Neutral Citation Number: [2016] EWCA Civ 1060

Case No: C4/2015/1637

C4/2016/0730

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM High Court, QBD, Administrative Court

Mr Justice Lewis (C4/2015/1637)

Mrs Justice Whipple (C4/2016/0730)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 01/11/2016

**Before:**

LORD JUSTICE McFARLANE

LORD JUSTICE UNDERHILL
and

LORD JUSTICE SIMON

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**Between:**

|  |  |  |
| --- | --- | --- |
|  | **NA (SUDAN)** |  Appellant |
|  | **- and -** |  |
|  | **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | Respondent |

**AND**

**Between:**

|  |  |  |
| --- | --- | --- |
|  | **MR (IRAN)** |  Appellant |
|  | **- and -** |  |
|  | **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | Respondent |

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**Mr Raza Husain QC** and **Mr David Chirico** (instructed by **Wilsons Solicitors LLP**) for the **Appellant** in *NA (SUDAN)*

**Mr Raza Husain QC, Ms Laura Dubinsky** and **Ms Harriet Short** (instructed by **Wilson Solicitors LLP**) for the **Appellant** in *MR (IRAN)*

**Ms Lisa Giovannetti QC, Ms** **Sasha Blackmore** and **Mr Robert Harland** (instructed by **Government Legal Department**) for the **Respondent** in both cases

Hearing dates: 26 & 27 July 2016

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Approved Judgment

**Lord Justice Underhill:**

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APPENDIX

**(A) INTRODUCTION**

1. There are two appeals before us. The Appellant in the first, NA, is from Sudan and the Appellant in the second, MR, is from Iran. Both have come to this country via Italy and claimed asylum here. NA had already claimed and been granted refugee status in Italy and is accordingly a “beneficiary of international protection” (“BIP”)[[1]](#footnote-1) there. MR did not claim asylum in Italy. The essential issue raised by the appeals is whether the Secretary of State can return them to Italy under the Dublin regime (as to which see paras. 36-38 below) without considering their asylum claims, on the basis that NA already has protection there and that MR is entitled to claim it. It is their case that the conditions encountered in Italy by asylum-seekers and BIPs are so inadequate that there is a serious risk that they will suffer inhuman and degrading treatment and that their enforced return would accordingly constitute a breach of their rights under article 3 of the European Convention of Human Rights (“the Convention”) and be unlawful under section 6 of the Human Rights Act 1998.
2. The procedural route by which that issue arises is as follows. First, in both cases the Secretary of State has in both cases certified, under paragraph 5 (4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (“the 2004 Act”), that the Appellants’ claims that their removal to Italy would be in breach of their human rights are “clearly unfounded”. The effect of such a certificate is that they can be returned to Italy without a right of appeal in this country: I set out the relevant provisions at para. 31 below. Both have brought judicial review proceedings challenging the certification of their claims. NA’s case was listed with two others raising similar issues, the claimants being known as MS and SG, and the case is generally referred to as *MS*. The claims were heard by Lewis J between 24 and 26 March 2015. By a judgment handed down on 22 April 2015 ([2015] EWHC 1095 (Admin)) he dismissed all three. His judgment was very substantial and considered a great deal of evidence relating to the treatment of asylum-seekers and BIPs in Italy. As for MR, his claim was dismissed by Whipple J at a hearing on 15 December 2015 ([2015] EWHC 3645). Her judgment was much shorter since she proceeded on the basis that she would follow Lewis J’s decision unless the evidence before her demonstrated a material change in the circumstances since the date of his decision, which she held that it did not.
3. In January this year Treacy LJ and I gave MS and NA permission to appeal against Lewis J’s decision, though MS’s claim has since been compromised (as SG’s had already been). As for MR, on 24 June I directed that his application for permission to appeal should be listed with NA’s appeal, on a “rolled-up” basis: it is convenient to say at this stage that I would grant permission.
4. These appeals form part of a long line of cases in which asylum-seekers, both in the UK and in other European countries, have resisted removal under the Dublin regime on the basis that conditions in the destination country were such that there was a risk of violation of their rights under article 3. I will have to review a number of those cases in some detail below. But it will be convenient if I outline at this stage a few key steps in the history:

(1) *MSS*. The seminal decision is that of the European Court of Human Rights (“the ECtHR”) in *MSS v Belgium and Greece* (2011) 53 EHRR 2, which concerned the return of an asylum-seeker from Belgium to Greece.[[2]](#footnote-2) The Court held that the conditions of detention and living conditions for asylum-seekers in Greece were such that if the applicant were returned there was a serious risk that he would be subjected to inhuman and degrading treatment; and that the decision of the Belgian government knowingly to expose him to that risk constituted a breach of his rights under article 3.

(2) *The first Italy cases in Strasbourg*. The difficulties encountered by the Italian authorities in coping with the surge of asylum-seekers and other migrants in 2011 – the so-called “North African emergency” – and following led to a number of challenges in different European countries to attempted removals to Italy, relying on the analogy of *MSS*. In a series of decisions in the course of 2013 which I review more fully below, the ECtHR declined to find that such removal would involve any breach of article 3.

(3) *EM (Eritrea)*. A number of claims in this jurisdiction challenging the certification of claims that removal to Italy would breach the claimant’s article 3 rights were dismissed in the Court of Appeal on the basis that they could only succeed if it were shown that there was a “systemic deficiency” in the Italian asylum or reception procedures: see *R (EM (Eritrea)) v Secretary of State for the Home Department* [2012] EWCA Civ 1336, [2013] 1 WLR 576. But that decision was reversed by the Supreme Court in February 2014 – [2014] UKSC 12, [2014] AC 1321. The Court held that there was no requirement to demonstrate a systemic deficiency, and the claims were remitted to the High Court for reconsideration on the correct basis in law.

(4) *Tabrizagh*. That consideration occurred (though not in fact in the case of any of the *EM* claimants) in *R (Tabrizagh) v Secretary of State for the Home Department* [2014] EWHC 1914 (Admin). In a judgment handed down on 11 June 2014 Elisabeth Laing J, applying the approach in *EM*, upheld the Secretary of State’s certificate that the claim that the claimants’ return to Italy would breach their rights under article 3 was clearly unfounded: she placed considerable weight on the Strasbourg case-law referred to at (2) above. Permission to appeal against that decision was refused at a hearing before myself and Sharp LJ on 17 September 2014 – [2014] EWCA Civ 1398.

(5) *Tarakhel*. On 4 November 2014, in *Tarakhel v Switzerland* (27217/2), (2015) 60 EHRR 28, the Grand Chamber of the ECtHR held that the removal from Switzerland to Italy of a family of asylum-seekers, including six children, would be a breach of article 3 unless a specific guarantee were obtained from the Italian authorities that they would be accommodated together and “in a manner adapted to the age of the children”. It is the Appellants’ case before us that the Court’s reasoning represents a substantial departure from its earlier case-law.

1. The three “*MS*” cases before Lewis J, of which NA’s claim formed one, were listed together in order to obtain an early decision about whether *Tarakhel*, together with evidence about more recent developments in Italy, meant that *Tabrizagh* could not be relied on as providing authoritative guidance in cases of proposed Dublin returns to Italy, of which there were a considerable number. They were chosen so as to include both cases where the claimant had been granted a form of international protection in Italy (as MS and NA had been) and cases where they had not claimed asylum (which SG had not). MR’s appeal to this Court was joined with NA’s for the same reason following the settlement of SG’s claim. A large number of cases – we were told about forty – have been stayed behind the present appeal, either in this Court or in the Administrative Court.
2. The Appellants have been represented before us by Mr Raza Husain QC, leading (in NA’s case) Mr David Chirico and (in MR’s case) Ms Laura Dubinsky and Ms Harriet Short. Mr Husain, Mr Chirico and Ms Short appeared for NA before Lewis J, and Ms Short appeared for MR before Whipple J. The Secretary of State is represented in both cases by Ms Lisa Giovannetti QC, leading Ms Sasha Blackmore and Mr Robert Harland: all of them appeared before Lewis J, though not before Whipple J (where the Respondent was represented by Mr John-Paul Waite). The solicitors for both Appellants are now Wilsons Solicitors LLP.
3. Initially a skeleton argument was filed on behalf of MS (whose case had not yet been settled) and NA. Following the joinder of MR the Appellants were directed to file a further skeleton argument responding to the Respondent’s skeleton: that also afforded an opportunity to develop any points peculiar to MR’s case. The supplementary skeleton argument filed purportedly pursuant to that direction is as long as the original, and is more of a restatement of the Appellants’ overall case than an answer to the Respondent’s. I have treated the original skeleton argument as the primary statement of the Appellants’ case, but I have tried to identify and deal with any variants appearing in the supplementary skeleton. Although the skeleton arguments were, I am sure, the work of all the counsel who signed them I hope they will forgive me if for convenience I refer to them simply as Mr Husain’s.

**(B) THE FACTS OF THE INDIVIDUAL CASES**

1. There have been no findings about the circumstances of the Appellants’ individual cases, but since the Secretary of State has certified their claims and there is no suggestion that there evidence is incredible I should proceed on the basis of the facts as alleged by them.
2. I should note by way of preliminary that it is not necessary for the purpose of the issues before us to go into any detail about the Appellants’ treatment in the countries from which they originally came: we are not concerned with the validity of their asylum claims but only with the question whether they can lawfully be returned to Italy. Nor is it necessary to go into a great deal of detail about their experiences in Italy before coming to this country, for the reasons explained at paras. 212-214 below.

*NA*

1. NA was born on 13 March 1979. She is from Darfur and is a member of an ethnic minority group, the Zaghawa. In 2003 she was beaten by militia from another ethnic group. She was also raped. Following further violence against the Zaghawa in about 2008, NA left her home and went to a refugee camp.
2. Eventually NA left the camp, and on 30 April 2011 she arrived on Lampedusa by boat from Libya.  She was taken to Campobasso on the mainland, where she was accommodated in a tent.  On 11 May 2011 her claim for asylum was registered.  After a while she and a dozen other asylum-seekers were moved to an old school building in a place which she describes as Cassa Calenga.  Although food was provided she describes the conditions as very poor and says that she received little or no support.  On 6 October 2011 her claim for asylum was accepted, and on 24 January 2012 she was issued with an Italian residence permit valid for five years.
3. In late February 2013, i.e. after she had been there for over a year, NA and the other occupants were told by the police that they had to leave Cassa Calenga because the lease on the building had come to an end. They protested, NA saying that she was ill and alone and a woman; but the police told them that that was her problem, not theirs. They do not appear to have been given any advice about how to find other accommodation: instead, she says, they were told that Italy had spent a lot of money on them without any support from the rest of Europe and they should go to another European country.  For the next fifteen days she and two friends lived on the streets, sleeping in the railway station or outside a church. They had no money. The church provided them with some food, but not reliably, and they were reduced to begging and searching in waste bins. During that time she was twice raped and was subjected to other sexual assaults: her friends were raped too. She says that she sought assistance from the police but they would not help.
4. Eventually some Sudanese men whom they met bought NA and her friends train tickets to Paris, from where they went to Calais and stayed in the “jungle”. Other Sudanese men smuggled her into a lorry which took her to England. She arrived on 22 March 2013 and claimed asylum on the same day, though she claimed to have come from Greece rather than Italy because she was told that if she said she had come from Italy she would be sent back. She says that she hates Italy and would prefer to die or go back to Darfur than to return there.
5. NA was initially detained while her claim was considered.  On 17 May 2013 the Italian authorities told the Home Office that she had already been granted asylum in Italy.  Although they took the view that this fact took her outside the scope of the Dublin regime (as to this, see para. 38 below), they accepted that she could be returned to Italy.   On that basis the Respondent certified her asylum claim as totally unfounded on “safe third country” grounds and issued removal directions.  NA claimed that her removal would be in breach of her Convention rights because of the conditions for BIPs in Italy but on 10 June the Respondent certified that claim as clearly unfounded.
6. Judicial review proceedings were commenced in June 2013.  The claim was initially stayed pending the decisions of the Supreme Court in *EM* and then of the Administrative Court and this Court in *Tabrizagh.* As is not uncommon, and in the circumstances of this case wholly unobjectionably, there were further decisions by the Respondent in response to developments in the situation.  The most recent is dated 6 March 2015.  It maintained the decision to remove NA to Italy and re-certified her claim under article 3.  It is that decision which was the subject of the challenge before the Judge.
7. NA suffers from diabetes and high blood pressure.  Although her diabetes had been diagnosed in Libya and she had been given tablets for it she says that she received no treatment in Italy.  As for her mental health, there are full and careful psychiatric reports prepared by Dr Chiedu Obuaya dated 12 February 2014 and 12 February 2015.  Dr Obuaya has diagnosed post-traumatic stress disorder (“PTSD”) and a severe depressive disorder without psychotic features. In his earlier report he 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 that applies to NA. 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.
8. In the light of the suicide risk referred to by Dr Obuaya NA was told in the most recent decision letter that she would be returned to Italy with medical escorts, who would accompany her “to the appropriate immigration or police desk”. She was then refusing to consent to the disclosure to the Italian authorities of her medical records. The letter said:

“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[[3]](#footnote-3) 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.”

1. NA persists in refusing to consent to the disclosure of her medical records to the Italian authorities. In her more recent witness statement she says that this is because she does not believe that the Italian authorities wish to assist her.

*MR*

1. MR was born in Iran on 11 April 1986. In 2007 he was detained on suspicion of having been involved in a series of muggings. He was released on the order of a judge three days later, but he says in his witness statement that while in detention he was beaten by the police.
2. In October 2012 he left Iran. He says that he did so because he was at risk following an incident where he burned a copy of the Koran. He arrived in Italy by boat in mid-December 2012 and was fingerprinted by the police. But he made no application for asylum and almost at once travelled to Milan, where he had a contact. He came to the UK, concealed in the back of a lorry, on 15 February 2013: for most of the intervening period he had been staying with another Iranian, but he does not know whether that was in Italy or some other country.
3. MR claimed asylum on 19 February 2013. His application was refused on 27 March 2013 on the grounds that he could safely be returned to Italy. Judicial review proceedings were started on 8 April 2013. The claim was stayed pending the decisions in *EM*, *Tabrizagh* and *MS*. As in NA’s case, there were subsequent decisions*.* The challenge which eventually came before Whipple J was to decisions dated 25 September 2014 and 16 October 2015. The former decision certified as clearly unfounded the Appellant’s claim that his removal to Italy would breach his article 3 rights; and the latter affirmed that decision.
4. There was no medical report before the Judge but it appears from MR’s witness statement and his GP records covering the period up to July 2014 that he suffers from significant mental health problems. He has on at least two occasions self-harmed, once by cutting himself and once by taking a drug overdose. He has been treated with sertraline for depression and there appear to have been episodes where he has suffered what the notes describe as “schizophrenia-like symptoms”.
5. Very shortly before the hearing of the appeal Wilsons lodged, purportedly in support of an anonymity application, a report from a consultant psychiatrist, Dr Bell, who interviewed MR on 15 July and had had sight of his recent notes. He describes him as suffering from “a mixed syndrome of Chronic Traumatised State and Depressive Disorder in the context of a vulnerable personality and with serious psychotic features”. MR told him that during the time that he was detained by the police in Iran he was not merely beaten but suffered sexual abuse, and Dr Bell believes that that requires further psychiatric examination. He refers to his current risk of self-harm or attempted suicide as moderate.

