MR JUSTICE LEWIS
Approved Judgment

Neutral Citation Number: [2015] EWHC 1095 (Admin)

Case No: CO/6869/2013;
CO/7110/2013;
CO/901/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2015

Before :

MR JUSTICE LEWIS

- -

Between :

The Queen on the application of MS	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -

The Queen on the application of NA	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -

The Queen on the application of SG	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Raza Husain QC and Duran Seddon and Greg Ó Ceallaigh (instructed by **Wilson Solicitors LLP**) for the **Claimant MS**
Raza Husain QC and David Chirico and Harriet Short (instructed by **Wilson Solicitors LLP**) for the **Claimant NA**
Raza Husain QC and David Chirico (instructed by **Duncan Lewis**) for the **Claimant SG**
Lisa Giovannetti QC and Sasha Blackmore and Robert Harland (instructed by **The Treasury Solicitor**) for the **Defendant (in all three cases)**

Hearing dates: 24 – 26 March 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE LEWIS

Mr Justice Lewis :

INTRODUCTION

1. These are three claims for judicial review of decisions of the Defendant, the Secretary of State for the Home Department, rejecting the claim of each Claimant that returning each of them to Italy would result in a real risk that each of them would be exposed to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights ("ECHR") and certifying the claim as clearly unfounded within the meaning of paragraph 5(4) of Schedule 3 to the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"). The hearing of a fourth claim was adjourned as the Claimant wished to adduce further evidence relating to her particular case.

2. In brief, the three Claimants applied for asylum in the United Kingdom. Prior to their arrival in the United Kingdom, two of the claimants, NA and MS, had been in Italy and had applied for asylum there. NA had been granted refugee status and MS had been granted leave to remain on the basis that he qualified for humanitarian protection. For convenience, persons recognised as refugees, or as entitled to protection under international law, are referred to in this judgment as "BIPs". The third claimant, SG, had been in Italy prior to travelling to the United Kingdom but had not claimed asylum there. The Claimants contend that they have at least an arguable case that return to Italy would involve a real risk of a breach of Article 3 ECHR and that the Defendant acted unlawfully by certifying their claims as clearly unfounded as, on one legitimate view, a tribunal considering their claims could conclude that the living conditions in Italy for those seeking asylum or for BIPs generally, or for these particular Claimants on the facts of their cases, are such that there is a real risk that they will suffer inhuman or degrading treatment contrary to Article 3 ECHR if returned to Italy.

3. By way of background, the appropriate approach to considering such claims has been determined by the Supreme Court in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] AC 1321. The issue, and the evidence about conditions in Italy, has recently been considered in detail by the High Court in *R (Tabrizagh and others) v Secretary of State for the Home Department)* [2014] EWHC 1914 (Admin.). Elisabeth Laing J. held that the evidence did not establish a real risk that the claimants in those cases, one of whom suffered post-traumatic stress disorder, would suffer treatment contrary to Article 3 ECHR if returned to Italy and dismissed the claims that the Defendant had acted unlawfully by certifying those claims as clearly unfounded. The Court of Appeal refused permission to appeal: see *R (Tabrizagh and others) v Secretary of State for the Home Department* [2014] EWCA Civ. 1398. There are also decisions of the European Court of Human Rights dealing with the return of individuals to Italy, including individuals suffering from severe psychological mental health conditions. The European Court found that the claims that the return of these individuals to Italy would breach Article 3 ECHR were manifestly unfounded.

4. The Claimants in the present cases however contend that circumstances are now different. They contend that a recent decision of the Grand Chamber of the European Court of Human Rights in *Tarakhel v Switzerland*, judgment being given on 4 November 2014, and recent evidence demonstrate that, on one legitimate view, a tribunal could conclude there are substantial grounds for believing that there is a real

risk that (a) any individual asylum seeker, or any person granted refugee status or humanitarian protection (b) any vulnerable such person or, (c) or at least these three Claimants would be subjected to treatment contrary to Article 3 ECHR if they were returned to Italy.

5. Pursuant to an order of Master Giddens of 11 February 2015, amended grounds of challenge have been filed in all three Claimants' cases. In accordance with that order, this hearing is to deal with the issues relating to the consideration of the lawfulness of removal to Italy (including certification of the Claimants' claims) but not the determination of any other issues such as the lawfulness of any forced detention or decisions of trafficking or decisions on a Claimant's status and treatment in the United Kingdom.

6. Given the range of legal and factual submissions made, this judgment is lengthy. It first sets out the material facts relating to each of the three Claimants and the facts relating to the situation they face if they are returned to Italy. Secondly, the judgment summarises the relevant European Union law dealing with asylum seekers and BIPs. Thirdly, the judgment considers the relevant case law of the European Court of Human Rights. Fourthly, the judgment summarises the legal principles set out by the Supreme Court in *EM (Eritrea)* for deciding these issues in the context of a challenge to a decision that a claim is clearly unfounded. Finally, the judgment considers the application of those principles both to asylum seekers and BIPs generally, and in the particular cases of these three Claimants considered against the overall context.

THE FACTS

The Individual Claimants

7. The facts of the three individual claimants can be summarised as follows. By way of preliminary observation, however, when deciding whether the Defendant was entitled to certify a human rights claim as clearly unfounded, the facts relied upon by the Claimants are assumed to be true. As explained by Lord Kerr in *EM (Eritrea)* [2014] A.C. 1321 at paragraph 8 in such cases:

> "it is customary to take the facts at their highest in the claimant's favour …..Where, therefore, it is stated that a particular event took place or that a certain factual proposition is established, that is for the purposes of considering the appellants' cases at their reasonable height. It does not betoken any final finding or conclusion."

MS

8. MS is a national of Afghanistan. His date of birth is 28 May 1970. He was subjected to threats and beating in Afghanistan by the Taliban. In 2010, he left Afghanistan and ultimately arrived in Italy having travelled via Iran, Turkey and Greece. An agent arranged for MS to travel by boat, with others, from Greece to Italy. MS arrived in Italy in about late October or late December 2010. The boat deposited MS and the others in Italy. He and some of the others walked to a train station. Eventually, he travelled to Rome.

9. In Rome, MS went to a police station. After three hours there, an interpreter was found. He was given a permit to stay for one month. He spent time sleeping in

overcrowded tents near the train station in Rome. He became ill. He subsequently went to a camp near Rome used, it appears, to accommodate asylum seekers. In any event, at the camp MS said he wished to claim asylum. He was fingerprinted. He was told he could not be accommodated there for a week. He spent that week living on the streets and eating from bins. After one week, he returned to the camp. He was provided with clothing, food and accommodation. The accommodation consisted of 5 beds in a container.

10. After some months, probably at a date between about January and July 2011, MS went to another camp in Mineo in Sicily. He was allocated a room, shared with two others. Each occupant had a bed and a blanket.

11. The information provided by the Italian authorities is that MS was granted humanitarian protection on 19 July 2011. In his witness statement, MS states that he was given a residence permit, called a "Soggiorno", which was valid for a year, and was also given another document which MS said he understood was a passport but was probably an identity card. Attached to his witness statements, are photocopies of a card with the words "permesso di soggiorno" and a document entitled "carta di'identita".

12. MS left the camp and was left in a city in Sicily. He began to feel ill and suffer panic attacks. He stayed for a week with a stranger but then had to leave that accommodation. He subsequently applied for and received a work card and what he refers to as a hospital card. This is, it seems, a reference to a document known as a "Tessera Sanitaria" which gives access to health services. Attached to MS's witness statement is a photocopy of a card bearing the words "Tessera Sanitaria". MS sought medical assistance at an emergency unit of a hospital but was told he needed a letter from a general practitioner. He approached a GP but the GP would not provide him with a letter to enable him to receive medical treatment at the hospital. He slept on the streets and underneath a bridge. He ate food from bins. He was unable to find work. He became ill. At one stage, he attempted to commit suicide by stepping in front of a car. He decided to leave Italy. A man in Italy, who was entitled to live and work in the UK, offered to help him. He and the man travelled by train to Calais in France. MS then travelled to the UK.

13. According to the Home Office, on 16 April 2013, MS was encountered by police in the United Kingdom when he was seen leaving a lorry outside a factory in Northamptonshire. He was arrested. He claimed asylum in the UK. He was placed in immigration detention on 18 April 2013. On 20 April 2013, it was confirmed that MS had been fingerprinted in Italy. On 21 April 2013, MS withdrew his asylum claim.

14. On about 24 April 2013, the United Kingdom authorities requested Italy to accept responsibility for MS. On 21 May 2013, the Italian authorities formally accepted responsibility for MS. Their response says as follows:

> "According to art 16.2, Italy accepts the transfer of the above named person.
>
> You are kindly requested to provide us with the relevant detailed transfer instructions, with at least a seven-day-notice.

> Moreover, you are kindly requested to inform the above mentions person/s that he/they are obliged to report immediately to the "Ufficio di Polizia di Frontiera" (Border Police) at the airport of CATANIA as soon as he/she/they arrives/arrive in Italy.
>
> You are requested to inform us in advance (at least 10 days before the transfer) about any particular health situation, both from the physical and from the physical and from the psychical point of view, as well as about any disability or delicate situation which can entail considerable reception problems.
>
> Where your Authorities deem such removals as unavoidable, it is necessary to forward the relevant detailed medical certification with particular reference to the fitness to fly."

15. The response also noted that the transfer needed to be carried before 2 p.m. on a weekday and by not later than 18 November 2013. On 21 May 2013, the Defendant decided to return MS to Italy and directions were issued for the removal of MS to Italy on 6 June 2013.

16. On 30 May 2013, solicitors acting on behalf of MS sent the Defendant a pre-action protocol letter indicating that MS intended to challenge the removal directions indicating, amongst other things, that there was a risk that MS would commit suicide. They indicated that they had obtained funding and made arrangements for the obtaining of a psychiatric report.

17. A report from Dr Hopkins, a consultant psychiatrist, was submitted to the Defendant on 4 June 2013 (the copy included in the bundle for the hearing is dated 6 June 2013). On 5 June 2013, MS also issued a claim for judicial review. On 5 June 2013, the removal directions set for the 6 June 2013 were cancelled.

18. In his report, Dr Hopkins records his professional opinion that MS is suffering from a severe depressive disorder without psychotic symptoms. MS also experiences panic attacks which are secondary to his depression. He has suffered depression for approximately three years. It began during his journey from Afghanistan and become more severe in Italy. Dr Hopkins assesses MS as posing a serious risk of suicide which is likely to increase the more certain he feels that he is going to be returned to Italy. At paragraph 54 of his report, Dr Hopkins says that there is a significant risk of MS attempting suicide if he believes that he is going to be returned to Italy or during the process of removal. At paragraph 55 of his report, Dr Hopkins states that if MS is returned to Italy, and if he finds life there as unbearable as he found it previously, his mental health will deteriorate and the risk of suicide will remain.

19. In the event, permission to apply for judicial review was granted. MS has not been returned to Italy. A fresh decision, contained in a letter dated 3 March 2014 (but which must be a misprint for 3 March 2015) was served on MS on 6 March 2015. That is the decision under challenge at this stage of the judicial review proceedings. The letter should be should be read in its entirety. The letter begins by noting that MS has asserted that he should not be removed to Italy as that would result in a breach of Article 3 ECHR. It sets out MS's immigration history. It reviews relevant case law on Article 3 ECHR, including the Supreme Court decision in *EM (Eritrea)*. It refers to material relied upon by MS.

20. In relation to what MS can expect on arrival in Italy, the Defendant notes that as MS had not previously been accommodated in a SPRAR he would be eligible for a place at a SPRAR. As explained below, accommodation at a SPRAR is usually for 6 months but this can be extended to 12 months in the case of a vulnerable individual.

21. The decision considers the Claimant's past experiences in Italy and the report of Dr Hopkins. Paragraph 45 of the decision letter says this (this paragraph of the letter refers to "she" and "her", but these must be misprints for "he" and "his" as the letter, read as a whole, is clearly considering, and is directed at, the specific situation of MS):

> "Applying these factors to your client's case, it is considered that the risk in the UK of suicide on learning of removal can be managed by the medical authorities. You will be aware that, if detained, an interview will be conducted at the time of detention at which your client will be asked about her current medication. The IRC will ensure that the medical staff at the centre are made aware that your client is at risk of suicide and will be made aware of your client's current medication. Your client will be carefully monitored at the Immigration Removal Centre (IRC) until she leaves for her flight. In addition your client would not be removed unless Healthcare had confirmed that she is fit to fly. If not detained, there would also be an assessment of your client's needs prior to any flight taking place, including a "fit to fly" assessment. The risk en route to Italy can likewise be managed, by way of provision of appropriately trained and experienced medical escorts to the airport, at the airport and during the flight, who would intervene to prevent suicide attempts if necessary. Upon arrival in Italy the escorts would accompany her to the appropriate immigration or police desk."

22. In relation to the position on return in Italy, the letter says this:

> "48. … the Italian authorities have previously confirmed (and the ECrtHR has accepted) that when the transferring country reports that a person being returned has a particular vulnerability, appropriate medical measures are taken. Special attention is paid to persons with physical and psychological trauma, who are entrusted to the medical stations of the reception centres or at a local level to receive treatment and support in a professional and appropriate way. Against that background, the ECrtHR has stated that "there is no basis on which it can be assumed that the applicants will not be able to benefit from the available resources in Italy or that, if they encounter difficulties, the Italian authorities will not respond in an appropriate manner to any request for further assistance…" (*Daytebegova* – see above). The ECrtHR has adopted a similar approach in *Abubeker and Halimi.*
>
> 49. Should your client agree to it, copies of any medical reports, in relation to his medical conditions, can be passed to the Italian authorities prior to any transfer in order that they may make appropriate reception arrangements.
>
> 50. In all the circumstances, the claim that removal would breach Article 3 by reference to the risk that your client would commit or

> attempt suicide is considered to be clearly unfounded. His mental health condition is not a sufficiently compelling or compassionate circumstance to warrant departing from the normal policy and practice, in the context of return to a state in which his mental health needs can be met."

