 16 and 18 the children are entitled to receive a State education. That is not so in Ireland. A comparison of the description of the accommodation that is provided in Ireland and the accommodation that is provided in Northern Ireland shows a marked difference in quality and therefore in the quality of life of those who live in such accommodation. There is ample evidence of physical and mental health issues developing in Ireland amongst those asylum seekers who are in Direct Provision accommodation. Ireland has opted out of the minimum standards directive and there is considerable evidence that the provisions in Ireland do not meet the minimum standards in that directive. Any analysis of the best interests of the children would have led to the inevitable conclusion that the best interests of the children favoured remaining in Northern Ireland.

[103] For those reasons alone the best interests of the children are that they should remain in Northern Ireland. However as additional support for that proposition there are other features which mean that the best interests of the children are that they should remain in Northern Ireland. The children will not face a lengthy delay in their application for asylum in Northern Ireland. In this jurisdiction the issue is simple, namely are they non-Arab Darfuris. If they are then they are entitled to asylum. In Ireland there is no such simplicity of issues as the Irish authorities have not been prepared to answer the question as to whether non-Arab Darfuris are returned to Sudan. In Ireland the children face making judicial review challenges to the decision of the Tribunal. In Northern Ireland they do not have to face years of such litigation.

[104] If the correct interpretation of the assertion is that that the best interests of the children are equally met in Ireland and in Northern Ireland then it is Wednesbury unreasonable. On that ground the appropriate order is to quash the removal decision and the decision not to assume responsibility under article 3(2) of Dublin II Regulation.

[105] The assertion also admits of the interpretation that the respondent has not determined the primary question as to what is in the best interests of the children. In so far as that is the correct interpretation of the assertion then the respondent has not determined the best interests of the children and has failed to comply with the duty under section 55. On that ground the appropriate order is to quash the removal decision and the decision not to assume responsibility under article 3(2) of Dublin II Regulation.

[106] In considering Section 55 the respondent asserted that Ireland was subject to the Minimum Standards Directive and that it would expect that Ireland would comply (138, 142, 151 and 153). That assertion was incorrect. Ireland has opted out of the Minimum Standards Directive. The evidence before me is that Ireland does not achieve the standards in that directive. The respondent has consistently and repeatedly misdirected itself as to the protections which the children will enjoy in terms of the international obligations which apply to Ireland. The respondent has taken into account a fact which it ought not to have taken into account namely that the Minimum Standards Directive applies in Ireland. The decision of the respondent is also unlawful on that ground and on that ground the appropriate order is to quash the removal decision and the decision not to assume responsibility under article 3(2) of Dublin II Regulation.

(d) A consideration of welfare in Sudan

[107] The applicants also contend that in determining best interests the respondent should not only take into account the interests of the children in Ireland but also the interests of the children in Sudan given what the applicants assert is a real risk of refoulment to Sudan. I do not consider that there is such a risk if the applicants are non-Arab Darfuris.

(e) Best interests and A's mental health.

[108] When the decisions were made to remove the applicants and not to exercise discretion under article 3(2) of Dublin II Regulation A was a child. It is clear that A's best interests, on mental health grounds, was to remain in Northern Ireland. The degree of that interest would be affected by the degree of planning in relation to the practical arrangements for his medical care in Ireland. There was no planning of any such arrangement and accordingly it was not possible for the respondent to say that the risk to A's mental health was small or trivial or could be accommodated by the provision of mental health services in Ireland. A's mental health is also affected by the failure of the Irish Immigration authorities to answer the question as to whether non-Arab Darfuris are returned to Sudan. The respondent did not independently of this court seek clarification from the Irish authorities in relation to the answer to that question. At the time that the decisions were made no proper assessment of the best interests of A in so far as it related to his mental health was taken by the respondent. Such an assessment could only be informed by a proper assessment of arrangements for handover to medical services in Ireland and by specifically addressing with the Irish immigration authorities the question at the centre of A's mental health concerns. The decision in respect of A was unlawful in that it did not properly assess his best interest.

[109] A is no longer a child and therefore the question arises as to the appropriate remedy. There is no longer a duty in respect of A under section 55 but their remains a duty to consider the best interests of B and C. The impact on the best interests of B and C of the mental illness of A has to be considered by the respondent and that in turn will be affected by the arrangements made in Ireland for A's medical treatment and the answer to the question at the centre of A's mental health concerns. It is the nature of a family that an impact on one can affect the others and of particular importance to best interests of children is the well-being of their primary carer, so also under consideration in relation to the best interests of B and C is the impact on ALJ of the mental health concerns of A. I consider that the appropriate remedy is to quash the removal decision and the decision not to assume responsibility under article 3(2) of Dublin II Regulation on the ground of a failure to properly address A's best interests in so far as they related to his mental health and the impact of his mental health on the best interests of B and C.

Conclusion

[110] I reject all the applicants grounds of challenge which rely on the contention that there is a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland

[111] I quash the removal decision and the decision not to assume responsibility under article 3(2) of Dublin II Regulation on the basis of a failure to have regard to the need to safeguard and promote the welfare of the children A, B and C as required by Section 55 of the Borders, Immigration and Citizenship Act 2009.