**(C) OUTLINE OF THE ASYLUM SYSTEM IN ITALY**

1. It is unnecessary that I give any comprehensive account of the system for dealing with asylum-seekers and BIPs in Italy. I give here a sufficient summary to explain the various references in the case-law and in the judgment. In so far as it is necessary to go into more detail on particular points I do so later.
2. When asylum-seekers first arrive they are likely to be accommodated on a temporary basis in a *Centro di Accoglienza* (Reception Centre), or “CDA”. In times of crisis these will be supplemented by emergency accommodation of various kinds.
3. Thereafter asylum-seekers are likely to be moved to a *Centro di Accoglienza per Richidienti Asilo* (Reception Centre for Asylum-Seekers), or “CARA”, while their claims are processed. As originally conceived, asylum-seekers would only be accommodated in a CARA for a matter of a few weeks. But the pressure on the system has caused long delays in decision-making and asylum-seekers may remain in a CARA for as long as a year. CARAs – which are operated on behalf of the government by third-party organisations – are typically large and have limited facilities. It is fair to say that there has been a good deal of criticism both of the physical state of many CARAs and of the level of support given in them. There are also some centres known as *Centri di Primo Soccorso e Accoglienza* (“CPSAs”).
4. Once an asylum-seeker has been granted BIP status (we are not concerned in these appeals with cases where it is refused) they are given a residence permit for a period of years. They are entitled as a matter of Italian law to work and to have the same rights as Italian citizens as regards such matters as access to public housing and social services (though it is said that those rights are not as extensive in Italy as in other EU countries). But it is acknowledged that many BIPs will need support and assistance with integration before they are realistically in a position to look after themselves. This is intended to be provided by the *Sistema di Protezione per Richiedenti Asilo e Rifugiati* (System for Protection of Asylum-Seekers and Refugees), or “SPRAR”. This funds and co-ordinates a large number of centres – themselves generally, though not strictly accurately, referred to as “SPRARs”. These provide accommodation, food, health care, Italian classes, referral to social services, legal advice, vocational training, and help for residents in due course to find their own accommodation[[4]](#footnote-4). Although there is an issue as to the availability of places in SPRARs, there is no general criticism of the standard of accommodation or support given in them. BIPs are entitled to accommodation in a SPRAR for six months, or up to twelve months if they are considered vulnerable.
5. Although SPRARs are primarily intended for BIPs they are also, because of their better facilities, used for the accommodation of asylum-seekers with particular vulnerability: in 2012 28% of those occupying SPRARs were asylum-seekers, and there are suggestions in the evidence that that proportion has gone up.
6. In addition, the European Refugee Fund (“ERF”), an EU body designed to give financial assistance to those member states bearing the brunt of migrant flows[[5]](#footnote-5), has funded a limited number of centres specifically for the reception of persons returned under the Dublin regime. The evidence before the Judge was that there were 572 places in such centres in early 2015, which represents only a fraction of the number of Dublin returnees; but of course such returnees would also be entitled to accommodation in a CARA or SPRAR.
7. It is convenient to say at this point that it is not clear what the status of the accommodation that NA occupied at Cassa Calenga was. But all that matters for present purposes is that it was not a SPRAR, so that it is common ground that she has not “used up” her entitlement to SPRAR accommodation.

**(D) THE LEGAL FRAMEWORK**

(1) CERTIFICATION

1. A decision to remove an asylum-seeker is in principle an appealable decision under section 82 of the Nationality, Immigration and Asylum Act 2002. Under section 92 the default position is that such an appeal must be brought from inside the UK but by section 92 (3) (b) it must in various specified circumstances be brought from outside the UK. One of those circumstances is where paragraph 5 (4) of Schedule 3 to the 2004 Act applies. Paragraph 5, which falls under Part 2 of the Schedule, provides (so far as material) as follows:

“(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.

…

(3) The person may not bring an immigration appeal from within the United Kingdom in reliance on–

(a) …

(b) a human rights claim in so far as it asserts that to remove the person to a specified State to which this Part applies would be unlawful under section 6 of the Human Rights Act 1998 because of the possibility of removal from that State to another 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.

(5) Sub-paragraph (4) applies to a human rights claim if, or in so far as, it asserts a matter other than that specified in sub-paragraph (3) (b).”

The states “to which this Part applies” are listed in paragraph 2 of the Schedule: they consist of the member states of the EU (together with Iceland, Norway and Switzerland). “Human rights claim” is defined in paragraph 1 as “a claim by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention) as being incompatible with his Convention rights”. “Convention rights” have the same definition as in section 1 of the 1998 Act.

1. Since NA and MR claim that their return to Italy would be contrary to their Convention rights otherwise than by reason of the risk of refoulement as identified in sub-paragraph (3) (b), their claim falls (by virtue of sub-paragraph (5)) within the terms of sub-paragraph (4), and the Respondent was obliged to certify them as “clearly unfounded” unless satisfied that that was not the case. If removed, they would remain, of course, entitled to pursue an appeal from Italy; but that is self-evidently a less than satisfactory form of redress when the removal to the place where their human rights are said to be at risk has already occurred.
2. The approach to be followed by the Secretary of State in deciding whether to certify a human rights claim as clearly unfounded was summarised by Lord Kerr at para. 6 of his judgment in *EM (Eritrea)* (p. 1329) as follows:

“Such a certificate can be issued if ‘on any legitimate view’ the claimant's assertion that his enforced return would constitute a violation of his human rights would fail on appeal: *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, by Lord Hope at para 34; *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230 and *ZT (Kosovo)* [2009] 1 WLR 348.”

1. The approach to be followed by the Court where such a certificate is challenged by way of judicial review was considered in the *ZT (Kosovo)* decision referred to by Lord Kerr. At paras. 21-23 (p. 355 B-G), Lord Phillips said:

“21. … [T]here was some debate as to the approach that should be adopted by the court when reviewing the Secretary of State's decision. Must the court substitute its own view of whether the claim is clearly unfounded, or has no realistic 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 is the correct approach. I consider, however, that in a case such as this, either approach involves the same mental process.

22. The test of whether a claim is 'clearly unfounded' is a black and white test. The result cannot, for instance, depend upon whether the burden of proof is on the claimant or the Secretary of State, albeit that section 94 makes express provision in relation to the burden of proof – in *R (L) v Secretary of State for the Home Department*[2003] EWCA Civ 25; [2003] 1 WLR 1230, paragraphs 56 to 59 I put the matter as follows.

‘56. Section 115 (1) empowers—but does not require—the Home Secretary to certify any claim ‘which is clearly unfounded’. The test is an objective one; it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.

57.  How, if at all, does the test in section 115(6) differ in practice from this? 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. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach.’

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 then it is not clearly unfounded. It 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 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.”

1. The upshot is that the issue before Lewis J and Whipple J was whether the Appellants’ claims that their return to Italy would constitute a breach by the Respondent of their rights under article 3 of the Convention was clearly unfounded; and since the question is one to which there is only one right answer that is likewise the issue before us. Despite Lord Phillips’ reference to the Court considering “the materials which the Home Secretary had”, the appeal before us proceeded on the basis that Lewis J and Whipple J were entitled, if not indeed obliged, to judge the issue on the basis of the evidence before them rather than on the basis of the evidence before the Respondent; but in any event the distinction is largely academic because the decisions that were the subject of the eventual challenge in *MS* were taken only shortly before the hearing and on the basis of the evidence lodged in the proceedings.

(2) THE DUBLIN REGULATION

1. The return of the Appellants to Italy would, subject to the qualification identified below, be under the Dublin regime. This forms part of the Common European Asylum System, which includes also the Reception and Qualification Directives to which I refer in more detail below. Its essential purpose is to allocate responsibility between member states for determining asylum applications. Very broadly, the principle is that asylum-seekers must claim asylum in the member state of the European Union in which they first arrive (“the responsible member state”): if they move on to another member state without claiming asylum they can be returned to the responsible member state. I should, however, note that a member state is never obliged to implement the Dublin procedures: the so-called “sovereignty clause” allows it to entertain a claim for asylum even where it is not the responsible state if it chooses to do so.
2. The original Dublin Convention has now been superseded by Council Regulations 343/2003 and, more recently, 604/2013 (“Dublin II” and “Dublin III”): in the two cases before us Dublin II is the relevant Regulation. Nothing turns on its detailed provisions. It is common ground, subject to the points made below, that since each of the Appellants first entered the EU through Italy the UK was not obliged to determine their asylum applications and was entitled to require the Italian government to accept their enforced return, and it has agreed to do so.
3. There is one qualification to the foregoing. We were told that both the UK and the Italian governments take, or at least took, the view that in the case of BIPs (i.e. as opposed to asylum-seekers) the right to return them to the responsible member state does not arise under the terms of the Dublin Regulation as such. The contrary conclusion was reached by the Supreme Court in *EM (Eritrea)*: see para. 79 of the judgment of Lord Kerr (p. 1346 E-F). No submissions were made to us about the substance of that question, because it was common ground that, subject to the issue about her article 3 rights, the UK is entitled to return NA to Italy. For convenience, and in accordance with what seems to be general usage, we will refer to both asylum-seekers and BIPs who are sought to be returned to the responsible member state as “Dublin returnees”.

(3) THE LAW ABOUT CONDITIONS FOR ASYLUM-SEEKERS AND BIPs

1. The other two elements in the Common European Asylum System which are relevant for our purposes are (a) the Reception Directive, the purpose of which is to provide for minimum standards to be applied by member states in their treatment of asylum seekers whose claims have not been determined; and (b) the Qualification Directive, which – among other things – lays down minimum standards for the treatment of those to whom refugee status or subsidiary protection are granted. It is those Directives that will apply to the case of the two Appellants if returned: in NA’s case, since she is a BIP, it will be the Qualification Directive, whereas in MR’s it will in the first instance be the Reception Directive.

*The Reception Directive*

1. The Reception Directive was originally promulgated in 2003 (2003/9/EC). Because we are concerned with what will happen to MR if returned the relevant version is the “recast” version promulgated in 2013 (2013/33/EU), but the relevant provisions are substantially identical.[[6]](#footnote-6) The scope of the Directive covers what are called “material reception conditions”, defined in article 2 as “the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance”.
2. Article 17 is headed “General rules on material reception conditions and health care” and reads (so far as material):

“1.   Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2.   Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.  Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3-5 …”

1. Article 18 deals with accommodation for applicants for asylum. Paragraph 1 provides:

“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 international protection made at the border or in transit zones;

(b) accommodation centres which guarantee an adequate standard of living;

(c) private houses, flats, hotels or other premises adapted for housing applicants.”

1. Article 19 deals with health care. Paragraph 1 provides that applicants for asylum shall receive “the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders”. Paragraph 2 provides that member states "shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed”.
2. Chapter IV is headed “Provisions for Vulnerable Persons”. Article 21 states the general principle, as follows:

“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, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.”

The following articles deal with the assessment of vulnerability and with particular categories of vulnerable person. I need only refer to article 25, headed “Victims of torture and violence”, which reads:

“1.   Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.

2.   Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.”

1. I should make a point here about terminology. In one sense all (or almost all) asylum-seekers are “vulnerable”, simply by reason of the fact that they have had to leave their homes, in circumstances typically of great stress and often danger, and find themselves trying to make a new life, for an indefinite period and perhaps permanently, in a new country. This point is made, albeit in a different context, by the ECtHR in *MSS* (see para. 53 below). But article 25 is concerned with a sub-class of asylum-seekers who are particularly vulnerable for reasons of the kind specified. I will refer to such persons as “peculiarly vulnerable”.
2. The recast Reception Directive has been implemented in Italian law.

*The Qualification Directive*

1. The Qualification Directive was originally promulgated in 2004 (2004/83/EC). Its primary purpose is to set out the minimum criteria for entitlement to recognition as a refugee or as a person entitled to “subsidiary protection” (i.e., in substance, as a BIP); but chapter VII also lays down minimum standards for the treatment of persons so recognised. Again, there is a recast version (2011/95/EU), which is the relevant one for our purposes.
2. I need not set out the relevant provisions of chapter VII in full. The governing principle is that BIPs should have in the specified respects the same rights as nationals of the member states in question. That is so as regards access to employment (article 26), social welfare (article 29, subject to a right of limited derogation), health care (article 30), and “access to accommodation” (article 32). BIPs are also to be entitled to a residence permit (article 24). Article 34 is headed “Access to Integration Facilities” and reads:

“In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.”

Although the right to access to integration programmes does not explicitly include the right to accommodation, it is self-evident that many BIPs may not in practice be able to avail themselves of the rights granted by articles 26-32, and thus avoid homelessness or destitution, without a good deal of initial help and support, which in appropriate cases will involve suitable accommodation. That is of course recognised in Italy by the establishment of the SPRAR system.

1. The recast Qualification Directive has been implemented in Italian law.

(4) ARTICLE 3 AND CONDITIONS FOR ASYLUM-SEEKERS

1. Article 3 of the Convention reads:

“No one shall be subjected to torture as to inhuman or degrading treatment or punishment.”

1. The decision of the ECtHR in in *Soering v United Kingdom*(1989) 11 EHRR 439, which concerned the extradition of an applicant to a U.S. state where he faced the risk of many years on “death row”, established the basic principle that the removal of a person from a member state of the Council of Europe to another country may constitute a breach of article 3 because of how he may be treated in the receiving state. The essence of the Court’s reasoning appears at para. 90 of its judgment, which reads:

“In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”

That principle was applied in the context of the return of asylum-seekers in *Vilvarajah v United Kingdom* (1991) 14 EHRR 248.

1. As already noted, in *MSS v Belgium and Greece*, the ECtHR held not only that the treatment of an asylum-seeker in Greece constituted a breach by Greece of his rights under article 3 but also, applying *Soering*, that Belgium’s decision to return him to Greece, knowing the risk that he would suffer such treatment, constituted such a breach. It acknowledged that there was a “presumption that the Greek authorities would respect their international obligations in asylum matters” (see para. 345), but it held that on all the evidence that presumption had been rebutted.
2. As regards the liability of Greece, the Court started, at para. 249 of its judgment, by acknowledging the general principle that “article 3 cannot be interpreted as obliging the high contracting parties to provide everyone within their jurisdiction with a home” (referring to *Müslim v Turkey* (53566/99)) and that nor did it “entail any general obligation to give refugees financial assistance to maintain a certain standard of living”. However it held that the case before it was different. It said:

“250. The Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited *Müslim* case (§§ 83 and 84), the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States (“the Reception Directive”; see paragraph 84 above). What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.

251. The Court attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.

252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.

253. The Court reiterates that it has not excluded the possibility “that State responsibility [under Article 3] could arise for ‘treatment’ where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity” (see *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.”

There follows a discussion about whether the applicant’s account of his circumstances was credible and whether he could be regarded as responsible for them himself on account of not having sought help: I need not set this out. The Court gives its conclusion at paras. 263-264 as follows:

“263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the Reception Directive …, the Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

264. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision.”