23. The conclusion of the Defendant is that:

> "54. In light of all the circumstances above, UK Visas and Immigration has concluded that the evidence and claims advanced by your client do not come close to rebutting the presumption that Italy will treat him in compliance with the requirements of the EU Charter, the Geneva Convention and the ECHR. Nor, having considered the appropriate case-law, evidence and the specific facts relied upon in your client's case, is it accepted that your client has established that his removal from the United Kingdom to Italy would result in a real risk that your client will suffer treatment there contrary to ECHR Article 3 as required under Soering. Therefore your client's claim under ECHR Article 3 is hereby refused.
>
> 55. In addition, your client's human rights claim is one to which paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimant's etc.) Act 2004 applies. This requires the Secretary of State to certify your client's human rights claim as being clearly unfounded unless she is satisfied that it is not clearly unfounded.
>
> 56. Having considered all the evidence available to her the Secretary of State hereby certifies under the provisions of Schedule 3, Part 2, paragraph 5(4) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 that your client's human rights claim is clearly unfounded.
>
> 57. As the Secretary of State has certified your client's human rights claim as clearly unfounded your client may not appeal until after he has left the United Kingdom."

24. Amended grounds of judicial review were filed on 13 March 2015 challenging the decision to certify the claim as clearly unfounded. For present purposes the material grounds are 1 and 2. In summary, they are that the Defendant acted unlawfully in certifying the claim as clearly unfounded as return would be incompatible with Article 3 ECHR (or Article 4 of the Charter of Fundamental Human Rights) having regard to the reception facilities available on return in Italy (ground 1) or having regard to the suffering that return would cause in the form of exacerbation of MS's mental health condition and the risk of self-harm or suicide.

NA

25. NA was born in Darfur in Sudan on 13 March 1979. She is a member of an ethnic minority group, the Zaghawa. In 2003, NA was beaten and burnt by militia from another ethnic group. She was raped by one of the militia. Following further violence against members of her ethnic group in about 2008, NA went to a refugee camp. In about 2010, NA ultimately managed to reach Libya. In April 2011, NA left Libya for

Italy arriving at Lampedusa on 30 April 2011. She was taken by police to a building and accommodated there with others, and provided with some food, for three to four days. She was fingerprinted. She was then taken to Manduria and she and others stayed in tents. She was then taken to Campobasso. She stayed in tents. Food was provided but on occasions there was little or no food provided. During that stay, on 11 May 2011, NA claim for asylum was registered.

26. After a few months, NA and approximately 120 others were taken to Cassa Calenga. NA and others stayed in a building in Cassa Calenga. The rooms were small and there were two persons to a room sharing a double bed. The food was better at this place than Campobasso, and they received two meals a day although the amount was very small.

27. On 6 October 2011, the Italian authorities accepted NA's claim for asylum. On 24 January 2012, NA was issued with a residence permit valid for five years.

28. In late February 2013, NA had to leave Cassa Calenga. For fifteen days, NA slept in a train station or outside a church. NA was raped twice during the time she was living on the streets. She was subjected to sexual assaults. She sought assistance from the police but they would not assist. Some men from Sudan bought NA and two other women with her train tickets to France. She travelled to Paris and then Calais and spent one night there. A Sudanese agent paid for her to travel by ferry to the United Kingdom. NA arrived in the UK on 22 March 2013 and claimed asylum on the same day.

29. There are psychiatric reports prepared by Dr Obuaya dated 12 February 2014 and 12 February 2015 and a further medical report prepared by Dr Cohen in June 2014. NA's medical records from her period in the United Kingdom and from the detention centre have also been included with the material provided to the court.

30. The medical information should be read in its entirety. In brief summary, NA suffers from diabetes (and did so while in Italy) and high blood pressure. NA also suffers from both post traumatic stress disorder and a severe depressive disorder without psychotic features. In 2014, Dr Obuaya noted that NA appeared to be convinced that she would be at great risk of further harm if returned to either Sudan or Italy. Regardless of whether that fear was objectively well-founded, Dr Obuaya was of the opinion that the threat of forced return to either country would be likely significantly to worsen her psychological symptoms. The report notes that previous experience of sexual trauma is a strong predictor of future victimisation and that applies to NA. The 2014 report notes that Dr Obuaya also considered that the risk of suicide or serious self-inflicted harm was likely to increase to a high level in certain circumstances, including during the removal process or when back in Italy. The 2014 report notes that the risk of suicidal behaviour could be minimised by regular monitoring of her mental state in primary and/or secondary care services as well as through the provision of regular psychotherapy and notes that the risk on return to Italy would be high enough to warrant assessing NA for an inpatient psychiatric admission. The 2015 report confirms that the opinions expressed in 2014 remain unchanged. There is also a report prepared under Rule 35 of the relevant detention centre rules where the medical practitioner had ticked a box to indicate that he had concerns that NA may have been the victim of torture.

31. NA in her witness statement dated 11 February 2015 states that she will not agree to her medical information being passed to the Italian authorities. The reason is that she does not believe that the Italian authorities wish to assist her. There is no suggestion that NA lacks capacity to take such a decision.

32. On 30 April 2013, the Defendant asked the Italian authorities to accept responsibility for NA. On 17 May 2013, the Italian authorities informed the Defendant that NA had, in fact, already been granted asylum in Italy. The Italians also informed the Defendant that, as NA had been granted refugee status, her case did not fall to be dealt with by the office responsible for processing the transfer of asylum seekers but would instead be processed within the framework of different arrangements.

33. On 20 May 2013, the Defendant certified NA's asylum claim as clearly unfounded on third country grounds as she could be returned to Italy. On 6 June 2013, the Defendant issued directions for the removal of NA to Italy. NA made a claim alleging that return to Italy would breach her human rights. On 10 June 2013, the Defendant certified that claim as clearly unfounded. Judicial review proceedings were commenced. Most recently, NA's claim that return to Italy would breach Article 3, and other articles, of the ECHR, was considered again in a decision contained in a letter dated 4 February 2015 and again by letter dated 6 March 2015. For present purposes it is sufficient to consider that last letter. The letter sets out the background and the case law on Article 3 ECHR. It considered the experiences of NA in Italy during her time there and notes that:

> "As to the alleged loss of her accommodation, this does not, of itself, demonstrate any arguable breach of Article 3 on the part of the Italian authorities in circumstances where your client had been granted refugee status, provided with accommodation for a lengthy period and had rights (including the right to work) that put her on a par with the general population."

34. The letter deals with NA's health conditions, noting, amongst other things, that the "Italian authorities will have a legal obligation to provide health care for [NA] on a par with that that provided to Italian citizens" and stated at paragraph 48 that:

> "Type 2 diabetes, high blood pressure and high cholesterol are all internationally recognised conditions for which treatment would be available in Italy if your client were to return there. Furthermore the medications cited in Dr Obuaya's report dated 14 February 2014 are all available in their generic forms in Italy. In considering Dr Obuaya's report relating to your client's mental illness it is noted that he had diagnosed your client as suffering from moderately severe depression and from PTSD. Again these are both internationally recognised conditions for which both medication and "talking therapies" are available in Italy and which will be available to your client on the same basis as they would be to an Italian citizen. Italy has a community-centred system for the treatment of mental illness although "in patient" care is also available when necessary. Treatment for mental illness can be accessed via a general practitioner or the patient can go directly to a Community Mental Health Centre for advice and/or treatment: a referral by a doctor is not necessary to access mental health services."

35. In relation to suicide, the letter considered that the risk in the UK or during removal could be managed by the medical authorities, noting the steps that could be taken. Paragraph 55 of the letter is in materially identical terms to paragraph 45 of the letter to MS which is set out at paragraph 21 above.

36. In relation to medical treatment in Italy, it notes that NA is currently refusing to give her consent to disclosing her medical records to the Italian authorities and expresses the hope that, on reflection, NA will decide to consent to the sharing of medical information. Paragraph 58 of the decision letter continues as follows:

> "Nevertheless, it is noted that even if your client refuses to give consent to share her medical records, she will be accompanied by a medical escort on her return to Italy. UK Visa & Immigration's Liaison Officer in Italy has confirmed that your client will be offered a medical assessment on arrival (and on arrival it would be noted that your client declines to consent to her medical records being shared). Your client would also be given sufficient medication to take with her to last a short period after arrival in Italy, to the extent appropriate."

37. The letter refers to the obligations of Member States of the European Union in relation to access to accommodation by BIPS (as NA has been granted refugee status, NA falls within the category of persons referred to as BIPs). The letter also notes that the Defendant has confirmed with the Italian authorities that NA had not previously stayed in a SPRAR. As explained below, NA would, therefore, be eligible to be accommodated for 6 months in a SPRAR centre, and if assessed as vulnerable, may stay a further 6 months. It noted that NA could also apply, if she chose, for accommodation provided by voluntary services or charities. It noted that Italy provides public housing for those in need at lower rents than the usual market rate and NA would be able to apply for such housing as would an Italian citizen.

38. For those reasons the Defendant considered that NA had not rebutted the presumption that Italy would treat her in accordance with the requirements of the EU Charter, the Geneva Convention on Refugees and the ECHR. Further, the Defendant considered that, on the specific facts of her case, NA had not established that her return to Italy would result in a real risk of treatment contrary to Article 3. The Defendant further certified the human rights claim as clearly unfounded.

39. Amended grounds of judicial review were filed on 13 March 2015 challenging the decision to certify the claim as clearly unfounded. For present purposes, and in brief summary, the material ground is ground 1. In summary, it is that the Defendant acted unlawfully in certifying the claim as clearly unfounded as return to Italy would be incompatible with Article 3 ECHR and Article 4 of the Charter of Fundamental Human Rights having regard to the reception facilities available on return in Italy and what is described as NA's extreme vulnerability and personal history. The ground then refers to a number of specific matters. The ground also states, in effect, that the risk of self-harm or suicide before, during and after removal could not be managed.

SG

40. SG is an Eritrean national. She was born on 15 January 1991. In 2010, she married. Her husband was performing compulsory military service. In May 2013 army officials

came to her home seeking to know the whereabouts of her husband who, they alleged, had deserted from the army. Shortly afterwards, SG left Eritrea fearing that she would be arrested by army personnel. She travelled to Libya. She was arrested there by Libyan military personnel. She was detained in a prison. SG was raped on numerous occasions by guards (approximately 10 times) during her imprisonment and subjected to sexual assaults. In August 2013, SG was released and in September 2013, SG left Libya by boat.

41. The Italian authorities intercepted the boat at sea and it was taken to Italy (probably Sicily). SG was fingerprinted. SG says that she did not claim asylum and information from the Italian authorities confirms that she is not recorded as having made a claim for asylum in Italy. SG, therefore, is in a different legal category from MS and NA. They are BIPs, that is persons who have been recognised as entitled to the benefit of protection (humanitarian protection and as a refugee, respectively) and their rights are governed by, amongst other instruments, Council Directive 2004/83/EC of 29 April 2004 ("the Qualification Directive"). SG's position is governed by, amongst other things, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ("the Reception Directive").

42. After arriving in Sicily, SG spent one night at a police station. She travelled by bus the next day to Catania. She spent two weeks there sleeping under a bridge and receiving one meal a day from a local church. She was raped on three different occasions by three different men.

43. From Catania, SG moved to Rome and lived with others in an abandoned building. She received food from charity organisations or non-governmental bodies. SG stayed in Rome for two weeks before travelling to France. She spent two months in France but did not claim asylum there either. She travelled inside a lorry to the United Kingdom.

44. According to the Home Office, SG was encountered by police on 23 December 2013 at Junction 8 of the M20 motorway at Maidstone in Kent. A number of persons, including SG, were seen exiting the rear of a lorry. SG was detained. She claimed asylum in the UK. As SG had arrived first in Italy, the United Kingdom authorities considered that Italy was responsible for assessing her asylum claim. On around 9 January 2014, the Italian authorities were formally requested to accept responsibility and they did so on 11 February 2014. The response stated that:

> "According to art 10.1, Italy accepts the transfer of the above named person. You are kindly requested to provide us with the relevant detailed transfer instructions, with at least a seven-day-notice.
>
> Moreover, you are kindly requested to inform the above mentioned person that she is obliged to report immediately to the "Ufficio di Polizia di Frontiera" (Border Police) at the airport of MILANO MALPENSA (VA) as soon as she arrives in Italy. The person concerned is to be referred to the ERF (European Refugee Fund) Project "STELLA".
>
> You are requested to inform us in advance (at least 10 days before the transfer) about any particular health situation, both from the physical and from the psychical point of view, as well as about any

> disability or delicate situation which can entail considerable reception problems. Where your Authorities deem such removals as unavoidable, it is necessary to forward the relevant detailed medical certification with particular reference to the fitness to fly."

45. The letter noted that the transfer needed to be carried out before 2 pm. on a weekday and by no later than 11 August 2014. On about 11 February 2014, the Defendant certified SG's asylum claim as clearly unfounded as she could be returned to a safe third country. In the event, SG brought a claim for judicial review on 27 February 2014 challenging the decision to return her to Italy. SG has not been removed to Italy.

46. There are three psychiatric reports on SG prepared by Dr Hajioff dated 4 June 2014, 19 June 2014 and 5 January 2015. The material provided to the court includes other medical information, including letters from Dr Chadwick dated 22 October 2014 and 27 January 2015, a psychological report from Dr Ferguson and medical notes from SG's GP. The medical reports and information should be read in their entirety. In brief summary, SG is suffering from chronic post traumatic stress disorder, and depression. Dr Hajioff considers that if SG were returned to Libya or Italy, where she was raped, her distress would be more marked and there would be a significant risk of suicide. Dr Hajioff also considered that if SG were sent back to places where she experienced trauma, there would probably be an exacerbation of her symptoms with a likelihood of increased depression and suicide. Dr Hajioff notes that SG tries to avoid being out after dark, is uneasy in crowds and is startled by loud noises. Sadly, Dr Chadwick has confirmed that, having been raped in Libya and Italy, SG has now been diagnosed as HIV positive. She is at present asymptomatic. The details are contained in his letters. SG has described her time in Italy in her first witness statement and her time in the United Kingdom in a supplementary witness statement dated 13 February 2015. She describes the life and friends that she has made in the United Kingdom. She describes the effect on her of hearing that an earlier tribunal case had been adjourned on the day of the hearing when the Defendant withdrew the decision under appeal.