1. Two points emerge from that reasoning which are important for our purposes.
2. First, the general rules about the limitations on the scope of article 3 identified in para. 249 of the judgment required qualification in MSS’s case (a) because of the special vulnerability of refugees as recognised in international law and (b) because Greece had, by transposing the requirements of the Reception Directive into its own law, undertaken positive obligations as regards the treatment of refugees. That analysis is confirmed by the judgment of Laws LJ in *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40, [2015] 1 WLR 3312, in a passage where he is seeking to explain the departure of the ECtHR from what he describes as “the article 3 paradigm” in some classes of case. He says, at para. 57 (p. 3334 A-B):

“In *MSS* a critical factor was the existence of legal duties owed by Greece under its own law implementing EU obligations: paragraphs 250 and 263 which I have cited; and it is clear that the court attached particular importance to the fact that the applicant was an asylum-seeker.”

1. Secondly, the Court did not proceed on the basis that the fact that there was a failure to comply with the Reception Directive was sufficient to constitute a breach of article 3. It examined the particular circumstances of the applicant’s case to see whether they reached the necessary “level of severity”. The circumstances that led it to the conclusion that they did are identified at para. 263 of the judgment: I will not repeat them here, but they include a prolonged period of street homelessness in circumstances of extreme destitution.
2. As regards the claim against Belgium, the Court at para. 365 “reiterated” that “the expulsion of an asylum-seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country”, citing, *inter alia*, *Soering* and *Vilvarajah*. It continued:

“366. In the instant case, the Court has already found the applicant’s conditions of detention and living conditions in Greece degrading ... . It notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources  ... .

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

368. That being so, there has been a violation of Article 3 of the Convention.”

1. I should record the basis of the Court’s finding at para. 366 that conditions for asylum-seekers in Greece were “well known”. It had earlier referred, at paras. 347-8 of its judgment, to “numerous reports and materials … based on field surveys”, which “all agree as to the practical difficulties involved in the application of the Dublin system in Greece … [and] … the deficiencies of the asylum procedure”. It referred specifically to reports from the UN High Commissioner for Refugees (“UNHCR”)[[7]](#footnote-7) and the Council of Europe Commissioner for Human Rights, and from a number of NGOs. It also said, at para. 349, that it attached “critical importance” to a letter sent by UNHCR in April 2009 to the Belgian government containing an unequivocal plea for the suspension of transfers to Greece.

(5) DUBLIN II AND ARTICLE 3: THE “PRESUMPTION OF COMPLIANCE”

1. In *R (NS (Afghanistan)) v Secretary of State for the Home Department* (C411/10)) [2013] QB 102 the Court of Justice of the European Union (“the CJEU”) had to consider the relationship between the rights of a member state to return an asylum-seeker to Greece under the Dublin Convention with its obligations under the Charter of Fundamental Rights of the European Union and under the Convention (which in this context are substantially identical). Its conclusions can be summarised as follows:

(1) The Common European Asylum System is based on the assumption that all the participating states observe fundamental rights (para. 78). Because of that “principle of mutual confidence” (para. 79) the Dublin regime proceeds on the basis that “it must be assumed that the treatment of asylum seekers in all member states complies with the requirements of the Charter, the Geneva Convention, and the [European Convention of Human Rights]” (para. 80): at para. 83 this is described as “a presumption of compliance by other member states with European Union law and, in particular, fundamental rights”. (It will be recalled that the Court had acknowledged the existence of a similar presumption in *MSS*: see para. 52 above.)

(2) However the Court recognises that the presumption of compliance cannot be absolute. At para. 81 it refers to the possibility that the system for the reception of asylum-seekers in a given country may “experience major operational problems” giving rise to a substantial risk that returnees may be treated in a manner incompatible with their fundamental rights (para. 81). The Court emphasises at paras. 82-85 that the risk of “minor infringements” would not be enough to render the return of an asylum-seeker under the Dublin Regulation unlawful; but it continues, at para. 86:

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

 (3) At paras. 87-93 it holds, following the reasoning of the ECtHR in *MSS*, that there were indeed substantial grounds for such a belief in the case of Greece. It concludes, at para. 94:

“It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of [Dublin II] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”

1. In *EM (Eritrea)* the Court of Appeal, in a judgment of the Court given by Sir Stephen Sedley, treated the language of the CJEU in the passages quoted as meaning that the presumption of compliance could only be disapplied in the case of “systemic” failures in the country of return.
2. That approach was, as already noted, rejected by the Supreme Court. At paras. 40-42 of his judgment, with which the other members of the Court agreed, Lord Kerr said:

“40. The need for a workable system to implement Dublin II is obvious. To allow asylum seekers the opportunity to move about various member states, applying successively in each of them for refugee status, in the hope of finding a more benevolent approach to their claims, could not be countenanced. This is the essential underpinning of Dublin II. Therefore, that the first state in which asylum is claimed should normally be required to deal with the application and, where the application is successful, to cater for the refugee's needs is not only obvious, it is fundamental to an effective and comprehensive system of refugee protection. Asylum seeking is now a world-wide phenomenon. It must be tackled on a co-operative, international basis. The recognition of a presumption that members of an alliance of states such as those which comprise the European Union will comply with their international obligations reflects not only principle but pragmatic considerations. A system whereby a state which is asked to confer refugee status on someone who has already applied for that elsewhere should be obliged, in every instance, to conduct an intense examination of avowed failings of the first state would lead to disarray.

41. It is entirely right, however, that a presumption that the first state will comply with its obligations should not extinguish the need to examine whether *in fact*those obligations will be fulfilled when evidence is presented that it is unlikely that they will be. There can be little doubt that the existence of a presumption is necessary to produce a workable system but it is the nature of a presumption that it can, in appropriate circumstances, be displaced. The debate must centre, therefore, on how the presumption should operate. Its essential purpose must be kept clearly in mind. It is to set the context for consideration of whether an individual applicant will be subject to violation of his fundamental rights if he is returned to the listed country. The presumption should not operate to stifle the presentation and consideration of evidence that this will be the consequence of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker.

42. Violation of article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings. It is self-evident that a violation of article 3 rights is not intrinsically dependent on the failure of a system. If this requirement is grafted on to the presumption it will unquestionably make its rebuttal more difficult. And it means that those who would suffer breach of their article 3 rights other than as a result of a systemic deficiency in the procedure and reception conditions provided for the asylum seeker will be unable to avail of those rights in order to prevent their enforced return to a listed country where such violation would occur. That this should be the result of the decision of CJEU in *NS*would be, as I have said, remarkable.”

1. At paras. 58-64 of his judgment (pp. 1341-2) Lord Kerr set out the correct approach. Para. 58 reads:

“I consider that the Court of Appeal's conclusion that only systemic deficiencies in the listed country's asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in [*Soering*]. The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR.”

He then proceeded to set out the principal provisions of the Reception Directive and the Qualification Directive, observing that it was necessary that they be interpreted and applied in conformity with fundamental rights. He concluded, at paras. 63-64:

“63. Where, therefore, it can be shown that the conditions in which an asylum seeker will be required to live if returned under Dublin II are such that there is a real risk that he will be subjected to inhuman or degrading treatment, his removal to that state is forbidden. When one is in the realm of positive obligations (which is what is involved in the claim that the state has not ensured that satisfactory living conditions are available to the asylum seeker) the evidence is more likely to partake of systemic failings but the search for such failings is by way of a route to establish that there is a real risk of article 3 breach, rather than a hurdle to be surmounted.

64. There is, however, what Sales J described in *R (Elayathamby) v Secretary of State for the Home Department*[2011] EWHC 2182 (Admin), at para 42 (i) as ‘a significant evidential presumption’ that listed states will comply with their Convention obligations in relation to asylum procedures and reception conditions for asylum seekers within their territory. It is against the backdrop of that presumption that any claim that there is a real risk of breach of article 3 rights falls to be addressed.”

He also said, at para. 68 (p. 1344 B-C):

“Although one starts with a significant evidential presumption that listed states will comply with their international obligations, a claim that such a risk is present is not to be halted *in limine* solely because it does not constitute a systemic or systematic breach of the rights of refugees or asylum seekers. Moreover, practical realities lie at the heart of the inquiry; evidence of what happens on the ground must be capable of rebutting the presumption if it shows sufficiently clearly that there is a real risk of article 3 ill-treatment if there is an enforced return.”

**(E) THE CASE-LAW CONCERNING RETURNS TO ITALY**

PRELIMINARY: THE REPORTS

1. The cases to which we were referred about returns to Italy under the Dublin Regulation – which are mostly from the ECtHR but which include *Tabrizagh* and *EM (Eritrea)* – refer frequently to a number of reports from international organisations and NGOs considering conditions for asylum-seekers and refugees in Italy. It will be convenient if I identify the most prominent and briefly identify their gist. I take first the reports from the two international institutions, UNHCR and the Commissioner for Human Rights of the Council of Europe.
2. *UNHCR*. In July 2012, in reaction to the North African emergency, UNHCR issued a report entitled “Recommendations on Important Aspects of Refugee Protection in Italy”. There was a further report a year later. Both reports contained criticisms of the reception conditions for asylum-seekers and BIPs. The “General Background” section to the 2013 report notes that:

“Over the last few years, Italy has undertaken far-reaching and commendable efforts to save lives at sea; a decentralized international protection status determination procedure with adequate safeguards and outcomes has been established; and, finally, the transposition of the EU Qualification Directive has entailed a number of significant positive developments in the normative framework on the definition of international protection status and of the rights attached thereto.

These significant improvements notwithstanding, a number of gaps persist, in particular with regard to the reception of asylum-seekers and integration of refugees and other beneficiaries of international protection, resulting in a situation in which a significant number of beneficiaries of international protection lead deprived and marginalized lives.”

An important problem identified as regards BIPs was the inadequate number of places available in SPRARs. It is, however, important to note that neither report recommended that returns to Italy under the Dublin Regulation be suspended, as had occurred in the case of Greece.

1. *Mr Muižnieks’ report*. In July 2012 the Council of Europe’s Commissioner for Human Rights, Mr Nils Muižnieks, visited Italy to report on the effects of the migrant crisis. He published a report on 18 September 2012. He made a number of criticisms broadly in line with those in the UNHCR report of July 2012. In particular, though he was complimentary about the quality of the service provided by SPRARs, he was concerned at the “woefully inadequate” number of SPRAR places available, leading to the risk of BIPs becoming homeless or having to live below minimum subsistence standards.
2. Other reports referred to in the case-law include:

(1) *The Brunswick Report*. In September 2012 the Brunswick Administrative Court in Germany commissioned a report from Dr Judith Gleitze, the Director of an NGO called Borderline Europe, to address 13 specific questions relevant to the conditions facing Dublin returnees in Italy. Dr Gleitze spent nine days in Rome in October 2012 and interviewed a large number of official bodies, NGOs and refugees. Her report was published in December 2012. I will not attempt to recapitulate her answers to the questions raised, but she identified a large number of failings in the system.

(2) *The Dublin II National Report on Italy*. In December 2012 a number of NGOs concerned with asylum-seekers affected by the Dublin regime reported on the reception arrangements in Italy. It made a number of the same criticisms as UNHCR.

(3) *The SRC Report*. In May and June 2013 the Swiss Refugee Council (“the SRC”) which is an independent NGO associated with Caritas and various Swiss humanitarian charities and the Swiss section of Amnesty International, sent a three-person delegation to Rome and Milan to report on the current situation for asylum-seekers and BIPs in Italy, and in particular Dublin returnees. The subject is one of particular importance in Switzerland because in 2012 over 80% of Dublin returnees to Italy were from Switzerland. The Council’s report, entitled “Reception Conditions in Italy”, was published in October 2013. The Introduction explains that the report is based on the delegation’s interviews with a wide range of NGOs, representatives of the Italian authorities, refugees and other interested persons. The report draws attention, *inter alia*, to a serious shortage of accommodation in both CARAs and SPRARs and to the fact that as a result many asylum-seekers and, in particular, BIPs are living in inadequate accommodation or are homeless and destitute.

THE CASES

(1) The 2013 ECtHRDecisions

*Hussein*

1. In *Hussein v Netherlands and Italy* (27725/10), (2013) 57 EHRR SE1, the applicant[[8]](#footnote-8) was a Somali woman who entered Italy in August 2008 and claimed asylum. She was accommodated in a CARA in Massa Carrara in Tuscany. She was given a temporary residence permit. On 28 January 2009 she was granted subsidiary protection for three years: in other words, she became a BIP. In April 2009 she travelled to the Netherlands and claimed asylum. She was pregnant. It was her case that the pregnancy was the result of her having been raped during the previous year when she had left the centre and was living rough in Florence. While in the Netherlands she had another child. She claimed both that her article 3 rights had been breached while she was in Italy and that they would be further breached if she were returned there by the Netherlands.
2. Notwithstanding that the decision was an admissibility decision, the judgment of the Court is very full. After setting out the facts and the relevant EU and Dutch law, at paras. 33-49 it reviewed the relevant Italian domestic law and practice in considerable detail. In particular it quoted at length the serious criticisms of the Italian system made by the UNHCR July 2012 report, Mr Muižnieks’ report and the Dublin II National Report. At paras. 51-55 it referred to case-law from Germany, Belgium and the UK[[9]](#footnote-9), noting that courts in both Germany and Belgium had suspended returns to Italy. I should note that in its account of the relevant law and practice it referred to the position both of asylum-seekers, governed by the Reception Directive, and of BIPs, governed by the Qualification Directive.
3. At paras. 68-71 of its judgment the Court set out what it regarded as the relevant principles, as follows (omitting some of the references):

“68. The assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 risk must necessarily be a rigorous one … and inevitably requires that the Court assess the conditions in the receiving country against the standards of that Convention provision … . These standards imply that the ill-treatment the applicant alleges he or she will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case, such as the duration, nature and context of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim … . The Court reiterates that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 … .

69. In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3 if transferred to Italy, the Court will examine the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* … . The Court’s assessment must focus on the foreseeable consequences of the applicant’s removal to Italy. This in turn must be considered in the light of the general situation there as well as the applicant’s personal circumstances … .

70. The Court further reiterates that the mere fact of return to a country where one’s economic position will be worse than in the expelling Contracting State is not sufficient to meet the threshold of ill-treatment proscribed by Article 3 (see *Miah v. the United Kingdom* (dec.), no. 53080/07, § 14, 27 April 2010 and, *mutatis mutandis*, *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008), that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home, and that this provision does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *M.S.S. v. Belgium and Greece*, cited above, § 249).

71. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. In the absence of exceptionally compelling humanitarian grounds against removal, the fact that the applicant’s material and social living conditions would be significantly reduced if he or she were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3 (see, *mutatis mutandis*, *N. v. the United Kingdom*, cited above, § 42); and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 281-292).

1. The Court then proceeded, at paras. 72-75, to consider and reject the applicant’s claim against Italy in relation to her treatment between her arrival there and her departure to the Netherlands. Its reasoning is specific to the facts of her case and I need not set it out here.
2. I should, however, set out in full (subject to omitting some immaterial references) how the Court dealt with Ms Hussein’s claim against the Netherlands as regards her proposed return. It said:

“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 (see paragraphs 43, 44, 46 and 49 above [being the paragraphs setting out the criticisms made by the UNHCR and others]), 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 (see [various authorities, including *MSS* at para. 219]). 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.”