47. The Defendant considered, and rejected, the claim that removal to Italy would result in a breach of Article 3 ECHR in a letter dated 27 October 2014 and certified the claim as clearly unfounded. The matter was considered again and a further decision letter dated 6 March 2015 was sent. That letter set out the immigration history and the case law relating to Article 3 ECHR. It recounts the experiences that SG underwent in the four weeks that she was in Italy, including being raped 3 times. At paragraph 39, the letter states:

> "39. In regard to what your client can expect upon arrival in Italy, the local authorities will be aware of your client's planned arrival from the United Kingdom and that your client has never previously claimed asylum in Italy. It is noted that your client has stated that she was not given an opportunity to claim asylum when she arrived by sea. Without accepting this, for the purposes of certification your client's case is taken at its highest, and we are satisfied that your client will have the opportunity to claim asylum on her return if she wishes. Therefore, once the authorities have completed their identity procedures and relevant checks, your client will be entered into a project for the reception and asylum claim procedure. Your client will be guided through the asylum process; completing a "C3" form which formalises the asylum claim in the Questura (local police

> station). From there the C3 will be passed to the relevant local Asylum Commission where your client will await her appointment for the asylum claim to be heard.
>
> 40. If your client chooses not the claim asylum upon arrival in Italy, it will be open to your client to present herself to any Questura across the country and ask for asylum. From there the process as set out above will begin. However, should your client choose to not claim asylum immediately upon arrival she may need to demonstrate that they have leave to stay in Italy otherwise they may be liable to be removed.
>
> 41. Depending on the particular circumstances of your client's case it is possible your client may be transferred to a Centre for Identification and Expulsion or CARA (Asylum Reception Centre) whilst a decision is reached on the asylum claim, unless your client can demonstrate she has some form of lodgings."

48. The letter reviewed the medical evidence. It stated that:

> "71. The fact that Dr Hajioff considers that your client is at risk of suicide if removed to Italy is taken very seriously by UK Visas and Immigration, as are her mental health conditions which in Dr Hajioff's opinion she is likely to need on-going treatment for. With regards to your client's HIV there is no letter from a doctor to say what ongoing treatment your client requires, but given the nature of this diagnosis, for the avoidance of doubt that does not mean that UK Visas & Immigration considers that she may not need further treatment. However your client's mental health and medical conditions are not a sufficiently compelling or compassionate circumstance to warrant departing from the normal policy and practice, in the context of return to a state in which her mental health and medical needs can be adequately met (see further below).
>
> 72. Should your client agree to it, copies of any medical reports, in relation to her mental health/medical conditions, can be passed to the Italian authorities prior to any transfer in order that they may make appropriate reception arrangements. Your client is due to be transferred to Italy in order that her asylum application may be fully considered by the Italian authorities. You will be aware from the letter of acceptance from Italy dated 11 February 2014 that the authorities there have specifically requested that they be informed of any particular health issues as well as disability or delicate issues which can entail specific reception conditions. The Italian authorities have also requested confirmation that your client is deemed to be fit to fly, by a medical practitioner."

49. In relation to the risk of suicide prior to and during removal, paragraph 76 of the letter is in materially similar terms to paragraph 45 of the letter sent to MS which is set out at paragraph 21 above.

50. For those reasons the Defendant considered that SG had not rebutted the presumption that Italy would treat her in accordance with the requirements of the EU Charter, the Geneva Convention on Refugees and the ECHR. Further, the Defendant considered

that, on the specific facts of her case, SG had not established that the return to Italy would result in a real risk of treatment contrary to Article 3. The Defendant further certified the human rights claim as clearly unfounded.

51. Amended grounds of judicial review were filed on 13 March 2015 challenging the decision to certify the claim as clearly unfounded. For present purposes, and in brief summary, the material ground is ground 1. In summary, it is that the Defendant acted unlawfully in certifying the claim as clearly unfounded as return would be incompatible with Article 3 ECHR and Article 4 of the Charter of Fundamental Human Rights having regard to the reception facilities available on return in Italy and what is described as her extreme vulnerability and personal history. The ground then refers to a number of specific matters. The ground also states, in effect, that the risk of self-harm or suicide before, during and after removal could not be managed.

The Arrangements for Asylum Seekers and BIPs in Italy.

The System Generally

52. The general system for dealing with asylum seekers and BIPs is described in the UNCHR Recommendations on Important Aspects of Refugee Protection in Italy 2012 and the UNCHR Recommendations on Important Aspects of Refugee Protection in Italy 2013 and the judgment of the European Court of Human Rights in *Hussein v Netherlands and Italy* application number 27725/10 at paragraph 46 and following.

53. In summary, Italy does not operate a centralised system for the provision of reception facilities for asylum seekers or integration projects for those granted refugee status or some other form of protection. The system that is operated includes the following:

(1) Reception Centres for Asylum-seekers ("CARAs"); these are facilities for those seeking asylum, operated by organisations following a tender procedure, in different locations in Italy. They are intended to provide accommodation for a period of up to 35 days, with persons moving to other types of accommodation, but many asylum-seekers remain for much longer periods whilst their application for asylum is considered;

(2) Reception Centres for Migrant ("CDAs); these are centres intended to provide emergency assistance to illegal immigrants;

(3) Centres known as "CPSAs";

(4) Facilities as part of the System for Protection for Asylum-seekers and Refugees ("SPRARs"); these comprise a network of projects run by local municipalities within Italy. They provide integration facilities for BIPs. In addition, a number of asylum seekers, particularly those identified as vulnerable or destitute, have also been accommodated within SPRARs (and, at various times, up to 30% of places have also been occupied by asylum-seekers). Accommodation is provided at a SPRAR for up to six months but, if a person is identified as vulnerable, accommodation may be provided for a further six months;

(5) Emergency accommodation, usually identified by regional or local municipalities within Italy;

(6) Other accommodation provided by non-governmental organisations or funded by the European Regional Fund ("ERF").

54. Italian legislation also provides that asylum-seekers are entitled to health care and mental health care. Special attention is paid to migrants with physical or psychological traumas and the victims of torture. BIPs have access to health care, welfare benefits and long term housing on the same terms as Italian nationals.

THE LEGAL FRAMEWORK

55. There are three material elements to the legal framework governing the return of these three Claimants to Italy:

(1) the provisions of EU law governing asylum seekers and those who are BIPs;

(2) the approach of the European Court of Human Rights to Article 3 ECHR;

(3) domestic law, including in particular the approach of the Supreme Court to Article 3 ECHR; and the domestic law governing the review of decisions certifying human rights claims as clearly unfounded.

EU LAW

56. The EU has established what is described as a Common European Asylum System governing claims for asylum and protection, comprising four legal instruments. First, Council Regulation (EC) No. 343/2003 of 18 February 2003 ("the Dublin Regulation") established the criteria and mechanisms for determining the Member State responsible for examining a claim for asylum. These provisions are, essentially, aimed at ensuring that one Member State is responsible for processing an asylum claim although there is a provision for a derogation from this principle whereby a different Member State than the responsible Member State may examine an asylum claim. Article 3(1) and (2) provides as follows:

> "3(1). Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
>
> "3(2). By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

57. The provisions of the Regulation then set out the criteria for determining the Member State responsible and for effecting a transfer of the claimant to that Member State. Italy is the responsible Member State for examining the asylum claims of the three

Claimants unless the United Kingdom exercises the power to derogate recognised by Article 3(2) of the Dublin Regulation.

The Reception Directive and Asylum Seekers

58. The Reception Directive lays down minimum standards for the reception of asylum seekers. "Material reception conditions" are defined in Article 2 as:

> "the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance"

59. Article 13 obliges Member States to provide material reception conditions to applicants for asylum which ensure "a standard of living adequate for the health of applicants and capable of ensuring their subsistence". Article 14 deals with housing for applicants for asylum and provides, so far as material:

> "**Modalities for material reception conditions**
>
> 1. Where housing is provided in kind, it should take one or a combination of the following forms:
>
> (a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;
>
> (b) accommodation centres which guarantee an adequate standard of living;
>
> (c) private houses, flats, hotels or other premises adapted for housing applicants.
>
> …
>
> 3. Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.
>
> …
>
> 8. Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when;
>
> - an initial assessment of the specific needs of the applicant is required.
>
> - material reception conditions, as provided for in this Article, are not available in a certain geopgraphical area,
>
> - housing capacities normally available are temporarily exhausted,
>
> - the asylum seeker is in detention or confined to border posts.
>
> These different conditions shall cover in any case basic needs."

60. Article 15 of the Reception Directive deals with health care and provides that applicants for asylum shall receive the necessary health care which shall include, at least, emergency care and essential treatment of illness. Article 15(2) of the Reception Directive provides that Member States "shall provide necessary medical or other assistance to applicants who have special needs".

61. Articles 17 and 20 of the Reception Directive provide that:

> "PROVISIONS FOR PERSONS WITH SPECIAL NEEDS
>
> *Article 17*
>
> General Principle
>
> 1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.
>
> 2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation.
>
> …
>
> "*Article 20*
>
> Victims of torture and violence
>
> Member states shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts."

62. The Reception Directive has been implemented into Italian law. A recast version of the Directive (Directive 2013/33/EU of the European Parliament and of the Council), with materially similar provisions, has been adopted and is due to be implemented by Member States by 20 July 2015.

The Qualification Directive

63. The Qualification Directive lays down minimum standards in relation to, amongst other things, the treatment of those granted refugee status or those whom the Directive describes as being entitled to subsidiary protection, that is those who would face a risk of serious harm if returned to their country of origin (essentially, BIPs).

64. Article 26 concerns the right to engage in employment. Article 28 deals with social welfare and provides:

> "1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has

> granted such statuses, the necessary social assistance, as provided to nationals of that Member State.
>
> "2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals."

65. Article 29(1) deals with health care and provides:

> "1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses."

66. Article 30 deals with access to accommodation and provides:

> "The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories."

67. Article 33 deals with access to integration facilities and provides:

> "1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.
>
> 2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes."

68. In summary, therefore, the provisions governing access to accommodation, employment, social welfare and health care are intended to ensure that BIPs are treated equally with Italian nationals. In one respect, access to integration programmes, there is a specific obligation to make provision for such facilities. Italy has implemented the Qualification Directive into national law. A recast Directive with materially similar provisions has been adopted and is to be implemented by Member States.

69. The case law of the Court of Justice of the European Union consistently states that the context of the Common European Asylum System means that it is possible to assume that all participating states observe fundamental rights including rights derived from the Geneva Convention. The Court of Justice has, however, recognised that the presumption is not absolute and is not irrebutable as it is not inconceivable that major operational problems may be experienced in a Member State so that there is a substantial risk of asylum seekers transferred to such a state being treated in a manner incompatible with their fundamental rights: see, e.g, paragraph 81 of joined cases C-411/10 and C-493/10 *R (NS) (Afghanistan)) v Secretary of State for the Home Department (Amnesty International Ltd. and others intervening)* [2013] Q.B. 102;

case C-411 *Bundesrepublik Deutschland v Puid* judgment 14 November 2013; and case C-394/12 *Abdullahi v Bundesasylamt* judgment 10 December 2013.

70. There have been suggestions that the approach of the Court of Justice is in some ways inconsistent with that of the European Court of Human Rights. The Supreme Court in *EM (Eritrea)* has considered and interpreted the case law of both courts. The Supreme Court has set out its understanding of the case law and the approach that is to be taken. I proceed on the basis that there is no difference in the test set out in the case law of either Court, and the correct approach is that set out by the Supreme Court in *EM (Eritrea)* and discussed below.

THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

71. Article 3 ECHR provides as follows:

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

72. The European Court of Human Rights has had to consider the operation of Article 3 in the context of the return of an asylum seeker or BIP by one Member State of the European Union to another on a number of occasions. The general legal principles governing the question of whether the return of an asylum seeker to another EU Member State would be breached by reason of the living conditions which the applicant would face on return can be extracted from paragraphs 66 to 72 of the judgment in *Hussein v Netherlands and Italy* application number 27725/10, read with paragraph 249 of the judgment in *MSS v Greece and Belgium* (2011) 57 EHRR 2 and can be summarised as follows:

(1) removal by one State to another may give rise to issues under Article 3 ECHR, and involve the responsibility of that State, where substantial grounds have been shown for believing that the individual concerned, if returned, faces a real risk of being subjected to treatment contrary to Article 3;
(2) the assessment of whether there are substantial grounds for believing that there is such a risk must be a rigorous one and involves the assessment of the conditions in the receiving country against the standards of the ECHR;
(3) the treatment in the receiving state must attain a minimum level of severity to fall within the scope of Article 3 ECHR, and is relative, having regard to all the circumstances including the duration, nature and context of the treatment, its physical or mental effects and, in appropriate cases, the sex, age and state of health of the victim;
(4) the assessment involves a court considering the material placed before it and the assessment should focus on the foreseeable consequences of return in the light of the general situation in the receiving state as well as the claimant's personal circumstances;
(5) the mere fact that return means that a person's economic, material or social condition would be significantly reduced would not, absent exceptional humanitarian circumstances, amount to a breach of Article 3;
(6) while Article 3 does not oblige States to provide everyone within their jurisdiction with a home and does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of

> living, the position in relation to EU Member States does not, however, fall to be analysed in that general way as an obligation to provide asylum-seekers with accommodation pursuant to the Reception Directive will have been implemented into the domestic law of the Member State and that Directive does lay down minimum standards (and, one could add, the obligations imposed by the Qualification Directive in relation to BIPs which will also have been implemented into the domestic law of Member States).

73. Against that background, and bearing in mind the claims in the present case, it is instructive to look at three groups of cases. First, there is a group of cases concerning Greece where it was contended, amongst other things, that the living conditions for asylum seekers in Greece were such that the return of asylum seekers to Greece would involve a breach of Article 3 both by the returning state and by Greece. The position was considered in *KRS v Greece* (2009) 48 EHRR SE8 and again in *MSS v Belgium and Greece* (2011) 52 EHRR 2. For present purposes, it is sufficient to consider *MSS.*

74. MSS was a national of Afghanistan who entered Greece. He was fingerprinted in Greece but did not claim asylum there. He was detained for a week and released. He spent months living in what was described by the Court as "a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live" added to which was the ever-present fear of being attacked and robbed and the lack of any likelihood of his situation improving. That occurred in a situation where there were fewer than 1,000 places in reception centres for asylum seekers but where tens of thousands needed to be accommodated. As the Court noted, an "adult male asylum seeker has virtually no chance of a place in a reception centre". Access to the job market was "so riddled with administrative obstacles" that this was not a realistic alternative. The Court considered that because of the inaction by the Greek authorities, MSS found himself living on the street for several months with no resources, no sanitary facilities and no means of providing for his essential needs. Greece had therefore violated his rights under Article 3 (see generally paragraphs 254 to 264 of the judgment in *MSS*).