1. The Court’s conclusion was that the applicant’s complaints against the Netherlands and Italy under Article 3 were manifestly ill-founded and accordingly inadmissible.
2. It is the reasoning in paras. 76-78 of the judgment which is most important for our purposes, since it is concerned with the risk of a breach of Ms Hussein’s article 3 rights if returned. The Court was well aware of the deficiencies in the Italian system, as revealed in particular in the reports of UNHCR and Mr Muižniek, but it also noted that, unlike in Greece, there remained “a detailed structure of facilities and care to provide for the needs of asylum seekers”, and it held that the various shortcomings disclosed by the reports were not such as to demonstrate a risk that Ms Hussein would suffer hardship of sufficient severity. The reasoning cannot have been that there was a real risk that Ms Hussein would have to live on the streets or in a squat or emergency accommodation, but that that did not constitute sufficient hardship: that would be inconceivable in the case of a mother with young children. Rather, it plainly was that the Italian authorities could be trusted, in the circumstances of her case, to find her accommodation which, if not ideal, was sufficient to prevent the kind of inhuman and degrading treatment suffered by the applicant in *MSS*.
3. I should note one particular point made by Mr Husain about the language of the judgment. He submitted that the Court was wrong to refer at para. 78 to whether Ms Hussein had shown that there was a “real and imminent risk” of a breach of her article 3 rights if she were returned. He said that that formulation derives from a different line of Strasbourg authority and that the only correct formulation was that which appears in *Soering*, namely “real risk”. I am sceptical about the significance to be attached to nice differences of language of this kind. But the point does not require to be considered further, since the Judge in this case used the *Soering* formulation throughout.

*Daytbegova*

1. In *Daytbegova v Austria* (6198/12), (2013) 57 EHRR SE12, another admissibility decision, the applicants were a Russian woman and her 16-year-old daughter who had arrived initially in Italy but who had gone on to Austria after a short period and claimed asylum there. They claimed that their return to Italy under the Dublin Regulation would be a breach of their rights under article 3 because of the deficiencies in the reception arrangements for asylum-seekers there and in particular the risk of homelessness. This was particularly serious in the case of the daughter, because she suffered from PTSD with suicidal tendencies.
2. The Court referred to the evidence which had been considered in *Hussein* about the reception conditions for asylum-seekers in Italy. It reiterated the statement of the applicable principles at paras. 68-71 of its judgment in that case. It held the complaint to be inadmissible. It gave its reasons at paras. 65-69 as follows (omitting some immaterial parts):

“65. The Court will now consider the question whether the situation in which the applicants, if removed to Italy, are likely to find themselves, can be regarded as incompatible with Article 3, taking into account their situation as asylum seekers and, as such, members of a particularly underprivileged and vulnerable population group in need of special protection (see *Mohammed Hussein,*cited above, § 76, with a reference to *M.S.S. v. Belgium and Greece,*… § 251).

66. The Court firstly notes that the applicants never applied for asylum in Italy. … The Court therefore turns to the general information available to it on the legal and practical situation of the asylum procedure in Italy, and refers first and foremost to the Italian Government’s observation that the applicants will be able to lodge formal asylum applications with the competent authorities in Italy on their return there … . While not disregarding the criticism raised in various reports concerning factual obstacles to the lodging of asylum applications in Italy …, the Court finds that the information available does not point to the conclusion that those singular incidents amount to such a systemic failure as was the case in *M.S.S. v Belgium and Greece …* . The same applies as regards the reports concerning the shortcomings of the general situation and living conditions for asylum seekers in Italy (see for the reports *Mohammed Hussein*, cited above, §§ 43-44, 46 and 49). 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 (see also ibid., § 78).

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 …. 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 …, 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 … .

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,*cited above, § 78).”

1. The Court’s conclusion accordingly was, as stated at para. 71, that:

“… at the time of the examination of the application before the Court, and assuming a comprehensive handover of relevant information on the applicants from the Austrian authorities to the Italian authorities in the event of their removal to Italy, the applicants’ complaint under Article 3 is manifestly ill-founded and therefore inadmissible”.

1. As in *Hussein*, the Court’s reasoning plainly is that, although the daughter’s healthcare needs meant that the applicants would require “a particularly well-planned reception” – which, as it says at para. 67, would necessarily involve the provision of suitable accommodation – the evidence of shortcomings in the Italian system was not sufficient to justify the conclusion that the necessary arrangements would not be made.

*Hassan*

1. On 27 August 2013 the ECtHR declared inadmissible nine applications from asylum-seekers in the Netherlands resisting their return to Italy under the Dublin Regulation. Its decision was reported under the name of the first of the applications. The applicants’ cases were summarised at paras. 162-165 of the judgment. I need only set out part of para. 162, which reads:

“All applicants complained under Article 3 of the Convention that their removal from the Netherlands to Italy would subject them to treatment contrary to that provision, given the general situation and living conditions in Italy for asylum seekers, in particular those who are particularly vulnerable such as, for instance, single parents with young children or persons requiring medical care.”

1. The Court dealt with the claim that the return of the applicants to Italy would involve a breach of their article 3 rights essentially by referring back to its conclusion in *Hussein*. It said, at para. 176:

“Reiterating its findings in the case of *Mohammed Hussein v. the Netherlands and Italy* (cited above, § 78) and having found no reasons in the submissions made in the applications at hand warranting another conclusion, the Court finds that, although the general situation and living conditions in Italy of asylum seekers is certainly far from ideal and may disclose some shortcomings, there is no systemic failure where it concerns providing support or facilities catering for asylum seekers, as was the case in *M.S.S. v. Belgium and Greece* (cited above). The Court further finds, also in view of the manner in which the applicants who stayed in Italy were treated by the Italian authorities after their initial arrival in Italy, that none of the applicants – whom the Court regards as asylum seekers – have established that their 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. The Court has found no basis on which it can be assumed that the applicants will not be able to benefit from the available resources in Italy for asylum seekers or that, in case of difficulties, the Italian authorities would not respond in an appropriate manner.”

I should also, because it was relied on by the Respondent, record an observation which the Court made at para. 179 to the effect that “the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee who has been explicitly granted permission to settle in the country of refuge”.

*Other decisions*

1. There are four other admissibility decisions from 2013 concerning returns to Italy – *Halimi v Austria and Italy* (53852/11), *Hagos v Netherlands and Italy* (9053/10), *Abubeker v Austria* (73874/11) and *Hussein Diirshi and Others v. Netherlands and Italy*(2314/10). They are all to the same effect as the three set out above, and it is unnecessary to refer to the reasoning.

(2) *EM (Eritrea)*

1. I have already quoted passages from the judgment of Lord Kerr in *EM (Eritrea)* as regards issues of general principle. However, as regards the application of those principles in the case of returns to Italy, the decision is of limited value since, as already noted, the Supreme Court remitted the cases before it for further consideration. The decisions of the ECtHR in *Hussein*, *Daytbegova* and *Hassan* are all referred to, but only in passing and on issues of general approach. However, there are three points that I should note.
2. First, something should be said about what implications can be drawn from the way in which the Supreme Court disposed of the case. There were four cases before it – *EM (Eritrea), EH (Iran), AE (Eritrea)* and *MA (Eritrea)*. EM’s case was heard at first instance by Kenneth Parker J – see [2011] EWHC 2012 (Admin) (also reported at [2012] 1 CMLR 42) and [2012] EWHC 1799 (Admin) (sub nom *R (Medhanye) v Secretary of State for the Home Department*): he had initially stayed the decision pending the decision in *NS*, but following that decision he dismissed the claim. MA’s claim was dismissed by Langstaff J – see [2012] EWHC 56 (Admin) (sub nom *R (Meaza Asefa) v Secretary of State for the Home Department*). EH and AE had both been refused permission to apply for judicial review at first instance but permission was given by the Court of Appeal and the claim for judicial review retained there. In at least three of the cases the claimants were, on the facts as alleged, peculiarly vulnerable. EH suffered from PTSD and depression, and there was a real risk that if he were returned to Italy he would be homeless. AE had been granted asylum in Italy but had had to live in a squat where she was repeatedly raped. MA had also been granted asylum in Italy but said that she had had to live on the streets and had been raped. She was said to be suicidal at the prospect of having to return to Italy. As I have already explained, the Court of Appeal said that, but for what it understood to be the requirement that a “systemic” deficiency in reception arrangements be proved, it would have quashed the certificates in all four cases because it could not be said to be unarguable that there was a risk of the claimants suffering inhuman and degrading treatment if returned (see para. 61 of its judgment). Although the Supreme Court held that the Court of Appeal’s understanding of the law was wrong, it did not itself proceed to quash the certificates, as it should have done if it had positively endorsed the Court of Appeal’s conclusion that the facts relied on arguably disclosed a real risk of a breach of article 3. That means that the observations of the Court of Appeal cannot be relied on as an authoritative statement of what the outcome should have been on the correct test. However, it would be wrong to rely on the course taken by the Supreme Court as a positive rejection of the Court of Appeal’s approach, since it is not clear that it was in fact invited itself to quash the decisions: the relevant passage of Lord Kerr’s judgment, at paras. 65-68, is directed only to the question whether the first-instance decisions of Kenneth Parker J and Langstaff J should be allowed to stand.
3. Secondly, at para. 71 of his judgment (pp. 1344-5) Lord Kerr quoted an observation by the Court of Appeal about the particular importance to be attached to reports by the UNHCR, as follows:

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

He continued, at paras. 72-74 (p. 1345), as follows:

“72. I fully agree with this assessment. In a recent decision of this court, the unique and unrivalled expertise of UNHCR in the field of asylum and refugee law was acknowledged. In *IA (Iran) v Secretary of State for the Home Department*[2014] UKSC 6; [2014] 1 WLR 384, this court said at para 44:

‘Although little may be known about the actual process of decision-making by UNHCR in granting refugee status in an individual case, the accumulated and unrivalled expertise of this organisation, its experience in working with governments throughout the world, the development, promotion and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determinations must invest its decisions with considerable authority.’

73. It is of course the case that UNHCR's criticisms of the situation in Greece in its interventions in *KRS* and particularly *MSS* were more pointed and direct than they have been in the present appeal in relation to Italy. In a report of July 2012 containing recommendations in relation to Italy, UNHCR did not call for a halt to all Dublin transfers to Italy. But, as Mr Fordham QC, for UNHCR, submitted, this does not mean that the organisation considered that there were no legal obstacles to particular transfers taking place or that UNHCR had given Italy a ‘clean bill of health’.

74. The recommendations contained in UNHCR's report of July 2012 and its more recent report of July 2013 will doubtless be examined carefully by the Administrative Court. While, because of their more muted contents, they do not partake of the ‘pre-eminent and possibly decisive’ quality of the reports on Greece, they nevertheless contain useful information which the court will wish to judiciously consider. Assumptions should not be made about any lack of recommendations concerning general suspension of returns under Dublin II to Italy but it is of obvious significance that UNHCR did not make any such proposal. The UNHCR material should form part of the overall examination of the particular circumstances of each of the appellant's cases, no more and no less.”

(As appears from that passage UNHCR had in fact been permitted to intervene in the appeal in the Supreme Court.)

1. Thirdly, it had been argued by the Secretary of State that a different approach was required as regards the application of article 3 in the case of a BIP than in the case of an asylum-seeker because BIPs, being entitled (in essence) to the same rights as nationals, would if returned be in a less vulnerable position – see para. 76 of the judgment (pp. 1344-5). Lord Kerr accepted that that might be the case, but he said that whether it was would depend on the evidence – see para. 79 (p. 1346 F-G). It is necessarily implicit in that response that the applicable principles are the same in either case.

(3) *Tabrizagh*

1. As already noted, *Tabrizagh* was the first English case to consider the lawfulness of returns to Italy in the light of *EM (Eritrea).* There were six claimants, all young single men. Some had mental health problems. They comprised both asylum-seekers and BIPs. They relied principally on the various reports to which I have already referred, and in particular on the Brunswick and SRC reports, emphasising that neither had been considered in any of the ECtHR 2013 decisions.
2. The judgment of Elisabeth Laing J is full and careful, but for present purposes I can sufficiently summarise it as follows:

(1) She held that a tribunal considering whether the claimants’ return to Italy would breach their article 3 rights would be bound to attach great weight to the July 2012 and 2013 UNHCR reports and to the fact that UNHCR had not made any recommendation against returns to Italy (noting that it had done so in the case not only of Greece but, more recently, of Bulgaria): see paras. 76-88 and 167. She said at para. 167 that, although the reports made robust criticisms of the situation in Italy, the picture that they painted did not come close to meeting the test identified in *EM (Eritrea).* The passage continues:

“[UNHCR] says in its 2013 report that there have been significant improvements. It is true that there has been a steep increase in arrivals in 2014, but against the backdrop of Italy's response to the [North African emergency], and the substantial recent increase in accommodation places I do not consider that the FTT could possibly conclude, on the current material, that the presumption is displaced.”

(2) She held that, for various reasons which she gave, the tribunal could give little weight to the Brunswick and SRC reports in so far as they painted a gloomier picture than the UNHCR reports: see paras. 89-99 and 169.

(3) She also held that a tribunal would and should attach very significant weight to the ECtHR 2013 decisions: see para. 67. In that connection she observed, at para. 66:

“The ECtHR is an international court, with an appreciation of the international context, and, in particular, it is in a uniquely strong position to compare the situation in Greece at the time of *MSS* (where it did find systemic deficiencies) with that in Italy, which it has considered several times during April to August 2013. The ECtHR is much better placed to evaluate the effect of this type of evidence than is the [First-tier Tribunal], as the [tribunal] would be bound to acknowledge.”

(4) She considered the evidence about the number of places available for the accommodation of asylum-seekers and BIPs. She held that it was impossible to make precise findings either about the accommodation available or about demand, but she was satisfied that a tribunal could not find on the evidence that there was a serious risk that the claimants would suffer any breach of their article 3 rights if returned by being forced into homelessness or destitution. In this connection she again referred to the Italian government’s impressive response to the North African emergency in 2011 and said, at para. 72, that “[the tribunal] would be bound to conclude, that the Italian authorities have, in the past, responded to extraordinary strains on the system by creating extra accommodation places”.

1. This Court refused permission to appeal on the basis that none of the pleaded grounds raised any arguable error in the Judge’s reasoning.

(4) *Tarakhel*

1. As noted above, the decision of the Grand Chamber of the ECtHR in *Tarakhel v Switzerland* is said by the Appellants to represent an important change in the Court’s approach from that taken in *Hussein*, which renders the conclusion reached in *Tabrizagh* unreliable. The applicants were an Afghan couple and their six children, born between 1999 and 2012. The parents and five of the children had arrived in Italy by boat in July 2011 but had left the CARA in which they were accommodated in Bari and travelled to Austria and then to Switzerland, where they applied for asylum in November 2011. The sixth child was born in Switzerland. It was their case that reception arrangements for asylum-seekers in Italy were wholly inadequate, by reason in particular of (a) the slowness of the relevant procedure, (b) the fact that there were insufficient places available in the CARA and SPRAR systems, so that they risked having to live in a squat or even on the streets, and (c) the living conditions in the CARAs, drawing on their experience in Bari. They expressed particular concerns about what they said was the practice of the Italian authorities at some centres to separate parents and children (see paras. 66, 68 and 83 of the judgment). They relied on a number of the reports which I have identified above, including that of the SRC.
2. The Court, after reviewing the relevant Swiss and EU law, devoted a lengthy section of its judgment to what it described as “the Italian context”. It adopted, without repeating, the account of the reception system for asylum-seekers in Italy which it had given in *Hussein*, though it updated it by reference to information from the Italian government about increases in the number of SPRAR places. It quoted at length from the July 2013 UNHCR report and from Mr Muižnieks’ report. A section on “relevant comparative law” noted that several German courts had ruled against returns to Italy under the Dublin Regulation and quoted a judgment from the Frankfurt Administrative Court, which itself relied on the Brunswick report. It also set out lengthy passages from the judgment of the Supreme Court in *EM (Eritrea)*.
3. At paras. 57-86 of its judgment the Court summarised the submissions of the parties – that is, the applicants and the Swiss government – together with the observations of a number of other parties who had intervened, including the Italian government. I need only record three points:

(1) The Court recorded at para. 70 that the Swiss government had relied on *Hussein* and on what it described as “the follow-up decisions in the same vein” – identifying each of the 2013 decisions to which I have referred under head (3) above.

(2) At para. 75 it said:

“…[At] the hearing … the [Swiss] Government stated that they had been informed by the Italian authorities that, if returned to Italy, the applicants would be accommodated in an ERF-financed centre in Bologna. They did not provide any further details concerning the arrangements for transfer and the physical reception conditions envisaged by the Italian authorities.”

(3) As regards the capacity available in SPRAR accommodation – in which, because they were a family with children, the applicants would be accommodated notwithstanding that they were not BIPs – the Italian government told the Court that the existing capacity was 9,630 but that as a result of recent legislation it would rise to 16,000 by the end of 2016.

1. The Court begins its consideration of its decision with a “recapitulation of general principles”, as follows:

“93.  The Court reiterates that according to its well-established case-law the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country [it refers to various authorities including *Soering*, *MSS* and *Vilvarajah*].

94.  The Court has held on numerous occasions 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 [reference is made to, *inter alia*, *MSS* at para. 219].

95.  The Court has also ruled that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living [reference is made to, inter alia, *MSS* at para. 249)].”

That passage essentially replicates what it had already said in *Hussein* (see para. 76 above).

1. The Court then says that “nevertheless” – i.e. despite those limits on the scope of article 3 – the Court had taken a different approach in *MSS* because “the obligation to provide accommodation and decent material conditions to impoverished asylum seekers had entered into positive law and the Greek authorities were bound to comply with their own legislation transposing European Union law, namely the Reception Directive” (para. 96). It goes on:

“97.  In the same judgment (§ 251), the Court attached considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.

98.  Still in *M.S.S.* (§§ 252 and 253), having to determine whether a situation of extreme material poverty could raise an issue under Article 3, the Court reiterated that it had not excluded “the possibility that the responsibility of the State [might] be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity” (see *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009).

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 (see *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 55, ECHR 2006-XI, and*Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012). 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 (see to this effect *Popov*, cited above,§91).”

1. The Court then proceeds, at paras. 100-122, to apply those principles to the facts of the case before it. At paras. 100-105 it sets out its general approach. At paras. 101-102 it makes clear that it will apply the *Soering* test and the approach taken in *MSS*. I should set out paras. 103-105, which read:

“103.  It is also clear from the *M.S.S.* judgment that the presumption that a State participating in the “Dublin” system will respect the fundamental rights laid down by the Convention is not irrebuttable. For its part, the Court of Justice of the European Union has ruled that the presumption that a Dublin State complies with its obligations under Article 4 of the Charter of Fundamental Rights of the European Union is rebutted in the event of ‘systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State’ … .

104.  In the case of ‘Dublin’ returns, the presumption that a Contracting State which is also the ‘receiving’ country will comply with Article 3 of the Convention can therefore validly be rebutted where ‘substantial grounds have been shown for believing’ that the person whose return is being ordered faces a ‘real risk’ of being subjected to treatment contrary to that provision in the receiving country.

The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.

The Court also notes that this approach was followed by the United Kingdom Supreme Court in [*EM (Eritrea)*].

105.  In the present case the Court must therefore ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants’ specific situation, substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy.”

1. The Court’s remaining consideration is under two headings – “(i)  Overall situation with regard to the reception arrangements for asylum seekers in Italy” and “(ii)  The applicants’ individual situation”. I take them in turn.
2. As regards the overall situation, the Court starts by noting that in *Hussein* it had set out the criticisms identified by UNHCR in its July 2012 report. It proceeds to take in turn the three matters of which the applicants particularly complained – see para. 89 above. As to (a), it holds that no question of the slowness of the identification procedure arose on the facts of the applicants’ case. As to the second element in the complaint, the capacity of the reception facilities, it sets out at para. 108 the figures given in the SRC report about the insufficiency of places in both CARA and SPRAR accommodation, namely that “in 2012 there were only 8,000 places in the CARAs, with waiting lists so long that the majority of applicants had no realistic prospect of gaining access” and there were only 4,800 places in SPRARs and 5,000 people on the waiting list.  It notes at para. 109 that the Swiss government did not dispute those figures as such but simply relied on the record of the Italian government in the past in coping with increased numbers of migrants; and it refers to the evidence of the Italian government about the intention to increase the number of SPRAR places. At para. 110 it says:

“The Court notes that the methods used to calculate the number of asylum seekers without accommodation in Italy are disputed. Without entering into the debate as to the accuracy of the available figures, it is sufficient for the Court to note the glaring discrepancy between the number of asylum applications made in 2013, which according to the Italian Government totalled 14,184 by 15 June 2013 …, and the number of places available in the facilities belonging to the SPRAR network (9,630 places), where - again according to the Italian Government - the applicants would be accommodated … . Moreover, given that the figure for the number of applications relates only to the first six months of 2013, the figure for the year as a whole is likely to be considerably higher, further weakening the reception capacity of the SPRAR system.

The Court further notes that neither the Swiss nor the Italian Government claimed that the combined capacity of the SPRAR system and the CARAs would be capable of absorbing the greater part, still less the entire demand for accommodation.”

As to the third element in the complaint, relating to reception conditions in the available facilities, the Court at paras. 111-113 refers to the evidence from the various reports about “lack of privacy, insalubrious conditions and violence” in the CARAs, although it also notes that UNHCR in its July 2012 report did not appear to regard such problems as widespread. It records the evidence of the Italian government that families were not systematically separated, though this might occasionally occur for short periods. It concludes, at paras. 114-115, as follows:

“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.”

1. As regards the applicants’ individual situation, the Court at para. 116 summarises the facts of their stay in Italy, noting that they had been accommodated in a CARA which they had left of their own accord. It points out in para. 117 that that distinguished their case from that of asylum seekers in Greece as analysed in *MSS*: MSS himself “was first placed in detention and then left to fend for himself, without any means of subsistence”. It proceeds at para. 118 to remind itself of the principles already stated about the need for ill-treatment to attain a “minimum level of severity” before article 3 was engaged, that the assessment of the minimum was relative and depended on all the circumstances of the case, and that as a particularly underprivileged and vulnerable population group asylum seekers require special protection. It continues, at para. 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 (see *Popov*, cited above, § 91). 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’ (see, *mutatis mutandis*, *Popov*, cited above, § 102). 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.”

1. There then follows its actual decision, which I should set out in full:

“120.  In the present case, as the Court has already observed (see paragraph 115 above), 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 (see paragraph 86 above). 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 (see paragraph 75 above). 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, there would be a violation of Article 3 of the Convention.”

1. Three members of the Court dissented. I need not set out the details of their reasoning, but I should note two passages. At para. OI-24, having referred to the statement of the Italian government that the applicants would if returned be accommodated in an ERF-funded facility, they said:

“... Must we nonetheless impose additional requirements in future on Switzerland – and by extension on any other country in the same situation – despite the fact that neither systemic deficiencies nor a real and substantiated risk of ill-treatment have been shown to exist?

OI-25. Will such assurances be required for all asylum seekers liable to be sent back to Italy – who, according to the *M.S.S.*judgment, are members of a particularly underprivileged and vulnerable population group in need of special protection – or only for families with children?”

They said that the decision of the majority represented an unwarranted departure from the consistent approach shown in the 2013 decisions referred to above, observing at para. OI-28 that:

“… [W]e cannot see how it is possible to depart from the Court’s findings in numerous recent cases and to justify a reversal of our case-law within the space of a few months.”

(5) The Post-*Tarakhel* ECtHR Decisions

1. Since *Tarakhel* the ECtHR has considered a number of other applications concerning returns to Italy. I should refer to the following.
2. In *AME v Netherlands* (51428/10) the applicant was a young Somali man: at different times he appears to have given widely different dates of birth, between 1985 and 1994. He arrived in Italy in 2009, when he may have been as young as 14 or as old as 23. He was granted subsidiary protection on a temporary basis but moved on to the Netherlands where he claimed asylum. The Dutch authorities sought to return him under Dublin II. He claimed that his return would breach his rights under article because (*inter alia*) of the living conditions for asylum-seekers in Italy. It was accepted that because his BIP status had expired in the meantime he would be treated as an asylum-seeker. By a decision dated 13 January 2015 a chamber of the ECtHR held his application to be inadmissible. It referred to paras. 93-99 and 101-104 of the judgment in *Tarakhel*as identifying the relevant principles, “including that to fall within the scope of Article 3 the ill‑treatment must attain a minimum level of severity”. It continued:

“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.”

 After reviewing the facts of his case it concluded, at para. 36, that:

“… the applicant has not established that his 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. The Court has found no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy for asylum seekers or that, in case of difficulties, the Italian authorities would not respond in an appropriate manner.”

 In the course of its review it observed, at para. 34, that

“unlike the applicants in the case of *Tarakhel*, cited above, who were a family with six minor children, the applicant is an able young man with no dependents and that, as regards transfers to Italy under the Dublin Regulation, the Netherlands authorities decide in consultation with the Italian authorities how and when the transfer of an asylum seeker to the competent Italian authorities will take place and that in principle three working days’ notice is given.”

It also, at para. 35, reiterated

“that the current situation in Italy for asylum seekers can in no way be compared to the situation in Greece at the time of the *M.S.S.* *v. Belgium and Greece* judgment, cited above, that the structure and overall situation of the reception arrangements in Italy cannot in themselves act as a bar to all removals of asylum seekers to that country (see *Tarakhel*, cited above, §§ 114-115).”

1. In *AS v Switzerland* (39350/13) the applicant was a Syrian Kurd born in 1988, who claimed asylum in Switzerland having passed through Italy previously. He suffered from serious PTSD and from problems with his back. The Swiss authorities sought to return him to Italy. It was argued that his enforced return would have a serious effect on his mental health and increase the risk of suicide. The Court declared his claim inadmissible. At paras. 25-34 of its judgment it reviewed in some detail the relevant authorities in relation to the removal of asylum-seekers who were suffering from serious illness in general and mental health problems in particular, including *D v United Kingdom* (1997) 24 EHRR 423, *Bensaid v United Kingdom* (44599/98) (2001) 33 EHRR 205, *N v United Kingdom* (26565/05) (2008) 47 EHRR 39, and *SB v Finland* (17200/11). In relation to suicide risk it said, at para. 34:

“Finally, as far as the risk of suicide is concerned, the Court reiterates that the fact that a person whose expulsion has been ordered has threatened to commit suicide does not require the State to refrain from enforcing the envisaged measure, provided that concrete measures are taken to prevent those threats from being realised (see, for example, *Dragan and Others v. Germany* (dec.), no. 33743/03, 7 October 2004; *Karim v. Sweden* (dec.), no. 24171/05, 4 July 2006; and *Kochieva and Others v. Sweden* (dec.), no. 75203/12, 30 April 2013). The Court has reached the same conclusion also regarding applicants who had a record of previous suicide attempts (see *Goncharova and Alekseytsev v. Sweden* (dec.), no 31246/06, 3 May 2007; and *A.A. v. Sweden* (dec.), no. 8594/04, § 71, 2 September 2008).”

At paras. 35-37 it applied those principles to the applicant’s case. I should set out those paragraphs in full:

“35. The Court notes that according to the medical information provided the applicant shows severe symptoms of post-traumatic stress disorder for which he is being treated by a doctor and receives medication (paragraph 9 above). The Court must therefore determine whether his return to Italy would put him in a situation of harm which would reach the high threshold set by Article 3 of the Convention.

36. In *Tarakhel* (§ 115), the Court found that while the structure and overall situation of the reception arrangements in Italy could not in themselves act as a bar to all removals of asylum seekers to that country, the data and information available to the Court nevertheless raised serious doubts as to the capacities of the system. Accordingly, in the Court’s view, the possibility that a significant number of asylum seekers might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded. The applicant is not, however, at the present time critically ill. The rapidity of any deterioration which he would suffer because of his removal from Switzerland and the extent to which he would be able to obtain access to medical treatment in Italy must involve a certain degree of speculation (see, *mutatis mutandis*, *N. v. the United Kingdom*, cited above, § 50). At present, there is no indication that the applicant, if returned to Italy, would not receive appropriate psychological treatment (see, *mutatis mutandis*, *Halimi v. Austria and Italy*, (dec.) no. 53852/11, 18 June 2013) and would not have access to anti-depressants of the kind that he is currently receiving in Switzerland. In this respect, the Court notes that it is common knowledge that Sertraline or equivalent treatment is available in Italy.

37. In the Court’s view, the applicant’s case cannot be distinguished from those cited in paragraphs 32 and 33 above. It does not disclose very exceptional circumstances, such as in *D. v. the United Kingdom* (cited above), where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support (*Bensaid*, cited above,§ 40).”

Five members of the Chamber had been part of the majority in *Tarakhel*.

1. In *AM v Switzerland* (37466/13) the applicant was a Syrian Kurd born in 1993, who claimed asylum in Switzerland having passed through Italy previously. He suffered from serious PTSD and from back pain. The Swiss authorities sought to remove him to Italy. It was argued that his enforced return to Italy, where he said he had been abused by the police, created a risk of suicide. The Court declared his claim inadmissible, holding that it was indistinguishable from *AS*. Its review of the relevant law was very close to that in *AS*, and the Court made reference also to *Tarakhel*.
2. In three more recent cases – *JA v Netherlands* (21459/14), *ATH v Netherlands* (54000/11) and *SMH v Netherlands* (5868/13) – the Court considered cases of applicants with minor children. Those cases are not directly comparable with the cases before us but it is worth identifying the basis on which they were decided. In June 2015 the Italian government formally notified the other states in the Council of Europe that arrangements of the kind which had operated post- *Tarakhel*, under which specific guarantees of accommodation were given on a case-by-case basis, were proving wasteful because too often the families in question never took advantage of them. Its policy was accordingly to earmark 161 places in SPRARs which would be available as required for families with children (an assurance was given that the number would be increased if necessary) and no longer to give specific guarantees. The Court in each case held that in the light of that policy there was no breach of article 3 in the families in question being returned to Italy and declared the applications inadmissible. The starting-point of its reasoning is the statement of principle in *Tarakhel* and the conclusion in that case (paras. 114-115) that the situation in Italy was in no way comparable to that in Greece and could not justify a general bar on returns. The issue was accordingly case-specific, and the essential question was whether the Italian government’s assurance about accommodation in one of the 161 places should be accepted: in each case the Court found no reason to doubt it. Case-specific points raised in *JA* and *ATH* based on the health of the mother (in *JA* there was a risk of suicide) were rejected on the basis that the Italian authorities could be relied on to provide the necessary care.