75. The applicant had left Greece and had gone to Belgium. In April 2009, the UNHCR sent a letter to Belgium requesting that Belgium suspend transfers of asylum seekers to Greece. Nonetheless, Belgium transferred the applicant to Greece. In considering Belgium's responsibility under the ECHR, the European Court of Human Rights accepted that

> "in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community Directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with art. 3 of the Convention."

76. However, both in terms of the risk of return to Afghanistan and the living conditions described, the European Court of Human Rights found that Greece was in breach of Article 3 ECHR. Further, the Court considered that the general situation was known to Belgium. There were a number of reports dealing with the position in Greece and the Court placed critical importance on the letter sent by the UNCHR unequivocally requesting Belgium to suspend transfers to Greece. In those circumstances, Belgium was responsible for a violation of Article 3 by returning the applicant to Greece both

in terms of returning MSS to Greece knowing that there was a risk of him being returned to Afghanistan without his asylum application being considered and because of the living conditions to which he would be subjected in Greece.

77. The second group of cases concern returns to Italy where the European Court of Human Rights found the claim was manifestly unfounded. The two most relevant cases are *Hussein v Netherlands and Italy* application number 27725/2012, and *Daybetgova v Austra* (2013) 57 EHRR SE12. In terms of the facts in *Hussein*, the applicants were a mother and two children. Mrs Hussein was a national of Somalia who had been raped there. She had gone to Italy and been fingerprinted and registered as an asylum seeker in Italy. She was provided with a temporary residence permit valid for three months. She had subsequently left Italy and gone to the Netherlands. Having set out the relevant legal principles summarised above, the Court found her claim that return to Italy would involve a breach by the Netherlands of its obligations under Article 3 ECHR to be manifestly unfounded. The Court said this:

> "72. Now turning to the facts of the case at hand, the Court observes that, unlike the situation of the applicant in the case of *M.S.S. v. Belgium and Greece* …. the applicant in the present case – three days after having arrived in Italy and one day before filing an application for international protection – was provided with reception facilities for asylum seekers in the CARA Massa Carrara reception centre, as put into place by the Italian authorities for asylum seekers pursuant to their international and domestic legal obligations and that, as from 23 October 2008, the applicant was allowed to work in Italy….
>
> "73. The Court further notes that on 28 January 2009, about five months after her arrival in Italy, the applicant's request for international protection was accepted. She was granted a residence permit for subsidiary protection under the terms of Article 15c of the Qualification Directive with a validity of three years, i.e. until 31 January 2012, which entitled her to a travel document for aliens, to work and to benefit from the general schemes for social assistance, health care, social housing and education under Italian domestic law in the same manner as the general population of Italy. The Court lastly notes that the applicant remained in the CARA Massa Carrara reception centre until 11 April 2009 when she left this centre and apparently made her way to the Netherlands where she applied for asylum on 18 May 2009 …..
>
> "74. Even assuming that, on 11 April 2009, the applicant had been compelled to vacate the CARA Massa Carrara reception centre where she had been staying since 25 August 2008 in order to make place for newly arrived asylum seekers needing accommodation, the Court notes that the applicant was pregnant at the material time whereas, pursuant to Article 8 of the Legislative Decree no. 140/2005, pregnant women are entitled to a priority placement in a facility for accepted refugees run under the SPRAR scheme ….. However, there is no indication in the case file that the applicant, who was provided with medical care and assistance in the CARA reception centre when she was pregnant with her son ….. ever sought assistance in finding work and/or alternative accommodation either within or outside the scope of special public or private social assistance schemes established in Italy for vulnerable persons in order to avoid the risk of destitution and/or homelessness.
>
> "75. In these circumstances ….. the Court does not find it established that the applicant's treatment in Italy, either as an asylum seeker or as an alien having been accepted as a person in need of international protection, can be regarded as having attained the minimum level of severity required for treatment to fall within the scope of Article 3.

> "76. Noting that the validity of the applicant's residence permit has expired in the meantime, the Court will now consider the question whether the situation in which the applicant – if transferred to Italy – is likely to find herself, can be regarded as incompatible with Article 3 taking into account her situation as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see *M.S.S. v. Belgium and Greece* …..).
>
> "77. The Court notes that the Netherlands authorities will give prior notice to their Italian counterparts of the transfer of the applicant and her children, thus allowing the Italian authorities to prepare for their arrival. The Court further notes that, after her arrival and after having reported to the border police, the applicant will be required to start the procedure to renew her residence permit, which in all likelihood will require her and her children to travel to the Agrigento police headquarters, the expenses of which will be covered by the Italian Ministry of Interior. The Court lastly notes that the applicant, as a single mother of two small children, remains eligible for special consideration – where it concerns admission to reception facilities for asylum seekers – as a vulnerable person within the meaning of article 8 of Legislative Decree no. 140/2005 …..
>
> "78. Taking into account the reports drawn up by both governmental and non-governmental institutions and organisations on the reception schemes for asylum seekers in Italy, the Court considers that, while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece* ….. The reports drawn up by the UNHCR and the Commissioner for Human Rights refer to recent improvements intended to remedy some of the failings and all reports are unanimous in depicting a detailed structure of facilities and care to provide for the needs of asylum seekers …... The Court would also note the manner in which the applicant was treated upon her arrival in Italy in August 2008, in particular that her request for protection was processed within a matter of months and accommodation was made available to the applicant along with access to health care and other facilities. Against this background, the Court considers that the applicant has not shown that her future prospects if returned to Italy, whether taken from a material, physical or psychological perspective, disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3 …..There is no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy or that, if she encountered difficulties, the Italian authorities would not respond in an appropriate manner to any request for further assistance.
>
> "79. It follows that the applicant's complaints under Article 3 brought against the Netherlands and Italy are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4."

78. In paragraph 78 in the judgment, the Court considered two bases upon which it could be said that there was a breach of Article 3 ECHR. First, the opening 9 lines or so of that paragraph considers whether there has been a systematic failure to provide support or facilities catering for asylum seekers. I read the reference to such failures in the sense of substantial operational failures of the sort identified in *MSS v Greece*. In other words, the overall situation in Italy was not like the overall situation in Greece. Secondly, and in any event, the Court considered the applicant's specific factual circumstances against the overall situation, as appears from the second part of

paragraph 78 and again found no basis for concluding that there were substantial grounds for believing that return would involve a real risk of a breach of Article 3 ECHR.

79. A similar situation arose in *Daybetgova v Austria*. The case involved applicants who were a mother and a daughter. They were national nationals of Russia and came from Dagestan. They arrived in Italy. They subsequently travelled to Austria which sought to return them to Italy. The second applicant, in particular, was very ill, uncommunicative and suffered from headaches. During her stay in Austria, she was admitted to the secure ward of a psychiatric hospital. That admission was approved by the Austrian court on the basis of an expert diagnosis of acute post-traumatic stress disorder with serious suicidal tendencies and specific thoughts of putting those tendencies into practice (a fuller description of her circumstances are set out in paragraphs 18 to 22 of the judgment in the case).

80. The Court again considered that the information available on the situation in Italy and considered that the situation was not such as existed in the case of *MSS v Belgium* and concluded at paragraph 66 of the judgment that:

> "Therefore, the Court establishes that there is no indication in the applicants' submissions or deriving from the general information available that the applicants would not be able to access sufficiently thorough asylum proceedings upon their arrival in Italy or that the reception schemes failed in such a way to provide support or facilities for asylum seekers as members of a particularly vulnerable group of people ….."

81. The Court then turned to the specific circumstances of the applicant and said the following:

> "67. Turning to the undoubtedly severe psychological health issues of the second applicant, the Court notes that a particularly well planned reception might be necessary upon the second applicant's return to Italy, including access to adequate housing and medical and psychological care.
>
> "68. The Court observes that in general the Italian reception system provides access to health care, including psychological care, for all aliens, whether they have leave to remain or not (see paragraphs 37 and 38 above). The Italian Government's observations also indicate that the Italian authorities are aware of the second applicant's considerable mental health problems. The Court therefore concludes that the Italian authorities consider that the applicants, as a group of vulnerable persons within the meaning of Article 8 of Legislative Decree no. 140/2005 (see paragraph 37 above), will be eligible for special consideration as regards access to housing and psychological and medical care. Furthermore, the Italian authorities emphasised in their comments on the report of the Council of Europe Commissioner for Human Rights that, when the transferring country reported a particular vulnerability of a Dublin-returner, appropriate medical measures were taken. Special attention was paid to aliens with physical and psychological trauma, who were entrusted to the medical stations of the reception centres or at local level to receive treatment and support in a professional and appropriate way (ibid.).
>
> "69. The Court thus considers that the Italian authorities are already aware of the applicants' particular vulnerability and need for special assistance. It further trusts that the Austrian authorities will, in the event the applicants are removed to Italy, provide the Italian authorities with all the most recent medical and psychological documentation available to them, to ensure that the applicants are adequately and appropriately received

> there. Under these circumstances, the Court finds that there is no basis on which it can be assumed that the applicants will not be able to benefit from the available resources in Italy or that, if they encounter difficulties, the Italian authorities will not respond in an appropriate manner to any request for further assistance (see for comparison *Mohammed Hussein* …..”

82. The claim of a breach of Article 3 was held to be manifestly unfounded. Finally, the last in the three groups of cases is the judgment in *Tarakhel v Switzerland*. There the Court was dealing with a family of two parents and six young children ranging from 2 to 15 years old at the time of the judgment. They had arrived in Italy from Iran. They had been fingerprinted but had not claimed asylum. They left Italy and went to Austria and then travelled on to Switzerland. The Court recapitulated the relevant principles at paragraphs 83 to 98. The Court emphasised at paragraph 99 that:

> “99. With more specific reference to minors, the Court has established that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant ….. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents …..”

83. The Court indicated that it would follow the approach in *MSS v Greece* and would consider the applicants’ individual situation in the light of the overall situation prevailing at the relevant time. It noted at paragraph 103 that the presumption that a state participating in the Common European Asylum System will respect fundamental rights was not irrebutable. That presumption could be rebutted if there were substantial grounds for believing that a person whose return is being ordered would face a real risk of treatment contrary to Article 3 ECHR in the receiving country. To that end, the Court had to ascertain “whether in view of the overall situation with regard to the arrangements for asylum seekers in Italy and the applicants’ specific situation” substantial grounds for believing that there was a real risk had been shown (paragraph 105 of the judgment).

84. The Court then considered the overall situation, including the figures of capacity and demand as at the material time. The Italian authorities had informed the Court that the applicants, that is the family of two adults and six children, would be accommodated in a SPRAR. The Court noted that there was a glaring discrepancy between the number of asylum claims, 14,184, received by 15 June 2013 and the number of SPAR places available of 9,630. Having considered the overall situation in Italy, the Court said this:

> “114. In view of the foregoing, the current situation in Italy can in no way be compared to the situation in Greece at the time of the M.S.S. judgment, cited above, where the Court noted in particular that there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale. Hence, the approach in the present case cannot be the same as in M.S.S.

> "115. While the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raise serious doubts as to the current capacities of the system. Accordingly, in the Court's view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded."

85. The Court then considered the specific situation of the applicants and found that return would involve a breach of Article 3 on the following basis:

> "118. The Court reiterates that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim …It further reiterates that, as a "particularly underprivileged and vulnerable" population group, asylum seekers require "special protection" under that provision (see M.S.S …..).
>
> "119. This requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents …. Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences" … Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.
>
> "120. In the present case, as the Court has already observed … in view of the current situation as regards the reception system in Italy, and although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.
>
> "121. The Court notes that, according to the Italian Government, families with children are regarded as a particularly vulnerable category and are normally taken charge of within the SPRAR network. This system apparently guarantees them accommodation, food, health care, Italian classes, referral to social services, legal advice, vocational training, apprenticeships and help in finding their own accommodation … However, in their written and oral observations the Italian Government did not provide any further details on the specific conditions in which the authorities would take charge of the applicants.
>
> It is true that at the hearing of 12 February 2014 the Swiss Government stated that the FMO had been informed by the Italian authorities that, if the applicants were returned to Italy, they would be accommodated in Bologna in one of the facilities funded by the ERF ….. Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation

> of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.
>
> "122. It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together."

86. Viewing the matter in relation to the overall situation alone, the position in relation to Italy (on the figures then available) did not establish a situation similar to Greece in M*SS*. The structure and overall position was not of itself a bar "to all removals": see paragraph 115. On the particular facts of that case, which involved a family of 8 with six young children in circumstances where the Italian authorities had accepted that families were occasionally separated albeit only in a few cases and for short periods but not systematically (see paragraph 114), and where, on the figures, there was at the material time a glaring discrepancy between the demand for places in the type of facility to which the applicants were to be returned and the number of places available, the Court considered that specific assurances were needed to ensure that the applicants, including the children, would be taken care of in a way suitable to the age of the children and ensured that the family were kept together in order to avoid a real risk of a breach of Article 3.

THE APPROACH IN THE DOMESTIC COURTS

87. The general approach to Article 3 in this context has now been the subject of consideration by the Supreme Court in *EM (Eritrea).* Lord Kerr, with whom the other members of the court agreed, set out the position as follows.

88. First, the legal test for determining whether a return of an asylum seeker or BIP to another country would involve a breach by the returning country of Article 3 is whether substantial grounds have been shown for believing that the person concerned faces a real risk in the country to which he or she is to be removed of being subjected to treatment contrary to Article 3 ECHR: see paragraphs 3 and 58 of the judgment in *EM (Eritrea).*

89. Secondly, in the context of a situation where the Defendant has certified such a claim to be clearly unfounded, such a certificate can only be issued if, on any legitimate view, the assertion that a return to that country would constitute a violation of the person's rights under Article 3 ECHR is clearly unfounded: see paragraph 6 of the judgment. If, therefore, on one legitimate view, a tribunal could properly consider that there were substantial grounds for believing that there was a real risk of the person facing treatment contrary to Article 3, the Defendant could not lawfully certify that the claim was clearly unfounded and the certificate would be quashed.