(6) *Weldegaber*

1. In *R (Weldegaber) v Secretary of State for the Home Department* [2015] UKUT 70 (IAC) the applicant was a 31-year-old Eritrean asylum-seeker, who had come to this country via Italy. His claim that his return to Italy would breach his rights under article 3 was certified. He applied to the Upper Tribunal for judicial review. He relied on the decision of the ECtHR in *Tarakhel* and also on reports of the character identified above and an expert report from Ms Loredana Leo, a report from whom was also relied on in this case (see paras. 200-209 below).
2. Permission to apply for judicial review was refused on the papers. There was an oral renewal hearing before the President of the Immigration and Asylum Chamber, McCloskey J, on 12 February 2015. He upheld the refusal of permission. His reasoning sufficiently appears from the (judicially-drafted) headnote, as follows:

“Dublin cases require the Respondent to undertake a thorough and individuated examination of the situation and circumstances of the person concerned.

2. The European Court of Human Rights in *Tarakhel* … was not purporting to promulgate a general rule or principle that a sending state is required to secure specific assurances from the destination state as to accommodation or the like.

3. In the light of the considerable body of relevant background country information considered by the Respondent, it was open to her to find that there was neither systemic deficiency nor serious operational failure in the conditions prevailing in Italy for the reception, processing and treatment of asylum seekers.”

OVERVIEW OF THE CASE-LAW

General Principles

1. The general principles to be applied in considering whether the return of an asylum-seeker to Italy would constitute a breach of his or her rights under article 3 are not in doubt. They can be summarised as follows:

(1) The fundamental question is whether “substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country” (*MSS*, para. 365, adopting the test originally formulated in *Soering*).

(2) Whether the threshold of “inhuman or degrading treatment” is crossed is “relative” and requires an assessment of “all the circumstances of the case, such as the duration, nature and context of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim …”. But the anticipated treatment relied on must attain “a minimum level of severity”. In particular, a breach is not shown merely by showing that “the applicant’s material and social living conditions would be significantly reduced if he or she were to be removed from the Contracting State” (*Tarakhel*, paras. 93-95). Nor is it sufficient to show no more than that there is a risk of a breach of the applicable EU Directives: this is not explicitly stated in the case-law but it is necessarily implicit in the approach of the Court in the cases cited, and in particular the two Grand Chamber decisions of *MSS* and *Tarakhel*.

(3) In considering that question the decision-maker should start with “a significant evidential presumption that member states will comply with [their obligations under the Convention]” (*NS (Afghanistan)*; *EM (Eritrea)* para. 68 – see also para. 40). But that presumption is of course rebuttable (*EM (Eritrea)*, para. 41; *Tarakhel*, para. 103); and there is no requirement that in order to rebut it the applicant must show that that the risk which he alleges is the result of “systemic” defects in the arrangements made for asylum-seekers or BIPs in the receiving country (*EM (Eritrea)*, paras. 41-42; *Tarakhel* paras. 104-105).

1. The last of those points does not of course mean that evidence about problems with the system for dealing with asylum-seekers and BIPs in the receiving state is irrelevant. Applicants will not be able to show that there is a real risk of their suffering inhuman or degrading treatment if returned merely by showing that there have been some particular cases of such treatment: they will in practice need to show that such cases are widespread. Proving that will often, or indeed generally, involve proving that there are systemic failings, or “major operational problems”, in the arrangements in the receiving country; and references to such failings or problems are found frequently both in the decision of the CJEU in *NS (Afghanistan)* and in numerous decisions of the ECtHR. The error of the Court of Appeal in *EM (Eritrea)* was only that it treated the proof of a “systemic” deficiency as a legal pre-condition for a breach of article 3 instead of a means by which a risk of such a breach might be established. That is clearly acknowledged in the judgment of Lord Kerr in the Supreme Court: see particularly para. 63.
2. Although the decision in *MSS* was concerned with an asylum-seeker, it is in my view clear that the relevant principles apply equally in the case of Dublin returnees who have already been granted international protection. In both *Hussein* and *AME* the applicants were BIPs, but the Court adopted the same approach in principle as in *MSS*: see, for example, para. 75 of the judgment in *Hussein*, finding no breach of article 3 in respect of the applicant’s treatment “either as an asylum seeker or as an alien having been accepted as a person in need of international protection”. That is consistent with Lord Kerr’s approach in *EM (Eritrea)* (see para. 85 above) and with what one would in any event expect. The special needs of refugees do not necessarily disappear at the moment that they are granted asylum, and those who were peculiarly vulnerable before the grant of asylum may remain peculiarly vulnerable thereafter. Access to integration facilities of the kind required by article 25 of the Qualification Directive, including a limited period of free accommodation, may – depending on the circumstances of the case – be essential if they are to avoid falling into circumstances sufficiently degrading to constitute a breach of article 3. I must emphasise that I am referring only to the question of principle – that is, whether it is open to a BIP to advance an “*MSS*-type” claim at all. I am not saying that the actual situations of asylum-seekers and BIPs are identical. On the contrary, it is clear that they are not, which is the point being made by the ECtHR at para. 179 of its judgment in *Hassan* (para. 80 above). On the whole, because of the more extensive rights enjoyed by BIPs it may be reasonable to regard them as being at lesser risk of suffering inhumane or degrading treatment than asylum-seekers; but that may not always be so, and it is necessary to look at the actual circumstances on the ground in each case.

Application of those Principles to Returns to Italy

1. So far so good, but the more difficult question is what light the authorities cast on how those principles apply in the case of returns to Italy. The Strasbourg cases are not formally authoritative on that question. It is for the domestic courts to decide on the application of the relevant principles to the facts of the particular case before them, and on the basis of the evidence adduced. However, how the ECtHR has applied the principles which it has itself enunciated to the particular cases before it gives valuable guidance as to the content and interpretation of those principles; and in a case where the facts and evidence are very similar the domestic decision-taker (whether that is a tribunal or the Secretary of State in forming a view as to what a tribunal would decide) is entitled to take its lead from the Strasbourg court. On the specific question of whether it is legitimate to return asylum-seekers to Italy it is indeed highly desirable that the ECtHR and the domestic tribunals adopt a consistent approach, provided always (a) that that approach is founded on good evidence and (b) that decision-makers recognise that the facts of a particular case, or evidence of significant changes in the situation in Italy, may require a departure from it. I do not believe that any of that is contentious. Both parties urged us to follow the Strasbourg decisions (or some of them): where they differed was about where those cases led.
2. The starting-point in considering the effect of the Strasbourg decisions must be the conclusion, reiterated in all the cases including *Tarakhel* (para. 114), that the situation in Italy is in no way comparable to that in Greece and that a general ban on returns to Italy cannot be justified. That conclusion was reached after consideration of all the reports considered at paras. 64-66 above.
3. However, *Tarakhel* decides that the problems about the availability of accommodation highlighted in the reports mean that at least in a case of the kind which was before the Court, namely that of a family with minor children, returns to Italy will not be lawful in the absence of specific assurances that suitable accommodation will be provided. The crucial question is whether that conclusion is limited to cases of that specific kind or whether it follows from the Court’s reasoning that the obligation to seek assurances arises in other cases also. That question was explicitly raised by the dissentients, who indeed raised the possibility that the reasoning of the majority entailed that (since it had been said in *MSS* that asylum-seekers as a class are particularly vulnerable) such assurances would have to be sought in every case of the return of an asylum-seeker to Italy. But a less extreme reading would be that the Court’s reasoning extends at least to the case of all other asylum-seekers who are peculiarly vulnerable, such as victims of rape or torture or those with mental health problems, so that returns of such asylum-seekers to Italy would be in breach of article 3 in the absence of specific assurances that they would be suitably accommodated.
4. Although in his original skeleton argument Mr Husain advanced both those possible readings, in the supplementary skeleton and his oral submissions he focused on the latter. He reminded us in particular that the Reception Directive required special provision to be made for “vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence” (see para. 44 above). Since the basis of the Court’s conclusion was the risk of accommodation, or suitable accommodation, not being available, and that risk would impact on all peculiarly vulnerable persons, and not just children, the reasoning must extend to the entire class. The distinction which the Court drew between the situation in Greece and that in Italy was only that in the case of a return to Greece there would necessarily and in all cases be a real risk of inhuman and degrading treatment while in the case of Italy that risk could be removed by the giving of sufficiently specific assurances.
5. I do not accept Mr Husain’s submissions on this question. In my view it is wrong to treat the reasoning of the majority in *Tarakhel* as going any further than the particular kind of case with which the Court was concerned – that is to say, families with minor children. There is some indication to that effect in the judgment itself, but the position is confirmed by the subsequent authorities. I take them in turn.
6. So far as the judgment itself is concerned, para. 119 is a central part of the Court’s chain of reasoning. It refers to the “specific needs and extreme vulnerability” of children: that picks up on para. 99, which records the special protection accorded to asylum-seekers who are minors by reason of their specific needs. It says that it follows that they must have “reception conditions … adapted to their age”. The immediately following paragraphs, which address the circumstances of the particular case, are founded on that point. The conclusion in paras. 120 and 122 is that the Swiss authorities must obtain assurances that the applicants would be received in facilities “adapted to the age of the children, and that the family will be kept together”: the element of the family being kept together was evidently particularly important to the Court. The passage as a whole is very specifically directed to the position of children. The Court was explicitly referred to the 2013 decisions. Its decision would seem to represent a departure from some of them, since they included cases, one being *Hussein*, where the applicants included a child. But although the dissentients suggest that the departure was fundamental in character, there is no suggestion that the majority believed that that was the case, as opposed to applying the relevant principles (in connection with which it referred explicitly to *Hussein*) to a particular situation and on the particular evidence adduced. The Court’s analysis does not refer at any point to the provisions of Chapter IV of the Reception Directive or to any general concept of peculiar vulnerability.
7. As for the subsequent cases, the applicants in both *AS* and *AM* were peculiarly vulnerable inasmuch as they both suffered from PTSD and were at risk of suicide. If *Tarakhel* were authority for the proposition that specific assurances of suitable accommodation should be obtained in the case of all returnees who were peculiarly vulnerable both their claims should have succeeded.
8. I also regard it as of some significance that in the most recent cases referred to at para. 104 above the Court has departed from the position that specific assurances are required in the case of the return of a family with children and has held that a more general assurance about the availability of accommodation, as there recorded, was sufficient. That change of position cannot be read across directly to the present case, because the Italian authorities have not offered even that more generalised kind of assurance for vulnerable persons other than children. But the cases in question are a useful reminder of the nature of the relevant exercise. What is required in each case is an assessment of the risk that the Italian authorities will be unable comply with their article 3 obligations; and in a case where the evidence showed that the Italian authorities had adapted their system to reinforce the protection of particularly vulnerable returnees the Court was prepared to proceed on the basis that the system would work even in the absence of specific assurances.
9. I of course understand the argument that if, as the Court believed in *Tarakhel*, there is a real risk that there will be insufficient accommodation to meet the demand for suitable accommodation for families it must follow that there will also be insufficient accommodation for other classes of vulnerable returnees who need equivalent accommodation. But I think it is clear, for the reasons given, that the Court has not gone that far. That is not necessarily illogical. The problems of accommodating a family together (particularly a family of eight), in child-friendly accommodation, might reasonably be thought to be substantially greater than those of finding suitable accommodation for a single vulnerable person, and the risks of failing to do so might also be thought to be greater; so that the fact that specific assurances were required in the former case did not necessarily mean that they were required in the latter.
10. In short, therefore, reading the Strasbourg authorities as a whole, I believe that the message of the cases to date is that the evidence to which the ECtHR has been referred (including and in particular the evidence about the shortage of accommodation in CARAs and SPRARs) is not sufficient generally to undermine the presumption that Italy will comply with its obligations under article 3 and the relevant EU Directives, the only exception being for the case of families with minor children. It is important to emphasise that I am at this point concerned only with the question of how far the case-law has gone. I am not to be taken as saying that it is not open to us in this case, on the basis of the evidence before us, to reach an equivalent decision to that in *Tarakhel* in the Appellants’ cases: I am saying only that the reasoning in the cases to date, and in particular in *Tarakhel*, does not point towards such a decision.
11. It follows also that the 2013 decisions remain a legitimate source of guidance except to the extent that they concern families with minor children, and that, contrary to a submission made by Mr Husain, the post-*Tarakhel* decisions in *AME*, *AS* and *AM* are not inconsistent with *Tarakhel* itself. (That renders academic a point emphasised by him, which is not in itself controversial, that decisions of the Grand Chamber are inherently more authoritative than decisions of individual chambers.)

**(F) THE DECISION OF LEWIS J IN *MS***

THE CLAIMANTS’ CASE

1. At para. 99 of his judgment Lewis J summarised the claimants’ case that they were at risk of a breach of their article 3 rights if returned to Italy as follows:

“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.”

1. The case was accordingly essentially about the availability of accommodation. More particularly, it was about the availability of suitable accommodation for vulnerable Dublin returnees. Most such accommodation would be in SPRARs.[[10]](#footnote-10) In the cases of MS and NA, who are BIPs, SPRARs are the only form of officially-provided accommodation potentially available; but, as we have seen, SPRARs are also used to accommodate peculiarly vulnerable asylum-seekers such as SG claimed to be.
2. However, as will appear, the claimants’ evidence also referred to practical problems facing returnees in obtaining access to the system at the point of return so as to be identified as peculiarly vulnerable and have the chance of being offered SPRAR accommodation, and specifically to the form of reception at the airports to which they were returned, which would in practice be either Rome (Fiumicino) or Milan (Malpensa). It is not disputed that the Italian government funds services run by NGOs at both airports to offer support and advice to asylum-seekers, including Dublin returnees; but it was the claimants’ evidence that the services of the airport NGOs were not available to BIPs, who would accordingly, after going through the usual formalities administered by the border police, simply be left to their own devices and have no reliable means of accessing SPRAR accommodation even if it were available.

THE NATURE OF THE EVIDENCE

The Claimants’ Initial Evidence

1. Each of the claimants gave a witness statement describing his or her own experiences, both in their country of origin and in Italy prior to coming to England. I have given a summary of NA’s evidence at paras. 10-13 above. As for MS and SG, MS was homeless and destitute for a substantial period and was unable to access healthcare despite being ill, and SG lived partly on the streets and partly in a squat and was the victim of rape on three occasions. Both had, as already noted, severe mental health problems.
2. The Claimants commissioned reports from four experts, or expert bodies, addressing reception conditions and living conditions for asylum-seekers and BIPs in Italy, with a focus on Dublin returnees. These were: Medici per I Diritti Umani (“MEDU”), a group working with asylum-seekers and BIPs in Florence; Loredana Leo, a lawyer specialising in asylum cases; Dr Chiara Marchetti, an academic at Milan University specialising in asylum law; and Amnesty International. Broadly, all attested to deficiencies in the provision of accommodation and support for Dublin returnees: I will give more detail when considering the grounds of appeal. In addition the claimants relied on a number of published reports from the international institutions and NGOs, most but not all of which had already featured in the case-law. I refer to all this material compendiously as “the reports”.
3. The claimants also provided a somewhat miscellaneous mass of press cuttings and short reports relating to conditions for migrants in Italy, accompanied by a 25-page “Schedule of Key Passages”. Lewis J was critical of the way in which this material was presented and noted that he had not been referred to any of it in oral submissions.