90. In terms of conducting the exercise of determining whether the test was satisfied, and whether a certificate should be quashed, it was appropriate for a court to proceed in the following way:

(1) there is a significant evidential presumption that a Member State of the EU will comply with its obligations under EU law and international law. It is against the

backdrop of that presumption that any claim that there are substantial grounds for believing that return would involve a real risk of a breach of Article 3 falls to be addressed: paragraph 64 of the judgment;

(2) that presumption will be rebutted where it was shown that there were failures to comply on a widespread and substantial scale, that is, the presumption would generally be rebutted if the applicant produced sufficient evidence to show that there were substantial operational problems in the receiving state: see paragraphs 66 and 67 of the judgment;

(3) furthermore, and separately, the presumption would be rebutted if it could be shown on the facts of a particular case, that there were substantial grounds for believing that there was a real risk that the individual applicant would face treatment contrary to Article 3 if returned. Although one starts with a significant evidential presumption, the court must examine the evidence to determine in each individual case whether there are substantial grounds for believing that the individual faces a real risk of treatment contrary to Article 3 if returned. That involves a rigorous assessment of the situation in the receiving country, examining the foreseeable consequences of sending a claimant to the receiving country and the claimant's personal circumstances, including his or her previous experience there; an assessment of the practical realities lie at the heart of that inquiry: see paragraphs 68 to 70 of the judgment;

(4) particular regard should be paid to the facts reported by the UNCHR and the value judgments to which the UNCHR has arrived; however, they form part of the overall examination and, by implication, other reports and material may also need to be considered: see paragraphs 71 and 72 and 74.

91. For completeness, in my judgment, the approach set out by Lord Kerr in *EM (Eritrea)* does not differ in substance from that adopted by the European Court of Human Rights in its case law, including the decision in *Tarakhel v Switzerland*. In both cases, the legal test is that identified in *Soering v United Kingdom* (1989) 11 EHRR 439. As is to be expected, different courts express themselves in different language, reflecting their differing judicial traditions. But in substance, the approach adopted by the Supreme Court involved recognising that Member States can be presumed to be complying with their obligations under EU law and international law. That can be rebutted in one of two ways. First, it may be rebutted in the case of all asylum seekers if there were sufficient evidence of substantial operational difficulties in the receiving state. Secondly, while the presumption would be the backcloth for considering individual cases, there may be situations where, on the individual facts of the case viewed against the overall situation (even if that situation did not rebut the presumption in all cases), there were still substantial grounds for believing that there would be a real risk on return. The European Court of Human Rights has taken a similar approach. In *MSS v Greece*, for example, it effectively considered that the circumstances were such that the assumption that an EU Member State was complying with its obligation was rebutted. In *Tarakhel*, the overall situation did not lead to the conclusion that all removals to Italy needed to be stopped. Nevertheless, the situation of the individual applicants' needed to be assessed against the overall situation to determine if, on the facts, there was such a breach.

The Domestic Law Governing the Certification of Human Rights Claims

92. The Defendant has decided that the return of each of these three Claimants to Italy would not involve a breach of Article 3 ECHR. There is a right of appeal against such a decision pursuant to section 82(1)(b) Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Section 92(1) and (3) of the 2002 Act provide that:

> **"92 Place from which an appeal may be brought or continued**
> (1) This section applies to determine the place from which an appeal under section 82(1) may be brought or continued.
> …
> (3) In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if—
>
> (a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or setion 94B (certification of human rights claims made by persons liable to deportation), or
>
> (b) paragraph 5(3)(b) or (4), 10(4), 15(4) or 19(c) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
> (removal of asylum seeker to safe third country) applies.
>
> Otherwise, the appeal must be brought from within the United Kingdom."

93. The Defendant has certified the decision under paragraph 5(4) of Schedule of the 2004 Act. That paragraph provides, so far as material, that:

> "5(1) This paragraph applies where the Secretary of State certifies that–
> (a) it is proposed to remove a person to a State to which this Part applies, and
> (b) in the Secretary of State's opinion the person is not a national or citizen of the State.
> …..
> (4) The person may not bring an immigration appeal from within the United Kingdom in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is not clearly unfounded".

94. Paragraph 5 applies to Member States of the European Union, including Italy, (and also to Switzerland): see paragraph 2 of Part 2 of Schedule 3 to the 2004 Act. As a result, unless quashed, the Defendant's certification that each of the Claimant's claims that removal to Italy involves a breach of Article 3 because of the living conditions to which they will be subjected on return to Italy is clearly unfounded means that they cannot appeal from within the United Kingdom. They would have to return to Italy and appeal from there. The full position is explained by Elisabeth Laing J. in paragraphs 153 to 158 of the judgment in *Tabrizagh*.

95. The challenge in the present case is to the decision to certify the human rights claims as clearly unfounded. A claim is clearly unfounded if it is "so clearly without substance that the appeal would be bound to fail": see *R v Secretary of State for the Home Department ex p. Thangarasa and Yogathas* [2003] 1 A.C. 920 at paragraph 34. As the Court of Appeal observed at paragraph 57 of its judgment in *R (L) v*

Secretary of State for the Home Department [2004] 1 W.L.R. 1230 dealing with a similarly worded provision:

> "58….. It requires the Home Secretary to certify all claims from the listed states "unless satisfied that the claim is not clearly unfounded". It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision—maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.
>
> "58 Assuming that decision—makers—who are ordinarily at the level of executive officers—are sensible individuals but not trained logicians, there is no intelligible way of applying section 115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision—maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded."

96. In terms of the role of the court, as the Supreme Court observed, the exercise is, strictly, one of judicial review of the decision of the Defendant to certify a claim as unfounded. In substance, however, the court will necessarily have to consider if the human rights claim is clearly unfounded, performing the same exercise as that carried out by the decision-maker. As Lord Philips expressed it in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 W.L.R. 348 at paragraphs 21 and 23:

> "21……Must the court substitute its own view of whether the claim is clearly unfounded, or has no prospect of success, for that of the Secretary of State or is the approach the now familiar one of judicial review that involves the anxious scrutiny that is required where human rights are in issue? ZT is seeking judicial review and thus I would accept that, as a matter of principle, the latter approach is correct. I consider, however, that in a case such as this, either approach involves the same mental process.
>
> …..
>
> "23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed or not then it is not clearly unfounded. If follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that the a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational".

97. Consequently, if the court in the present case considers that, on one legitimate view, a tribunal properly directing itself could conclude that there were substantial grounds for believing that the return of any of the Claimants to Italy would involve a real risk of a breach of Article 3, the claim should not have been certified as clearly unfounded and the certificate should be quashed.

THE ISSUES

98. Against that background, the issues that arise in this case, as they emerged from the pleadings, the skeleton arguments and the oral submissions can, essentially be stated as follows:

(1) on one legitimate view, could a tribunal conclude that the evidential presumption that Italy will comply with its obligations under EU law and Article 3 ECHR had been rebutted in relation to:

(a) all asylum-seekers and/ or all BIPs; or at least

(b) in relation to vulnerable asylum-seekers and/or BIPs?

(2) considering the individual facts of each Claimant against the overall situation in Italy, could a tribunal, on one legitimate view, conclude that any of the three Claimants had shown that there were substantial grounds for believing that that individual faced a real risk of being exposed to treatment contrary to Article 3 ECHR if returned to Italy?

(3) further, and in particular, could a tribunal conclude that, on one legitimate view there are substantial grounds for believing that there is a real risk of a breach of Article 3 arising out of the fact that the Claimants' mental health problems and suicidal ideation could not be properly managed (a) prior to removal (b) during removal to Italy or (c) thereafter in Italy?

THE FIRST ISSUE: THE EVIDENTIAL PRESUMPTION

99. The Claimants presented their cases on the following basis. All the Claimants have significant vulnerabilities. All three have severe mental health problems. Two, NA and SG, are victims of repeated rapes (some of the rapes in each case occurring whilst they were in Italy). In the light of the *Tarakhel* judgment, the Claimants submit that, on one legitimate view, a First-tier Tribunal hearing an appeal against the Defendant's rejection of their human rights claim could conclude that (1) there was a glaring discrepancy between the number of asylum applications and the places available at relevant facilities in Italy (2) the three Claimants would be among a significant number of asylum seekers who may be left without accommodation or accommodated in overcrowded facilities or in unsalubrious conditions and (3) the three Claimants all have mental health problems and suicidal ideation which could not be properly managed.

100. It is clear from the oral submissions that those submissions could be analysed in two ways. On one analysis, the Claimants are in fact saying that the significant evidential presumption that Italy would comply with its obligations under Article 3 ECHR in relation to all, or at least all vulnerable, asylum seekers and BIPs has now been rebutted in the light of the current statistical information and reports on conditions. Mr Husain confirmed in oral submissions that that was part of the Claimants' case. Secondly, and alternatively, even if that situation were not reached, the Claimants contended that those considerations provide the overall situation against which the situation of the individual Claimants was to be assessed and, on the facts of their particular cases, they had demonstrated substantial grounds for believing there would be a real risk of a breach of Article 3 ECHR if they were returned to Italy. In addition, in my judgment, even if the Claimants' cases were advanced solely on the second

basis, namely that there were substantial grounds for believing that that there was a real risk based on the Claimants' individual position considered against the overall context, it would still be necessary to consider whether the evidential presumption had been rebutted. That is because, as the Supreme Court has observed, it is the backcloth against which any claim that there is a real risk falls to be addressed.

101. There are three principal features to be considered in assessing whether the evidential presumption has been rebutted: the case law, the statistics and the other reports and material relied upon.

The Case Law

102. First, any tribunal would need to have in mind the domestic case law and the case law of the European Court of Human Rights. Elisabeth Laing J. considered the statistical picture, and the evidence available, as at May 2014 in *Tabrizagh*. The judge concluded that, on a detailed consideration of the evidence available the evidential presumption that Italy would comply with its obligations if asylum seekers and BIPs were returned to Italy had not been rebutted.

103. Secondly, two decisions of the European Court of Human Rights have expressly considered the position in relation to the return to Italy of vulnerable adults with severe mental health conditions, those judgments being delivered in 2013. The Court found that the claims in those cases were manifestly inadmissible. That must implicitly include a finding both that the situation in Italy was not such that, generally, the return of asylum-seekers to Italy would be incompatible with Article 3 ECHR and also that the return of the particular individuals in those cases, given their situations, would not be a breach: see *Hussein v Netherlands and Italy* application no. 27725/10 and *Daytbegova v Austria* (2013) 57 EHRR SE12.

104. Thirdly, the European Court of Human Rights in *Tarakhel* did not consider that the situation in Italy generally was comparable to Greece. At paragraph 115 of its judgment, the Court stated expressly that "the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers". That is consistent with a finding that the evidential presumption has not, generally, been rebutted.

105. Against that background, there would need to be some proper evidential basis before a tribunal could legitimately conclude that the situation in Italy had changed so that the evidential presumption had been rebutted. The Claimants rely upon the most recent statistical evidence and reports and evidential material.

The Statistics - The Numbers Seeking, and being provided with, Facilities

106. Mr Husain for the Claimants contends that there is a glaring discrepancy between the number of places available for asylum-seekers and BIPs and the demand for such places. Different methods of calculating the shortfall were advanced on behalf of the Claimants. For asylum seekers, these methods producing a shortfall of a minimum of some 39,000 places and a maximum of over 60,000. For BIPs, the shortfall was said to be either 24,325 or (the Claimants' preferred method) 32,769. The alleged shortfall for asylum seekers and BIPs, added together, ranged from over 60,000 places to well

in excess of 90,000 places. Ms Giovanetti, for the Defendant, contends that there is, in fact, no such discrepancy.

107. The position in terms of number of persons being accommodated is, in my judgment, best judged by reference to the official statistics produced by the Italian Ministry of Interior. Those figures demonstrate the following. As at 31 December 2014, 66,066 persons were being accommodated. As at 28 February 2015, a total of 67,128 immigrants were being accommodated in various forms of accommodation within Italy, namely:

(1) SPRARs – 20,596;
(2) CARAs/CDAs and CPSAs – 9,504; and
(3) Temporary structures – 37,028.

108. In terms of the number of persons seeking assistance, the precise figures cannot be ascertained. Dealing first with the position as at December 2104, the most recent Eurostat data shows that 42,630 asylum-seekers had an asylum claim registered and awaiting a decision as at November 2014. The official figures show 21,861 persons had received a favourable decision on their asylum claim during the 12 months of 2014 (either being granted refugee status or some other form of international protection). They, too, would generally need to be provided with facilities at a SPRAR for up to six months or, if assessed as vulnerable, for up to 12 months. If those figures were combined, that would yield a total of 64,491 persons.

109. That figure, however, could not simply be measured against the number of persons being accommodated as at the end of December 2014 (the figure of 66,066). First, a further 6,313 persons arrived in Italy during December 2014. It would not, however, be right simply to add the 6,313 to the total number of persons seeking asylum and who had received a favourable decision during the course of 2014. The precise number of persons arriving in Italy who would claim asylum and, if they did so, would seek accommodation, cannot be determined. It is clear that a large proportion of migrants arriving in Italy do not claim asylum (or leave Italy). By way of example, the figures indicate that almost 170,000 migrants arrived in Italy during 2014. The official figures, however, show, 42,630 asylum claims pending at the end of November 2014. Neither the number of decisions taken on asylum claims (nor the number arriving in Italy in December 2014) could possibly account for the difference in numbers. Furthermore, those who claim asylum may not seek accommodation as they may seek to live with family already established in Italy, or within their own ethnic communities or in organisations outside the network described above. Hence, it is unlikely to be correct to assume that the 6,313 migrants who arrived in December 2014 all claimed asylum and sought accommodation. Secondly, BIPs are provided with accommodation for six months (or 12 months if vulnerable). The figure of 21,861 reflects the number of persons who received a favourable decision over the 12 month period of 2014. By way of example, those who received a decision prior to the end of June 2014 and who were not vulnerable may not, in fact be accommodated in December 2104. Further, there is the prospect of BIPs obtaining other forms of accommodation. The court has not been provided with a figure for the number of persons out of those of the 21,861 for whom a favourable decision was reached during the 12 months of 2014 who continued to be provided with a place in a SPRAR as at the end of December 2014.

110. For all those reasons, it would not be right to take the figure of 42,630 claims pending as at the end of November 2014, add to that the figure of 6,631 arrivals in December 2014 and then add the figure of 21,861 favourable decisions reached during 2014 to give a total figure of 70,80. It would not therefore be right to claim that the number seeking asylum or being eligible for assistance is 70,080 and, as that exceeds the number of persons accommodated of 66,066, to treat the statistics as evidencing a shortfall. That would be a false figure as it fails to take account of those arriving who do not seek asylum (or if they do, do not seek accommodation) or those who would have ceased to be accommodated at a SPRAR. Such an approach would, therefore, leave out of account two significant components: arrivals in Italy during December 2014 who did not claim asylum or accommodation and those ceasing to occupy places during 2014.

111. Dealing with the position as at the end of February 2015, 67,128 persons were being accommodated. The number of pending claims at the end of November 2014 was 42,630. It is also right to note that the figures provided by the Italian authorities show that 6,313 persons arrived in Italy in December 2104, 2,171 in January 2015 and 3,335 in February 2105. That would give a further figure of 11,919 persons arriving during those three months. But again, it would not be right simply to add that to the total of claims for asylum pending of 42,630, and the number of favourable decisions, 21,861 during the course of 2014, to give a total figure of 75,410 – and then to argue that that exceeds the number of persons accommodated as at end of February 2015. That again would include those among the 11,919 arrivals persons who did not seek asylum or accommodation. It would include those non-vulnerable people who received a favourable decision during the course of 2014 but who not be eligible for accommodation as at February 2015 as they had already had 6 months accommodation (i.e. those receiving a decision prior to the end of September 2014).

112. Precise comparison of the number of asylum seekers and BIPS being eligible for a place at a facility at any particular given point in time is, therefore, not possible. For all those reasons, statistical exercises establishing precisely the capacity against demand are likely to prove futile as the position is fluid, and a number of key numbers are missing. Similar conclusions were reached on the figures before them by Kenneth Parker J. (at first instance in *R (Mehanye) v Secretary of State for the Home Department* [2011] EWHC 2012 (Admin) at para. 28) and Elisabeth Laing J. (in *Tabrizagh* at paragraph 75).

113. It is clear, however, that the various shortfalls identified by the Claimants are not accurate. Their analysis depends upon a number of assumptions which, in my judgment, no tribunal could legitimately regard as being justified. In relation to asylum seekers, for example, the Claimants omit the accommodation provided in temporary structures. They contend that the European Court of Human Rights adopted that approach in their judgment in *Tarakhel*. First, the Court did not take that approach. It knew the number of places available at temporary structures and at SPRARs. In relation to the particular claimants in that case, who comprised two adults and six young children, the Court noted that they would, on the information before them normally be accommodated in a SPRAR (paragraph 121 of the judgment). Unsurprisingly, they considered the position in relation to SPRARs (see paragraph 109 of the judgment). The Court was not ruling that temporary accommodation could not be considered. Secondly, such accommodation is

acceptable for asylum-seekers in certain circumstances under Article 14 the Reception Directive (see out at paragraph 49 above). It is by reason of EU law that positive obligations to provide facilities have been recognised by the Court. It would not be appropriate, therefore, to leave this accommodation out of account. The Claimants also assert that significant numbers of migrants who did not claim asylum were accommodated in the temporary structures but, in my judgment, there is no reliable evidence before the court that supports that assertion or, in particular, which would assist in determining the figures.

114. Furthermore, in relation to certain models proposed by the Claimants there are other mistaken assumptions. By way of example only, one model took the number of claims determined in 2014 (36,330) and the claims outstanding in November 2014 (42,630), to produce a figure for demand of 78,960. Yet, 13,327 of the decisions were refusals and those persons were not eligible for the provision of facilities. On that basis, the demand was 65,533. In relation to BIPs, the Claimants take, as one element of the calculation, the figure of persons given favourable decisions and granted some form of decisions during 2014. That is a figure of 21,861 persons. BIPs are, generally, intended to be provided with a place in a SPRAR for 6 months (unless assessed as vulnerable, in which case they may remain for up to 12 months). It is, therefore, in my judgment, inappropriate to leave that fact out of account. Either the figure of 21,861 would need to be discounted to reflect that fact or a figure of one half could be taken (to reflect the assumption that a BIP would stay for up to 6 months) and some attempt to increase that figure to reflect those who stayed longer.

115. Ultimately, however, in my judgment, the court is not able to resolve precisely the amount of demand against provision for the reasons given. An attempt at absolute precision is likely to be a futile. The following conclusions are, however, clear and any tribunal would be bound to accept them. First, the amount of provision made by the Italian authorities has increased over the period up to February 2015. Secondly, when the Italian authorities faced a crisis in 2011 with a large influx of migrants, they "responded to the extraordinary strains placed upon the system by creating extra accommodation places" (per Elisabeth Laing J. in *Tabrizagh* at paragraph 72). Thirdly, the figures of possible shortfalls presented by the Claimants, and which are said to show a glaring discrepancy between demand and the provision of places are unrealistic and could not reasonably be taken by any tribunal as representing the likely position. Fourthly, on any reasonable analysis, no tribunal could consider that the current official figures demonstrate a shortfall due to the absence of key figures (the number of persons coming to Italy who claim asylum and accommodation and the number of BIPs who ceased to occupy a place at a SPRAR during 2014 or by the end of February 2015). Consequently, having regard to all those matters, no tribunal could reasonably conclude on the statistical evidence that the Italian authorities were leaving persons who claimed asylum, or who were BIPS entitled to some form of integration programme, in a situation of homelessness. A tribunal could not, in my judgment, reasonably conclude on the evidence available that there was a glaring discrepancy between demand for facilities and provision and it could not conclude, on the figures, that there were omissions to provide facilities on a widespread or substantial scale, amounting to substantial operational problems, sufficient to displace the presumption of compliance.

The Other Material

116. The court needs to consider the other material relied upon. This falls into three broad groups. First, there are the UNCHR reports of 2012 and 2013. Secondly, there are a series of reports relied upon in particular by the Claimants and which were the subject of oral submissions. Thirdly, there is a collection of other material, together with a 25 page document entitled "schedule of key passages" submitted on behalf of the Claimants. The Claimants contend that that material demonstrates both a shortfall in accommodation and poor living conditions which, on one legitimate view, demonstrate substantial grounds for believing that those returned to Italy will suffer treatment contrary to Article 3 ECHR. The Defendant submits that the material demonstrates that there are shortcomings in Italy but that no tribunal, having regard to the material which is in fact capable of being regard as reliable evidence, could conclude that there are substantial grounds of a real risk of treatment contrary to Article 3 ECHR.

117. I deal first with the two UNCHR reports. The Supreme Court in *EM (Eritrea)* has recognised that these reports need careful consideration and will provide useful factual information and that respect should be accorded to the views of the UNHCR. The 2012 and 2013 report considers the position in Italy in detail. They should be read in their entirety. Taking the 2013 report, that notes a series of problems in relation to matters such as limited capacity, overcrowding, and lack of opportunities for integration. It made a number of specific recommendations for the improvement of facilities within Italy for both asylum-seekers and BIPS. In my respectful judgment, Elisabeth Laing J. correctly summarised the contents of these two reports at paragraph 167 of the judgment in *Tabrizagh* as follows: "in its two most recent reports on Italy, the UNCHR, while making robust and objective criticisms, has not painted a picture which begins to meet the relevant test", that is, the test for determining whether, generally, the presumption of compliance has been rebutted. As noted at paragraph 87 of the judgment in *Tabrizagh*, "the reports reveal a picture of general compliance by Italy with its EU and international obligations, while disclosing some operational difficulties". It would not be open to a tribunal to conclude on the basis of the UNHCR reports that there were "omissions on a widespread or substantial scale, or operational problems". I agree.

118. I turn next to the reports, or the parts of them, on which the Claimants particularly rely. It is important to bear in mind that the question is whether on any legitimate view, a tribunal could conclude from the evidence that there are substantial grounds for believing that there would be a real risk. Mr Husain, for the Claimants, accepts, however, that the evidence adduced must be reliable and capable of supporting the Claimant's case. In my judgment, a number of factors are potentially relevant to determining whether a report is capable of being considered reliable evidence such that a tribunal could, properly, rely upon that report in considering if there were substantial grounds for believing that there was a real risk of a breach of Article 3 ECHR. These factors are, largely, the ones identified in submission by Ms Giovannetti on behalf of the Defendant.

119. The factors include the context in which the document was prepared, such as whether it was intended to be a fair, balanced document capable of being relied upon in a court or tribunal. They also include whether the report can properly be regarded as objective and balanced, and based on relevant and up-to date information derived from reliable sources. They include consideration of whether the report's authors properly

understand and address the legal context in which the report is now being relied upon, for example do the authors understand the difference in entitlements between asylum-seekers and BIPs and the extent of the obligations owed to each. It may also be relevant, depending on the circumstances, to have regard to whether the relevant national authorities have been consulted, and offered the opportunity to comment upon a report, not least as national authorities are likely to have information relevant to the issues. Furthermore, it may well be that a report has been the subject of careful consideration by the domestic courts as were certain reports in the *Tabrizagh* case. A tribunal would be bound to place considerable weight on the assessment of the High Court. Unless there were some new material, or some reason to suggest that the conclusions in relation to the report needed to be reconsidered, a tribunal would be entitled to rely upon the assessment of the High Court and would need some proper evidential reason for departing from its assessment. The same is true where a report has been subject to detailed, relevant analysis by the European Court of Human Rights. Against that background, I consider the reports, or those parts of the reports, relied upon by the Claimants.

120. First, the Claimants rely upon a Swiss Refugee Council, report ("the SFH-OSAR report"). That was based upon the views of a delegation which visited Rome over a number of days in May to June 2013 and Milan in June 2013 and interviews with representatives of non-governmental bodies, authorities and refugees. In general terms, in my judgment, the report does not begin to establish that the conditions they found in Italy in May to June 2013 demonstrate the existence of substantial operational problems such as would rebut the evidential presumption. Furthermore, that was the conclusion of Elisabeth Laing J. in *Tabrizagh* at paragraphs 91 to 99 who had subjected the report to what McCloskey J. has described as a "more intense, more penetrating" analysis than the European Court of Human Rights, in the Upper Tribunal decision of *Weldegaber v Secretary of State for the Home Department*. I agree that the material in the report discloses some failings in May and June 2013 but not on the sort of scale which would entitle a tribunal, or other objective observer, to conclude that Italy was breaching its obligations on a widespread scale. Furthermore, the reports were based on visits which took place 2 years ago. There is now further information, discussed above, which indicates the current position in relation to the supply and demand for accommodation. Nor, in my judgment, are the Claimants correct to say that the SFH-OSAR report was approved by the European Court of Human Rights in *Tarakhel v Switzerland* so that it is no longer appropriate to rely upon Elisabeth Laing J.'s assessment. The applicants in *Tarakhel* relied upon the report and the Court referred to it. However, the Court's conclusions are based on the statistical and other information provided by the Italian authorities (see, in particular, paragraph 110 of its judgment). For all those reasons, no tribunal, properly directing itself could, at this time, regard the SFH-OSAR report as establishing that there are substantial operational problems in Italy.

121. The Claimants rely upon a report by a group, Doctors for Human Rights ("MEDU"). The members of MEDU, which is a not-for-profit organisation, frequently come into contact with beneficiaries of intentional protection who have ceased to be eligible for places in SPRARs. The MEDU report confirms that it is not in a position to provide information on the reception and living conditions for asylum seekers. The report could not, therefore, assist in relation to that group of persons (who include SG). In relation to the report, it is relevant to note its inherent limitations. It is based on BIPs

living in Florence and the report expressly states that its expertise is limited to Florence. It refers to serious shortcomings on the part of the authorities in identifying BIPs and vulnerable people. It refers to 13 cases in a squat in Florence, occupied by asylum seekers and BIPs, during the period from September 2013 to May 2014 when such persons had no contact with health care services. The report does not indicate whether these were asylum seekers or BIPs. It does not indicate whether they were returned under the Dublin Regulation. No tribunal could properly rely upon this report to determine whether the arrangements and conditions in Italy were such that Italy would not comply with its obligations in relation to persons returned to Italy.

122. Next, the Claimants rely upon a report by Amnesty International Limited. That body is, of course, a well-known organisation. The report, read as a whole and fairly, could not on any justifiable view be capable of supporting a conclusion that the evidential presumption that Italy would comply with its obligations is rebutted. Nor could any tribunal legitimately regard the report as capable of supporting the conclusion that those returned to Italy would be exposed to treatment in breach of Article 3. Part of the report is a commentary on the judgment in *Tarakhel*. Part is an acceptance that the two UNCHR reports are broadly in line with Amnesty International's understanding of the position in Italy. The report does not, itself, include, and is not based upon, any further analsyis or work done by Amnesty International. It relies upon earlier data, such as Eurostat data, discussed above, or information about the numbers accommodated within SPRARs which are now out of date. It states that, in its view, "absent some specific special provision for an individual returnee" such a person will face the same risk on return as any other asylum arrival in relation to overcrowding and undersupply. However, it does not seek to address the question of the arrangements in place for those being returned to Italy and could not reasonably be relied upon as demonstrating any difficulties in this regard.

123. The Claimants relied upon a report by Chiara Marchetti, a sociologist at Milan University. The report is based on field research and study of the existing literature. The position in relation to the number of asylum seekers in 2014 is referred to, but no data on the number of asylum seekers other than that provided by the official figures, discussed above, is provided. In relation to information on asylum seekers and BIPs returned to Italy, it is based mainly on research conducted in 2010 and the beginning of 2011. No tribunal could rely upon that information, or the report as a whole, as beginning to justify a conclusion that the evidential presumption is rebutted and that Italy is not complying with its obligations. There is nothing in the report that could, legitimately, be said to assist in the assessment of the individual claimants in the present case.