The Respondent’s Evidence

1. The Respondent relied on a witness statement dated 6 March 2015 from Mr Carl Dangerfield, a civil servant from the Home Office working with the Ministry of the Interior in Rome as liaison officer to the team dealing with Dublin returns. Mr Dangerfield had given evidence in the *EM* and *Tabrizagh* cases, and those statements were also relied on. The following points in his witness statements are particularly relevant for our purposes.
2. Mr Dangerfield gives figures, derived from Ministry of Interior statistics (which he exhibits), about the numbers of asylum-seekers in Italy and the numbers accommodated in government-provided accommodation. I discuss these at paras. 162-172 below.
3. In his witness statement for the *Tabrizagh* proceedings dated 13 May 2014 Mr Dangerfield explains that whenever an asylum-seeker is returned to Italy the UK authorities inform the Italian authorities of the travel arrangements. At that stage they will advise them if the returnee is particularly vulnerable or has particular needs (para. 18). In the case of returnees with health needs they will supply a copy of their medical records, provided they consent (para. 19). Mr Dangerfield says that if the information provided suggests that this is necessary medical staff will be present at the point when the ordinary verification procedures are performed by the border police. He says that following verification the police will refer the returnee to the airport NGO for assistance (para. 20). That evidence is of course consistent with what was said in the most recent decision letter in NA’s case: see para. 17 above.
4. In his witness statement for these proceedings Mr Dangerfield gives substantially the same evidence though in a slightly different form. He appears to say in the case of each category of returnee that they will be “medically assessed” at the airport (see paras. 20, 21, 23 and 24), but it may be that he means only that the NGOs will conduct a medical assessment where the UK authorities have provided prior notice of health problems or where they identify them for themselves: he deals with the latter category at para. 25 (making no distinction between BIPs and others). The point does not matter for our purposes because in the cases of both NA and MR the Respondent says that she will notify the Italian authorities of their health problems. In such a case he says that following the assessment the NGO will transfer the returnee either to a hospital or to “an appropriate accommodation centre”, where they will receive a further medical assessment.
5. As regards accommodation, Mr Dangerfield says in his witness statement for these proceedings that asylum-seekers will be entitled to CARA accommodation until their claim is decided, at which point (if it is granted) they will be entitled to SPRAR accommodation (para. 20). He says that BIPs will be entitled to SPRAR accommodation unless they have already been in such accommodation and that even in that case they will still be entitled to it if they are vulnerable (which must mean, in the terminology adopted above, peculiarly vulnerable). He says that in his experience “returnees with refugee status who are assessed to be vulnerable are always accommodated in some form, usually in a SPRAR” (para. 23). He says at para. 25 that certain accommodation centres have special provision for dealing with people with special needs, such as those suffering from PTSD, and the authorities will endeavour to arrange for returnees with such needs to be accommodated accordingly.
6. Mr Husain submitted that little weight should be given to Mr Dangerfield’s evidence because he does not state the sources of his information. I do not accept that. It is self-evident that as an official working in the Dublin unit in Rome he was very well-placed to acquire a good understanding of the workings of the relevant aspects of the Italian system.

*AIDA*

1. The European Council on Refugees and Exiles (“ECRE”), an NGO partly funded by UNHCR and the EU, in partnership with three other NGOs, has established the Asylum Information Database (“AIDA”), which aims to provide authoritative and up-to-date information on asylum practice in a number of European countries, including Italy. AIDA’s first country report on Italy was published in May 2013; updated versions were published thereafter. The Respondent included the April 2014 version of the AIDA report on Italy in her bundle before Lewis J, but a version from March 2015 was submitted in the course of, or shortly after, the hearing, apparently by the claimants. The latter, to which I will refer as “the 2015 report”, stated the position as at the end of January. We were referred to passages concerning reception arrangements for Dublin returnees and SPRAR accommodation.
2. As regards reception arrangements, the report says that “once asylum-seekers arrive at the airport … they are assisted by a specific NGO and referred to the reception centre, on the basis of the individual situation (vulnerable or ‘ordinary’ categories)” (p. 31). The way the report is drafted suggests that the reference to “asylum-seekers” is meant to cover BIPs, but that cannot be said to be entirely clear.
3. As for availability of accommodation, Mr Husain asked us to note that the report says (at p. 53) that “the main negative aspect of the Italian reception system consists in the reduced number of places and structures that are not sufficient to provide to all asylum seekers in need an adequate reception”. It is necessary to look, however, at what it says specifically about the SPRAR accommodation. As to that, it notes the rapid expansion of SPRAR places, giving a figure of 19,900 as at the end of 2014 and noting a very substantial increase in the allocation of government funding (p. 53). But it makes clear that some of that extra capacity is taken up by asylum-seekers rather than BIPs. In the context of Dublin returnees it refers to the number of SPRAR places available as “limited” (p. 31), though the problem is to some extent mitigated by the ERF-funded accommodation, which it describes as available to “either all the Dublin returnees or to vulnerable categories among Dubliners” (*loc. cit.*): Mr Husain submits that there is a doubt whether the ERF accommodation is in fact available to BIPs as opposed to asylum-seekers, but it is not necessary to resolve the point. Beyond the reference to SPRAR accommodation being limited, AIDA gives no specific figures: in particular, nothing is said about waiting-times. It does refer to accommodation in SPRARs being dependent “on the availability of places and the urgency and vulnerability of the case” (p. 53), which suggests that an element of prioritisation occurs. It refers to the authorities sometimes filling centres beyond their official capacity and also to BIPs and asylum-seekers who are unable to access accommodation having to live in settlements such as the notorious “Selam Palace” in Rome where conditions are very poor.
4. I have referred to the AIDA report in some detail, even though the Judge did not (apparently because the claimants did not themselves rely on it), because both parties took us to it in their oral submissions, and Ms Giovannetti referred to it as being – like the UNHCR reports – of a more objective character than reports produced by campaigning bodies or for the purpose of litigation. But it does not significantly alter the picture appearing from the earlier evidence. The impression given is of a system which is operating under great pressure but which the authorities are taking active steps to improve.

Late Evidence

1. Some further material (in addition to the AIDA January 2015 report) was submitted either during or shortly after the hearing. I need only refer to further witness statements from Mr Dangerfield and Ms Leo (with a colleague), and a letter from MEDU, about the applicable procedure where the residence permit of a returning BIP had expired or been lost, to which Ms Leo had referred in an earlier statement. The point appears to have arisen because MS’s permit had expired and NA had said (though not, so far as I can see, in either of her witness statements) that she had lost hers. It was not suggested before us that any difficulties which NA might encounter in this regard were important in considering the risk of an article 3 breach.[[11]](#footnote-11)

THE JUDGMENT

1. At paras. 1-70 Lewis J sets out the facts and the relevant background law. At paras. 71-91 he reviews the relevant case-law about article 3, focusing, so far as the Strasbourg cases are concerned, on *MSS*, *Hussein*, *Daytbegova* and *Tarakhel* and on *EM (Eritrea).*  He states his view of the effect of those authorities at para. 91 as follows:

“… [I]n 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.”

1. At para. 98 the Judge identifies the issues that he has to decide. The first and second issues are 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?”

I need not set out the third issue, which concerns the risk of suicide during the removal process itself, because there is no challenge to the Judge’s finding that standard Home Office practice governing the removal of returnees who pose a suicide risk would prevent the risk eventuating.

1. The distinction between the two issues identified by Lewis J – the first being concerned with whether the presumption of compliance had been displaced generally as regards Italy (or at least for particular classes of returnee), and the second with the risk in the individual cases – is unobjectionable as a working framework, particularly in the light of how the case-law has developed; and I dare say it reflected the way the case was put before him. But it is important to appreciate that there is no necessity for a two-stage approach of this kind. There is no sharp distinction between cases that depend on the general situation in the country of return, to be assessed by reference to whether the presumption of compliance has been rebutted, and cases that depend on some “individual facts” peculiar to the particular returnee. The ultimate issue is always whether the individual applicant has shown a real risk that if returned he or she will suffer a breach of their article 3 rights: the role of the presumption of compliance is to condition the assessment of that issue. In all cases the assessment will involve considering both the characteristics of the individual returnees and the general situation in the country of return so as to assess whether a returnee with those characteristics is at real risk of being subjected to inhumane and degrading treatment.

The First Issue: the Evidential Presumption

1. The first issue is considered at paras. 99-145 of the judgment. I have already set out how the Judge summarised the claimants’ case: see para. 121 above. He proceeds to address that case under three headings – the case-law, the statistics about accommodation for asylum-seekers and BIPs, and “the other reports and material relied upon”. I take those headings in turn.
2. As regards the case-law, the Judge says this:

“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, BAILII: [2013] ECHR 1341 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.”

1. As to the alleged shortfall in accommodation, the Judge addressed the statistics at paras. 106-115. His conclusion was that the statistics relied on by the claimants were insufficient to displace the presumption that Italy would comply with its obligations under article 3. I consider the details of his reasoning at paras. 162-172 below.
2. The Judge considered the other material relied on by the claimants at paras. 116-135. Again, he concluded that none of it displaced the presumption of compliance. I return to this aspect at paras. 172-209 and 213-221 below.
3. Finally, at paras. 136-149 the Judge addresses the significance of the decision in *Tarakhel*. In short, he reaches the same conclusion as I have done at paras. 112-119 above, saying at para. 138 that the Court’s decision in the case of a family with children “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”. As regards the claimants’ physical and mental health, he says:

“140. … [T]he 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’ … . 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.”

1. The Judge summarises his decision on the first issue as follows:

“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 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

1. The Judge states his approach to the second issue, at para. 146, as follows:

“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.”

He then proceeds to consider in turn the cases of MS, NA and SG. I need not summarise how he deals with MS’s case, but his consideration of SG remains relevant because she, like MR, was an asylum-seeker rather than a BIP.

1. As regards NA, the Judge says, at para. 150:

“NA … 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.”

At para. 151 he considers the case based on her mental ill-health and risk of suicide. He finds that when and if arrangements were put in place to return her to Italy the UK government would, unless she continued to refuse her consent, provide the Italian authorities in advance with copies of the medical information in their possession in order to enable them to make any appropriate special arrangements. He refers to the judgment in *Daytbegova*, where the Italian government confirmed that where it was informed of any particular vulnerability of a Dublin returnee, appropriate medical measures would be taken – see para. 68, quoted at para. 76 above. He says that “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 [NA’s health issues]”. Specifically in relation to the suicide risk he concludes that “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”. Para. 152 reads:

“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.”

(It is convenient to note at this stage that Mr Husain did not seek to resile from that acceptance before us.) The Judge concludes, at para. 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.”

1. The Judge’s reasoning and conclusions as regards SG, at paras. 153-158, are essentially similar. He notes her peculiar vulnerability, as a result of her mental ill-health and history of rape, but he says that full information about that vulnerability will be given to the Italian authorities on her return. He refers to their obligations under the Reception Directive to provide her with appropriate treatment and support, and he finds that there is no basis for a conclusion that they will not do so. He refers, as in NA’s case, to *Hussein* and *Daytbegova*. He summarises his conclusion in her case in the same terms as para. 153 in NA’s case.

**(G) THE GROUNDS OF APPEAL IN NA’s CASE**

1. As noted above, initially all three claimants appealed against Lewis J’s decision. Five grounds of appeal are pleaded, but they fall into three groups and are indeed so treated in Mr Husain’s original skeleton argument. They can be summarised as follows:

(1) Ground 1: The effect of *Tarakhel*. It is the Appellants’ case that the effect of the decision of the ECtHR in *Tarakhel* is that it was unlawful to return them, as vulnerable persons, without obtaining specific assurances that they would be suitably accommodated; and that Lewis J was wrong in law to hold otherwise.

(2) Grounds 2-4: Lewis J’s assessment of the evidence. Mr Husain makes a plethora of criticisms, some very specific but some more general, of how Lewis J approached the evidence about the risks faced by vulnerable BIPs and asylum-seekers if returned to Italy.

(3) Ground 5: Mental Health and Suicide Risk. It is contended that Lewis J failed to give effect to the authorities about the application of article 3 where a mentally ill person is removed from the UK.

1. Essentially the same grounds are relied on by MR. But it will be more convenient if I start by considering NA’s appeal on its own and then consider MR’s appeal in the light of my conclusions in her case.

**(H) GROUND 1: THE EFFECT OF *TARAKHEL***

1. Mr Husain in his skeleton arguments refers to four errors in Lewis J’s approach to the decision in *Tarakhel*, but on analysis there is an element of overlap between them, and at least one other point is made which does not appear to correspond to any of the four errors. I address the substance of the points made as follows.
2. Mr Husain submits that the Judge was wrong to treat the reasoning in *Tarakhel* as confined to the case of families with children and as not extending to the case of vulnerable persons generally. For the reasons given at paras. 112-119 above I do not accept that submission.
3. Mr Husain’s other principal point is that the Judge was wrong to “focus on the question whether an evidential presumption had been rebutted rather than on whether an arguable article 3 case had been shown”. In his submission the message of paras. 103-105 of the judgment in *Tarakhel* is that “the presumption of compliance is rebutted without more where there is evidence of a real risk of harm” and that accordingly the only question is whether such a risk had in fact been demonstrated.
4. I have no difficulty with the premise of Mr Husain’s submission, namely that the ultimate question in any case is whether there is a real risk, having regard to the practical realities, that if the asylum-seeker is returned his or her article 3 rights will be breached; and that asking whether or to what extent “the presumption has been rebutted” as regards a particular country should not be allowed to distract from that question. I can see that the way that the Judge framed the issues could have led to his losing focus on the essential question in that way: see my observations at para. 140 above. But I do not believe that it in fact did so. He framed the second issue squarely in terms of the *Soering* test and answers it in those terms in the cases of the individual claimants (see, as regards NA, para. 153, quoted at para. 148 above).
5. In so far as Mr Husain’s submission is that the reasoning of the ECtHR meant that the presumption of compliance had no application in the case of Italy, I do not accept that. In answering the correct, *Soering*, question the Judge was entitled – indeed positively obliged – to take as his “backdrop”, or starting-point, the expectation that Italy would meet its obligations under the Convention: Lord Kerr says so in terms at paras. 64 and 68 of his judgment in *EM (Eritrea)* – see para. 62 above. That is a “significant evidential presumption” not for some reason of theory but because it is indeed reasonable as a matter of practical reality to believe that a member state of the Council of Europe will comply with its obligations under the Convention unless the evidence demonstrates that there is a real risk that it will not. I see no sign that the ECtHR in *Tarakhel* intended to depart from that approach. On the contrary, in the very paragraphs on which Mr Husain relies it uses the language of a rebuttable presumption and refers specifically to its own previous decision in *MSS* acknowledging the existence of such a presumption and to the decision of the CJEU in *NS (Afghanistan)*, which it discusses at length (see para. 94).
6. Mr Husain also submits that Lewis J adopted a “binary approach, whereby Italy is totally and irremediably unsafe or presumed to be compliant in all respects”, ignoring the possibility of any more nuanced position. I can see no sign in the judgment that that was his approach.