124. The Claimants relied upon two reports prepared by Ms Loredana Leo, one dated 15 September 2014, and one dated 18 March 2015 and provided to the court on the morning of the first day of the hearing in this case. Both reports were said to be expert reports and were commissioned by the Claimants in the context of the issues to be considered in this litigation. I have read both reports carefully a number of times. There are, in my judgment, many features of these two reports which mean that this court, and indeed any tribunal, would have to regard the reports as so lacking in objectivity as to be incapable of constituting reliable evidence. Viewed objectively, the reports do not provide a fair, balanced objective picture capable of assisting in the

resolution of the disputes in this case. Rather they are partisan and advocate a particular view.

125. I mention the following criticisms but there are others. First, the 2014 report states that the UNCHR had urged member states not to return refugees to EU countries "whose asylum systems are not functioning, particularly Bulgaria, Greece, Italy and Malta". In fact, the speech relied upon refers to systems which "are already overstretched or highly dysfunctional". There is a material difference between a system that is overstretched (as was Italy's at the time of the speech in March 2014) and a system that is "highly dysfunctional". A failure by a person said to be providing an expert report to recognise that and to reflect the differences does not demonstrate either accuracy or objectivity. Secondly, in the same vein, Ms Leo's 18 March 2015 report refers to the UNCHR highlighting the "absolute need" to do away with the CARA system and then cites from a UNCHR document containing observations on the transposition of the recast Directives. Reading Ms Leo's 2015 report, the reader would assume from the language that a fair summary of the UNCHR view is that the UNCHR considers that there is "an absolute need" to do away with the CARA system. The full text, not exhibited to Ms Leo's statement, gives a very different view. In context, the document sets out recommendations for implementing the recast Directives. It notes that, despite major improvements, problems remain in relation to reception and integration. The first sentence of the paragraph containing the quotations relied upon by Ms Leo, but not cited by her says: "Experience in recent years has demonstrated the importance of moving beyond CARAs as reception centres". That is far removed from the impression that Ms Leo seeks to give of the document that there is "an absolute need" to do away with the CARA system.

126. Furthermore, on occasions, Ms Leo's reports give the impression of being based upon research but, on analysis, they are not. In relation to arrivals at Rome airport, for example, Ms Leo notes in her 2014 report that a particular association is undertaking thorough research. The results of that research, if it is available, has not been presented to this court. Ms Leo then goes on to say that "is possible to predict what will be revealed by the research from the data gathered to date". No details of that data are provided but Ms Leo goes on to conclude that no persons are offered any form of reception or social support at the airport. She then infers the same would be true of Milan, based on (unspecified) research done "a few years ago". None of that could legitimately be viewed as properly sourced, objectively presented material. Similarly, Ms Leo refers (in her September 2014 report) to a Ministry circular dated 19 March 2014 and gives a quote saying that all the centres of government and those backed by some local authorities are saturated. Ms Leo then says there is a waiting list and, based on "reports by some operators", there is a waiting list of around 2-3 months. The identities, roles and numbers of such operators are unspecified. No properly sourced data giving an up to date picture of the position or demonstrating that there is such a waiting list is provided. Other parts of her reports give rise to similar criticisms of lack of objectivity and analysis. In my judgment, no tribunal could possibly treat the two reports as constituting reliable evidence of the position in Italy generally or the position in relation to what any individual, including these Claimants, would face if returned to Italy.

127. Mr Husain drew attention to the fact that the Court of Appeal in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2013] 1 W.L.R. 576 would have relied

upon a report co-authored by Ms Leo and another person. He invites me to find that Ms Leo is a credible expert witness. First, the Court of Appeal were not dealing with the 2014 and 2015 reports with which I am dealing. For the reasons given those reports could not reasonably be relied upon as constituting reliable evidence. Secondly, the Court of Appeal decided the case upon the basis that there had to be systemic deficiencies to rebut the presumption. The Supreme Court held that to be wrong but did not consider that the appeal could be allowed on the basis of the views on the evidence expressed in the Court of Appeal but rather remitted the case to the Administrative Court for detailed consideration of the evidence. As the Court of Appeal held, when refusing permission to appeal against the decision of Elisabeth Laing J., that neutralised the point that reliance could be placed upon the findings of the Court of Appeal: see paragraph *R (Tabrizagh and others) v Secretary of State for the Home Department* [2014] EWCA Civ 1398. As Mr Husain correctly submits, I am not bound by a decision of the Court of Appeal refusing permission to appeal. I do, however, find its reasoning, to be compelling and grateful adopt it.

128. The Claimants relied upon the Braunschweig report. For the reasons given by Elisabeth Laing J. in paragraph 89 of *Tabrizagh*, a tribunal could not rely upon that report as evidence of a failure by Italy to comply with its obligations. The Claimants referred in argument to a report by Human Rights Watch although it did not appear to be relied upon for any specific point. There is now more detailed information about places than was available at the time of this report. The report does not, in my judgment, constitute evidence that could reasonably be understood as demonstrating now that there are reasonable grounds for believing that there would be a risk of a breach of Article 3 on return to Italy.

129. The Claimants rely on a passage from one report by Pro-Asyl, based on a one week visit to Rome and Turin in October 2010, and a passage from a report prepared by the Norwegian Organisation for Asylum Seekers dated April 2011. Mr Husain accepts that he cannot, and does not, place reliance upon the rest of the reports given that they are out date. He relies upon the two passages to suggest that BIPs who return and whose residence permit has expired or has been lost (such as MS and NA respectively), need to go to the police station in the locality where the original residence permit was granted in order to obtain a replacement. That was said to be supported by the report of Ms Leo presented to the court on the morning of the first day the hearing which indicated that a person would have to apply at the police station which issued a lost or expired residence permit and without a new permit, it would be impossible to access certain social services and more difficult to find employment. At the hearing, the Defendant indicated, and confirmed subsequently, that a person can on arrival go to the police station in the locality to which he or she returns and obtain a receipt indicating that a new residence permit has been applied for and the person will be entitled to services until the new permit is issued. Following the hearing, the Claimants adduced further evidence in the form of a letter dated 31 March 2015 from MEDU and a report dated 30 March 2015 from Ms Leo. The letter from MEDU says that they had been informed by a lawyer that MS and NA would have to go to the place where the original residence permit was issued to obtain a replacement permit. Ms Leo confirms that a receipt can be issued by a local police station and a person is not capable of being expelled from Italy in those circumstances. She considers that a person seeking a replacement or renewed residence would need to go to the police station in the locality where the original permit was issued in order to obtain a new

permit. She expresses the view that there would be difficulty in her experience in accessing employment and social services (said to be family and social allowances and public residential accommodation) without a replacement permit.

130. On the evidence presented, there is no suggestion, and no reliable evidence, that a BIP returning to Italy would be prevented from being provided with a place at an appropriate facility such as a SPRAR because of the loss or expiry of a residence permit. There is no suggestion, or any reliable evidence, that medical assessment or access to appropriate health care is delayed pending the reissuing of a residence permit. The most that is said is that until such a replacement permit is obtained, there is difficulty in obtaining access to employment and certain social benefits. That evidence is based upon what Ms Leo says in her report of 18 March 2015 and, now, the report of 30 March 2015 which re-iterates the views expressed in the 18 March 2015 report. The letter of MEDU simply gives an indication of what it has been told about where a permit would need to be renewed and does not express views about the effect of a need to renew or replace a residence permit would be. For the reasons given above, I do not consider Ms Leo's report of 18 March 2015 to be capable of being regarded as reliable evidence. The 30 March 2015 report is, in effect, a reiteration of the view that she expressed on 18 March 2015. It refers to numerous practical difficulties, above all in relation to the search for employment, but does not fully or adequately explain the source of her information in this regard. It makes assertions about what must be inserted into a contract or that access to a service is dependent upon a residence permit but no bases for these assertions are given. Given that the 18 March 2015 report is not capable of being relied upon for the reasons, and given that the 30 March 2015 reiterates the views in that report and provides no further adequate, properly sourced basis for the views advanced, the 30 March 2105 report is, in my judgment, also not a report that is capable of being regarded as reliable evidence.

131. However, even assuming, in favour of MS and NA, that the difficulties referred to exist, those difficulties would be relevant to the ease with which BIPs can integrate into Italian life. It has been recognised, for example, in the 2013 UNCHR, that there are difficulties in relation to integration. However, the European Court of Human Rights has expressly considered this specific issue (and the first two reports relied upon by the Claimants, namely the Pro-Asyl report and the Norwegian Organisation for Asylum-Seekers) and did not accept that there would be a breach in respect of a person, such as Mrs Hussein whose temporary resident permit had expired prior to her return to Italy: see *Hussein v Netherland and Italy* application no. 27725/10, at paragraphs 22, 47 to 49 and paragraphs 76.

132. For completeness, the issue is not said to arise in relation to asylum seekers such as SG who had not claimed asylum (and not being given a residence permit) while in Italy.

133. The Claimants also adduced, but did not make oral submissions upon, approximately 55 other documents, together with a 25 page document entitled "schedule of key passages". The documents range from newspaper articles, through reports by organisations and individuals, and comments or views by officials such as the UNCHR. I have considered all of the documents submitted by the Claimants. In my judgment, none of those documents, nor the summary of key passages, provide any basis upon which a tribunal could legitimately conclude that the documents

established, or assisted in establishing, that Italy would not comply with its obligations or that there were substantial grounds for believing either generally, or in relation to these Claimants, that there would be a real risk of treatment contrary to Article 3 if they were returned to Italy. It is not necessary to go through each and every one of the 55 or documents referred to, nor the "key passages" highlighted in the summary. That would serve no useful purpose and would be disproportionate.

134. For completeness, I note that in *Tabrizagh* the Claimants relied initially upon a number of reports. However, leading counsel there was able, in fact, to identify the three reports upon which the Claimants relied: see paragraphs 63 to 64 of the judgment in *Tabrizagh*. In my judgment, it would have been both helpful, and a proportionate method of conducting litigation, if counsel for the Claimants had been able to take a similar approach in this case. Counsel for the Claimants were invited to do so. However, the list of material identified as being material upon which the Claimants relied included the 25 page "key passages" document and 18 other specified documents. As the key passages document contained passages taken from the other approximately 55 documents, it was necessary for the court to read the 25 page summary and all the other documents. It is to be hoped that counsel will, if there is litigation of this kind in future, adopt the approach taken in *Tabrizagh* as representing a more useful, and proportionate, method of conducting litigation.

135. I note that the parties disagree about the relevance of the fact that the UNCHR has not requested states to suspend returns to Italy. If the UNCHR had done so, that would have been an important, potentially critical, piece of evidence demonstrating that the presumption of compliance had been rebutted. The Claimants contend that, on a proper reading of *EM (Eritrea)*, the fact the UNCHR has not made such a request is not material which supports an assertion that the evidential presumption has not been rebutted and the court must look to the other evidence in the case. As I consider that I am able to resolve the question of whether or not the presumption has been rebutted without reliance upon the fact that the UNCHR has not requested states to suspend returns to Italy, I do not need to resolve this issue.

Assurances and Tarakhel v Switzerland

136. The final matter that needs consideration in relation to the first issue is the decision of *Tarakhel v Switzerland* that specific assurances were required in that case to avoid a breach of Article 3. The question arises as to whether that approach would mean that, in general, assurances would be needed before asylum seekers or BIPs, or, in particular vulnerable such persons, were returned. In this context, the description "vulnerable" is used a short-hand description of the persons falling within the description of vulnerable in Articles 17 and 20 of the Reception Directive and would include persons with mental health difficulties or victims of rape or sexual violence or torture.

137. *Tarakhel v Switzerland* was dealing with a family with two adults and six children ranging in age at the material time from 2 to 15. The legal context recognises the importance of the needs of children. Article 14(3) of the Reception Directive emphasises that Member States shall ensure that children are lodged with their parents. Article 17 includes minors among the category of vulnerable people. Article 18 provides that the best interests of minors shall be a primary consideration for Member States when implementing the Reception Directive. The Court itself

recognised the importance of a child's extreme vulnerability (see paragraph 99 of the judgment in *Tarakhel*). The factual situation in *Tarakhel* was that there was a glaring discrepancy in the number of places in SPRARs (where the Court was told the family would be placed) and the number of applicants. There was also the fact that the Italian Government confirmed that families were separated albeit they said only in a few cases and for short periods. It was against that background and "in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit" that the Court was of the view in that case that the Swiss authorities "did not possess sufficient assurances that, if returned to Italy , the applicants would be taken charge of in a manner adapted to the age of the children": see paragraph 111 of the judgment in *Tarakhe.*. For that reason it was necessary to obtain the specific assurances referred to in paragraph 122 of the judgment that the children would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

138. That judgment does not suggest, or lead to the conclusion, that similar specific assurances must be sought in relation to other potentially vulnerable asylum seekers or BIPs such as those who have experienced trauma and have mental health difficulties in order to avoid a breach of Article 3 ECHR. I reach that conclusion for the following reasons.

139. First, the European Court of Human Rights has twice specifically considered the issue in relation to Italy, in *Hussein* and in *Daytbegova.* The relevant extracts are set out above. There is no indication in *Tarakhel* that it was seeking to qualify those decisions (*Hussein* is, in fact, referred to in the judgment in *Tarakhel*) or any suggestion that the position in Italy, or circumstances, generally, have altered.

140. Secondly, and significantly, the important consideration in *Hussein* and *Daytbegova* was that Italy provided access to health care, including psychological care. What was important was that Italy should provide a "well-planned reception": see the extract set out at paragraph 81 above. The Court was aware that the Italian authorities would know in advance of the applicants' vulnerability and hoped that the Austrian authorities would provide the medical and psychological documentation available to them.

141. That is the position here. All the reliable evidence is that the United Kingdom authorities will provide the medical information available to them to the Italian authorities for MS, SG and, if she consents, NA: see the decision letters. The evidence of how the Italians last proposed to effect the transfer of MS and SG confirms that the Italian authorities wanted 10 days advance notification of any health issue, including both physical or psychological issues. For completeness, that conclusion is reinforced by, but not dependent upon, the evidence of Mr Dangerfield, who has 7 years experience of working as the asylum and immigration liaison officer in Rome, and says that medical assessments are carried out on individuals where there are particular issues.

142. Furthermore, the issue in relation to children (absent evidence of a particular medical condition) is to ensure reception conditions adapted to their age and to ensure that the family can be kept together. That task lends itself more easily to the exercise of identifying particular accommodation in advance which will meet those requirements. The position in relation to those with mental health needs or other vulnerabilities may

be different. A "well planned approach" may require proper assessment by the relevant Italian authorities, who can assess the medical situation and determine the care most appropriately available in Italy. That will be at least as likely to ensure that the needs of the individual are properly identified and catered for in Italy as would an assurance given in advance and before the relevant Italian medical authorities have had the opportunity to carry out an assessment of the individual concerned.

143. For all those reasons, there is no basis for considering that the Italians would not comply with their obligations in relation to vulnerable asylum seekers and BIPs, such as those with mental health issues.

Summary of Conclusions on the First Issue

144. The presumption that Italy will comply with its obligations under EU and international law is a significant evidential presumption. It is the backcloth against, or context in, which the question of a real risk of a breach of Article 3 ECHR falls to be addressed. In my judgment, on the material produced, there is no legitimate basis upon which a tribunal, properly directing itself, could reasonably conclude that that presumption was rebutted in relation either to asylum seekers or BIPs, or in relation to vulnerable asylum seekers or BIPs, that is, those such as MS who has mental health difficulties or NA and SG who have been the victim of rape and sexual violence, and have mental health difficulties.

145. That has two consequences. First, this is not a situation such as that which prevailed in *MSS v Greece* where all removals of asylum seekers or BIPs, or all vulnerable asylum seekers or BIPs, should cease. Secondly, the presumption is that Italy will comply with its obligations, particularly in relation to those vulnerable asylum seekers such as SG, and vulnerable BIPs such as MS and NA. It is against the backdrop of that evidential presumption that consideration will need to be given to as to whether a tribunal could legitimately conclude that, given the particular circumstances of each of the Claimants viewed in the overall context, there are substantial grounds for believing that they would face a real risk of treatment which breached Article 3 if returned to Italy.

THE SECOND ISSUE – THE SITUATION OF THE CLAIMANTS

146. The second issue involves consideration of the position in relation to each individual Claimant, viewed against the overall situation. As indicated, the backdrop against which that is assessed is that there is a significant evidential presumption that Italy will comply with its obligations. That presumption can, as explained by the Supreme Court in *EM (Eritrea)* be displaced in a particular case. That will involve an assessment of the situation in the receiving country and the foreseeable consequences of returning each Claimant there.

MS

147. I deal first with MS. The situation is that he is a BIP. He will have access to health care on the same terms as Italian nationals. In terms of integration facilities, MS is eligible to be accommodated in a SPRAR for six months, and, if he is assessed as vulnerable, for a further six months. Given the overall situation in Italy, and the increase in the number of places at SPRARs, and the statistics considered above, there

is no legitimate basis on which a tribunal could conclude that there is a glaring discrepancy such as would make it unlikely that MS would not be provided with a place in a SPRAR or left homeless. MS is entitled to work and access to social benefits on the same terms as Italians. The evidence of difficulties associated with this by reason of the need to renew his residence permit is not capable of constituting reliable evidence and, even if such difficulties did exist, they could not, on any legitimate view be regarded as establishing substantial grounds for believing that there was a real risk of treatment contrary to Article 3 ECHR if MS were returned for the reasons given above.

148. In terms of MS's mental health difficulties, these are described above. He has depression without psychosis and suffers panic attacks. He would have access to health treatment in Italy which is appropriate for persons with such difficulties. The United Kingdom authorities will, assuming that MS agrees, provide the Italian authorities with copies of the medical information in their possession prior to transfer to enable the authorities to make appropriate arrangements on arrival at the airport and subsequently. The previous experience, when agreement of the Italian authorities to a transfer of MS was sought, was that they wanted advance notice of the transfer (7 days) and 10 days advance notice of any medical issues. Transfers were to be limited to working hours during week days. So far as a suicide risk is concerned, Dr Hopkins states that if MS is returned to Italy and finds life there as unbearable as previously, the risk of suicide will remain. There is no evidential basis upon which a tribunal could conclude that the Italian authorities would be unable to make effective arrangements to deal with such issues given the evidence. The legal principles are set in *J v Secretary of State for the Home Department* [2005] Imm AR, and subsequent considered by the Court of Appeal in *R (Tozlukaya) v Secretary of State for the Home Department* [2006] INLR 354. Given the nature of MS' mental illness and risk of suicide, the fact that health care is available in Italy, and that there are effective arrangements to minimise the risk in that the Italian authorities would have notification in advance of the arrival and of any medical issues, and taking into account the decisions of the European Court of Human Rights in *Hussein v Netherlands*, and *Daytbegova v Austria*, no tribunal could legitimately conclude that there were substantial grounds for believing that there was a real risk of a breach of Article 3 because of the risk of suicide on return. I deal below with the position in relation to the risk of suicide prior to and during removal.

149. For all those reasons in my judgment, there is no legitimate basis upon which could a tribunal, properly directing itself, conclude that, if MS were returned to Italy, there are substantial grounds for believing that there is a real risk that the conditions in Italy would be such as to amount to a breach of Article 3 ECHR.

NA

150. NA too is a BIP. She will have access to health care on the same terms as Italian nationals. In terms of integration facilities, NA is eligible to be accommodated in a SPRAR for six months, and, if she is assessed as vulnerable, for a further six months. Given the overall situation in Italy, and the increase in the number of places at SPRARs, and the statistics considered above, there is no basis on which a tribunal could conclude that there is a glaring discrepancy such as would make it unlikely that NA would not be provided with a place in a SPRAR or left homeless or without support. The evidence of difficulties associated with this by reason of the need to

replace her residence permit is not capable of constituting reliable evidence and, even if such difficulties did exist, they could not, on any legitimate view, be regarded as establishing substantial grounds for believing that there was a real risk of treatment contrary to Article 3 ECHR if NA were returned for the reasons given above.

151. In terms of illness, NA has diabetes and high blood pressure. In terms of mental health, NA has chronic post traumatic disorder and a severe depression disorder without psychosis. She would have access to health treatment in Italy which is appropriate for persons with such difficulties. So far as the risk of suicide is concerned, that risk is assessed as increasing to a high level if forced to return, although Dr Obuaya observes that that risk could be minimised through regular monitoring of her mental state in primary or secondary care facilities as well as through the provision of psychotherapy. He notes, though, that his view is that the risk of suicide is likely to be high enough to warrant assessing NA for in patient psychiatric admission. At present, no arrangements for transfer have been made and NA is refusing to consent to her medical documentation being provided to the Italian authorities. If NA changes her mind and consents, the United Kingdom authorities will provide the Italian authorities with copies of the medical information in their possession prior to transfer to enable the authorities to make appropriate arrangements. There is no evidential basis upon which a tribunal could conclude that the Italian authorities would be unable to make effective arrangements to deal with such issues. Again, as in the case of MS, in the light of *J v Secretary of State for the Home Department,* and *Tozlukaya,* and given the nature of the mental health condition in NA's case, the fact that health care is available, that there are effective arrangements to protect against the risk including the fact that the Italian authorities would have notification in advance of the transfer and (if consent is given) the medical issues, and taking into account the decisions of the European Court of Human Rights in *Hussein v Netherlands*, and *Daytbegova v Austria*, no tribunal could legitimately conclude that there were substantial grounds for believing that there was a real risk of a breach of Article 3 because of the risk of suicide on return. I deal below with the position in relation to the risk of suicide prior to and during removal. If NA decides not to consent to the provision of medical information to the Italian authorities, or not to co-operate with the Italian authorities, including medical officers, (and she has mental capacity to make such decisions), then any consequences flowing from those decisions will be her responsibility and will not involve any breach on the part of the United Kingdom authorities of Article 3 ECHR.

152. In terms of the risk of re-victimisation, and exposure to rape or further sexual violence, Mr Husain accepted in argument that if accommodated on return, rather than being homeless, that risk would be removed. For the reasons given, no tribunal could legitimately consider that NA would be left homeless on return.

153. For all those reasons, in my judgment, there is no legitimate basis upon which a tribunal, properly directing itself, could conclude that, if NA were returned to Italy, there are substantial grounds for believing that there is a real risk that the conditions in Italy would be such as to amount to a breach of Article 3 ECHR.

SG

154. SG is a person who would be entitled to claim asylum in Italy and, if she did so, that claim would be processed by the Italian authorities. There is no basis for considering

that the asylum claim would not be considered properly and no suggestion of that is made on SG's behalf.

155. SG is a vulnerable person. In brief, and as described more fully above, SG has chronic post traumatic stress disorder and severe depression. The medical opinion is that removing SG to Italy is likely to make her more depressed and will result in a significant risk of suicide. She has been diagnosed as HIV positive but is asymptomatic at present having suffered repeated rapes and sexual violence. Assuming SG did claim asylum, then Italian legislation requires special attention to be given to vulnerable people with mental health difficulties, such as post traumatic stress disorder. Asylum seekers generally are eligible for accommodation in a CARA or, if they have specific needs arising from their vulnerability, they can be accommodated in an SPRAR.

156. The United Kingdom authorities will provide the Italian authorities with copies of the medical information in their possession prior to transfer to enable the authorities to make appropriate arrangements. The previous experience, when agreement of the Italian authorities to a transfer of SG was sought, was that they wanted advance notice of the transfer (seven days) and 10 days advance notice of any medical issues. The transfer had to be carried out in working hours during week days. SG would have access to health treatment in Italy which is appropriate for persons with such difficulties. Italian legislation requires special attention to be given to the needs vulnerable persons and there is no basis for assuming that Italy would not comply with that obligation or for considering that they would not accommodate her on return in a place which took account of her specific vulnerabilities. So far as the mental health difficulties include a risk of suicide on return, there is no evidential basis upon which a tribunal could conclude that the Italian authorities would be unable to make effective arrangements to deal with these issues. Again, as in the case of MS, having regard to *J v Secretary of State for the Home Department*, and *Tozlukaya,* and given the nature of the mental health condition in SG's case, the fact that health care is available, that effective arrangements are in place to protect against the risk including the fact that Italian authorities would have notification in advance of the transfer and any medical issues, and taking into account the decisions of the European Court of Human Rights in *Hussein v Netherlands*, and *Daytbegova v Austria*, no tribunal could legitimately conclude that there were substantial grounds for believing that there was a real risk of a breach of Article 3 because of the risk of suicide on return. I deal below with the position in relation to the risk of suicide prior to and during removal. Further, if SG were accommodated on return, rather than being left homeless, the risk of re-victimisation and exposure to further rape or sexual violence would be removed as Mr Husain accepted.

157. For completeness, I note that all three Claimants rely on Article 4 of the Charter of Fundamental Human Rights. Article 4 is in materially similar terms to Article 3 ECHR and provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". No separate oral submissions were made in relation to Article 4 of the Charter. In my judgment, reliance on Article 4 cannot, on the facts of this case, lead to a different conclusion from that on Article 3 ECHR. A similar conclusion was reached by the Court of Justice of the European Union in joined cases C-411/1- and C-493/10 *R (NS (Afghanistan)) v Secretary of State for the*

Home Department (Amnesty International Ltd. intervening) [2013] Q.B. 102 at paragraph 114.

158. Consequently, for all those reasons, in my judgment, on no legitimate basis could a tribunal conclude that, if SG were returned to Italy, there were substantial grounds for believing that there is a real risk that the conditions in Italy would be such as to amount to a breach of Article 3 ECHR.

THE THIRD ISSUE – THE SITUATION PRIOR TO AND ON REMOVAL

159. The third issue concerns the risk of suicide by each of the Claimants. The Court of Appeal in *J v Secretary of State for the Home Department* [2005] Imm AR 409 considered the situation in three stages, namely (1) when the individual is informed of removal (2) during removal and (3) after the individual has arrived in the receiving state, in this case, Italy. I have dealt above with the position after return to Italy in the case of MS, NA and SG.

160. The medical opinions submitted on behalf of the three Claimants are summarised above. In brief, Dr Hopkins says of MS that he would rather kill himself than return to Italy and if he were to be returned he would kill himself. The thoughts, and attempts at suicide, tend to be impulsive. Dr Obuaya notes that the risk of suicide or self harm in relation to NA would increase to a high level if she were informed that she was definitely going to be returned to Italy or during the removal process. Dr Hajifoff refers to a risk of suicide if SG is removed to Italy.

161. The United Kingdom authorities will remain under a positive obligation to take reasonable measures to protect all three Claimants against the risk of suicide on being informed of removal to Italy and during removal: see *Toyzlukaya* at pragraphs 69 to 70. In the present case, the decision letters in the case of each of the Claimants addresses these issues. They emphasise the importance attached to the risk of suicide and the steps to be taken to protect against that risk. Detention staff will informed of the risk. The Claimants will each be carefully monitored until they leave for the flight. The risk during removal will be guarded against by the provision of appropriately trained and experienced medical escorts to the airport, at the airport and during the flight and they would accompany each Claimant to the Italian authorities on arrival at the airport. There is no legitimate basis upon which a tribunal, properly directing itself, could conclude that there are substantial grounds for believing that there is a real risk of a breach of Article 3 ECHR arising out of a risk of suicide prior to or during removal.

ANCILLARY MATTERS

162. The Claimants have, as I have indicated, relied upon a number of documents and a number of legal points were made to by counsel for all parties in their skeleton arguments, oral submissions and closing submissions. I have sought in this judgment to deal with what I consider to be the principal points raised and the principal evidence relating to those matters. All the Claimants, and the Defendant, can be assured however, that I have carefully considered all the points made and all the documents relied upon in carrying out the rigorous assessment required in cases such as these.

CONCLUSION

163. No tribunal, properly directing itself, could conclude that there are substantial grounds for believing that there is a real risk of the Claimants being exposed to treatment contrary to Article 3 ECHR if they were returned to Italy. There is no legitimate basis upon which a tribunal properly directing itself could conclude that the evidential presumption that the Italian authorities would comply with their obligations under EU law and international law has been rebutted. There is no legitimate basis upon which a tribunal could conclude that, considering the individual situation of each Claimant against the overall situation in Italy, there are substantial grounds for believing that there is a real risk of a breach of Article 3 ECHR in respect of any one of these three Claimants if that Claimant were returned to Italy. In those circumstances, the Defendant acted lawfully in certifying each of the Claimants' human rights claims as clearly unfounded. These claims for judicial review are, therefore, dismissed.