**(I) GROUNDS 2-4: LEWIS J’s ASSESSMENT OF THE EVIDENCE**

PRELIMINARY: THE NATURE OF THE ISSUE BEFORE LEWIS J

1. The essence of the factual case advanced by NA was (a) that her vulnerability, as a single woman and a rape victim, with serious mental health problems, is such that her rights under article 3 would be infringed if on her return to Italy she was unable to access suitable accommodation and support (in practice that meant accommodation in a SPRAR or equivalent[[12]](#footnote-12)); and (b) that on the evidence if she were returned to Italy there was a serious risk – to put it no higher – that she would not be provided with such accommodation, primarily because there was an inadequate supply but also because of practical or procedural difficulties that she was likely to encounter in accessing it.
2. Since this is a certification case I do not think that element (a) in that case can be challenged, and I did not understand Ms Giovannetti to be seeking to do so. The essential issue for the Judge was thus simply whether there was a serious risk that if she were returned NA would not be accommodated in a SPRAR: this subsumes the question whether she would receive proper healthcare, and specifically psychiatric care, since it is not argued that even if she were in a SPRAR her needs would not be attended to. The only evidence that was material, at least in her case, was evidence that bore, directly or indirectly, on that question.
3. Ms Giovannetti reminded us that as a matter of principle the only right of a BIP or an asylum-seeker under the Convention is not to be subjected to inhumane and degrading treatment. Although the terms of the Reception Directive were relevant in the way identified in *MSS* (see para. 55 above), article 3 does not import an obligation to comply with its terms as such, and still less with those of article 25 of the Qualification Directive (integration facilities). Long-term homelessness in conditions of the kind described in *MSS* would no doubt constitute such inhumane and degrading treatment but short-term homelessness need not, nor would a situation where she was obliged to live in accommodation which was merely sub-standard. I accept all that, but I do not think that it is relevant in NA’s case, for the reason already given, namely that she is (at least arguably) sufficiently vulnerable to require not only accommodation but SPRAR accommodation. Ms Giovannetti’s point is, however, a useful reminder of the “minimum level of severity” qualification. It would not in my view even arguably be a breach of article 3 if there were, for example, a short delay in SPRAR accommodation being found for her or if the quality of such accommodation and the associated support were merely sub-optimal.
4. The evidence relating to the prospects of NA accessing SPRAR accommodation was of various kinds and the Judge is said to have erred in his treatment of each. I take them in turn.

(1) THE STATISTICS

1. It was an important part of the claimants’ case that the published figures showed a drastic shortfall between the numbers of migrants[[13]](#footnote-13) requiring accommodation and the places that were in fact available, with the result that there was inevitably a grave risk that they would not be found suitable accommodation, or indeed any accommodation, if returned: they calculated the shortfall in overall accommodation at between 60,000 and 90,000 places. The Respondent did not accept that the figures showed any such shortfall.
2. Lewis J did not accept the claimants’ case on this point. His reasoning can be summarised as follows:

(1) As regards available accommodation, the published figures showed that 66,066 migrants were being accommodated as at 31 December 2014. Figures for the types of accommodation in question were available for 28 February 2015, where the overall total (67,128) was only slightly different: the breakdown was 20,596 in SPRARs, 9,504 in CARAs/CDAs and CPSAs, and 37,028 in “temporary structures”.

(2) As regards demand, he said that the precise figures could not be ascertained. He said that as at December 2014 the figure for registered asylum-seekers whose claims had not been determined was 42,630 and the figure for those granted BIP status (and thus entitled to SPRAR accommodation) in the previous twelve months was 21,861. That would yield a total of persons entitled to accommodation of 64,491. A further 6,313 migrants had arrived in December, which would yield a total of 70,804, but he said that that total overstated the demand because (a) not all the BIPs would be vulnerable and thus entitled to twelve months in a SPRAR as opposed to six; (b) not all the migrants who arrived in December would seek asylum in Italy; and (c) not all those who were entitled to accommodation would in fact require it (because they might seek to live with family already established in Italy, or within their own ethnic communities or in organisations outside the official network). He made a similar point about the position as at the end of February 2015.

(3) On that basis he concluded that “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 … not possible” and that “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”. He noted that Kenneth Parker J. and Elisabeth Laing J. had reached the same conclusion in *Medhanye* (being *EM (Eritrea)* at first instance) – see paras. 27-28 – and in *Tabrizagh* – see para. 75.  These two judgments explain the nature of the problems with particular clarity and cogency, but it would further encumber this already unwieldy judgment to set them out here.

(4) Although for that reason he declined to make a finding as to the precise figures, he held that the various shortfalls alleged by the claimants were plainly not accurate. Apart from the points made above, he pointed out that they disregarded the accommodation provided in temporary structures. He rebutted an argument that the claimants’ approach was the same as adopted by the ECtHR in *Tarakhel*.

1. His conclusion, at para. 115, was as follows:

“Ultimately, … 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 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.”

1. Before considering Mr Husain’s challenge to that reasoning I should note that a comparison between overall supply and demand of the kind which the Judge was asked to undertake is of very limited value in resolving the specific issue in NA’s case, which depends on the availability of SPRAR accommodation. A shortage of places in CDAs or CARAs would be immaterial if there were sufficient places in SPRARs for BIPs and for the minority of peculiarly vulnerable asylum-seekers who might also be accommodated there. I am not to be taken to be criticising the Judge for entering into the exercise: he was asked to do so, and it may well have been more relevant to the case of SG. But I am sceptical of its relevance to NA’s case. I will nevertheless address the challenges to it.
2. By ground 2 of the Appellant’s Notice Mr Husain submitted that the Judge’s reasoning was flawed on what, on analysis, comes down to two grounds. I take them in turn.
3. First, he submitted that the ECtHR had in *Tarakhel* “placed the onus on the member states, rather than on the individual who asserted a risk, to displace the doubts raised by controversial and incomplete statistics”, and that since the Judge himself found that the statistics were disputed and incomplete he was bound to find that there was a risk that SPRAR accommodation would not be available for NA, as the Court had done in *Tarakhel* itself.
4. I do not accept that submission. I do not believe that Mr Husain’s characterisation of the reasoning in *Tarakhel* is correct. In finding that there was a risk that the applicants would not be properly accommodated the Court did not rely on any question of onus but on the facts (a) that it was common ground that the applicants would have to be accommodated in a SPRAR and (b) that there was in mid-2013 a “glaring discrepancy” between the number of asylum-seekers and the number of SPRAR places available: see para. 110[[14]](#footnote-14). The question for Lewis J was whether the claimants had adduced evidence about the shortage of accommodation sufficient to show the same risk in the case before him.
5. Mr Husain sought to reinforce his submission by reference to the decision of this court in *Gashi v Secretary of State for the Home Department* [1999] Imm AR 415. In that case a Kosovar asylum-seeker was resisting being removed to Germany under the Dublin Convention on the basis that if returned he was at risk of refoulement to Yugoslavia in breach of his rights under article 3. Part of his case depended on a remarkable discrepancy between the rate of grants of asylum to Kosovars in the UK and in Germany which it was said should have put the Secretary of State on enquiry as to whether unlawful refoulement was a real risk. The Court accepted that case. Buxton LJ, giving the leading judgment, said at p. 429 that the statistics called for an explanation and that it was for the Secretary of State to investigate the reasons for the discrepancy before deciding whether the claim could be certificated. I do not regard that case as analogous to the present. This is not a case where the available statistics raised a *prima facie* case that Italy was unable or unwilling to provide accommodation where required by its obligations under article 3.
6. Mr Husain’s other submission was that the Judge was wrong to take into account the 37,000 “temporary structures” when measuring the accommodation against the demand. He said that such evidence as there was about these structures showed that they were set up to provide accommodation for migrants arriving by boat from North Africa immediately following their arrival, many of whom would not even claim asylum: they were not intended for the longer-term accommodation of asylum-seekers, still less BIPs. They had, rightly, been ignored by the Court in *Tarakhel* in its discussion of the figures.
7. I do not believe that this submission undermines the Judge’s essential reasoning. I am content to assume that Mr Husain is right that many[[15]](#footnote-15) of those accommodated in temporary structures at any given date will not have claimed asylum and thus that the spaces that they occupy should not be treated as available for asylum-seekers – and still less for BIPs such as NA. But the Judge was not seeking to demonstrate that the figures for accommodation fully matched the figures for demand: rather, his point was that the available figures did not allow such an exercise to be usefully performed. If anything, Mr Husain’s submission reinforces that point.
8. I can accordingly see nothing wrong in the Judge’s conclusion that the statistics did not demonstrate a risk that NA could not be accommodated in a SPRAR.

(2) THE REPORTS

1. Both the expert reports commissioned by the claimants in *MS* and the various published reports on which they relied contain statements about the availability and accessibility of SPRAR accommodation. As we have seen, the Judge addressed those reports at paras. 116-131 of his judgment and held that none of them were capable of displacing the presumption that Italy would comply with its obligations under article 3. Mr Husain submits, as ground 3, that in relation to at least some of those reports that conclusion was unjustifiable. He also submits, as part of ground 4, that the Judge ignored important evidence contained in them.
2. In order to assess those submissions I will have to summarise the contents of the reports that were before the Judge, though I do so as shortly as I may, focusing on the questions of the availability of SPRAR accommodation and of support for returning BIPs. Some of the reports contain a good deal of more general material about the availability and standard of CARA accommodation; but it would not conduce to clarity of analysis if I allowed myself to be diverted from the issues before us. I will also have to set out and examine the Judge’s observations on some of the reports, an exercise which at some points, regrettably but unavoidably, involves descending to minutiae. I take the reports in the order that they are dealt with in the judgment.

The UNHCR 2012 and 2013 Reports

1. I have summarised the criticisms made in these reports at para. 64 above. Lewis J dealt with them at para. 117 of his judgment as follows:

“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.”

1. There is no challenge to that passage in the grounds of appeal or Mr Husain’s skeleton arguments.

The SRC Report

1. I have explained the origin and general conclusions of this report at para. 66 (3) above. Chapter 5 deals with the reception of BIPs. The following points are particularly relevant for our purposes.
2. Section 5.1 addresses the procedures for returning BIPs at the airport. It reports conflicting evidence about their access to the airport NGOs. UNHCR told the authors that the arrival of returning BIPs was reported to the NGOs and the border police said such returnees they could go to the NGOs if necessary, but the representatives of the airport NGOs at Fiumicino and Malpensa said that they only saw asylum-seekers.
3. Section 5.2.1 deals with the availability of SPRAR accommodation. It refers to the fact that there were only 3,000 SPRAR places in 2012 and to Mr Muižnieks’ description of that as “woefully inadequate”. It says that “5,000 people were on the waiting list for a SPRAR place in 2012” and goes on to describe the consequent difficulties in accessing a place, which it says is particularly acute for people with mental illness. It says that vulnerable BIPs who are not able to find accommodation in SPRAR centres “end up staying in [ERF] housing for Dublin returnees for a very long time”. It does not suggest that they are rendered homeless. The conclusion reads:

“The SPRAR system offers good support to those who get in. However, it does not provide enough places by far. The waiting list is long and obtaining a place is a matter of luck. Plans exist to significantly increase the number of places from 3,000 to 16,000 starting in 2014. It remains to be seen whether implementation will be successful and the extent to which this will defuse the accommodation problem in Italy. SPRAR places are always temporary, and the length of stay in the project is not long enough to ensure lasting independence afterwards. Dublin returnees make up only a small percentage of SPRAR participants. It is striking how few of those returned from Switzerland are accommodated in SPRAR. For this reason, the chances of finding a place in a SPRAR programme appears to be very small for returnees with protection status.”

1. Sections 5.2.3-6 deal with alternatives to SPRAR accommodation in Milan and Rome. They conclude that the various forms of municipal and charitable provision are inadequate and that a large number of BIPs live in squats or slums.
2. Lewis J considered the SRC report at para. 120 of his judgment. He said:

“In general terms, in my judgment, the report does not begin to establish that the conditions [which the authors] 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 … 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 … report as establishing that there are substantial operational problems in Italy.”

1. That may seem a rather short analysis, but it is fair to say that in her judgment in *Tabrizagh*, which Lewis J effectively adopts, Elisabeth Laing J had gone into a good deal more detail.Her essential reason for finding that the SRC report did not justify the conclusion that there was a risk that the Italian authorities would not discharge their obligations under article 3 was that it did not have the same authority as the UNHCR reports. But she also said, at para. 91, that there were some reasons to doubt the objectivity and accuracy of the report. She characterised the SRC report overall as disclosing “some failings, but nothing on the sort of scale which would entitle an objective observer to declare that Italy was breaching its obligations on a widespread scale”.
2. Mr Husain said that the only reason given by Lewis J for “rejecting” the SRC report was that it was based on research that was two years old. He submitted that that was illegitimate in the context of a certification case, since the extent to which the report’s findings were out of date clearly required careful factual examination. He also said that that reasoning was inconsistent with what he said was the ECtHR’s reliance on the report in *Tarakhel*.
3. It is not correct to say that Lewis J relied only on the date of the SRC report. He relied also on the criticisms by Elisabeth Laing J in *Tabrizagh*, which Mr Husain did not address. But I accept that the age of the data was an important part of the Judge’s reasoning. I do not believe that it was illegitimate for him to attach weight to that factor in the particular circumstances of this case. The crucial question for his purposes was the availability of SPRAR accommodation. The SRC report had drawn attention to the plans for a massive expansion of the SPRAR network and had said that it remained to be seen whether implementation would be successful: see para. 179 above. The evidence before the Judge was that by 28 February 2015 over 20,000 SPRAR places were being occupied, as against 3,000 in the period covered by the SRC report. In those circumstances the Judge was entitled to place little weight on evidence about shortages in 2012/2013.
4. As regards the references to the SRC report in *Tarakhel*, Lewis J was right to say that its evidence had not been explicitly adopted in the crucial part of the ECtHR’s reasoning. It may nevertheless be fair to say that the Court regarded the report as contributing to its overall conclusion that there was a risk that SPRAR accommodation would not be available for the applicants. However that does not meet the point that the evidence in question was, by the time of the hearing before Lewis J, two years old and that the number of SPRAR places had doubled in the meantime.
5. Mr Husain also relies on SRC’s evidence about reception arrangements at Fiumicino and Malpensa, but I deal with those separately below (see paras. 213-216).

The MEDU report

1. The MEDU report is dated 16 December 2014. The authors work in a project helping migrants living in squats in Florence. The number about whom they have data is 105, of whom 64 are Dublin returnees who are BIPs (referred to conveniently as “Dublin BIPs”). They make clear that they have no data about Dublin BIPs in Rome or Milan (though they do hear from some of “their” BIPs about their experiences elsewhere). They explain that since almost all the people with whom they work are BIPs they feel unable to comment on reception and living conditions for Dublin returnees who are asylum-seekers.
2. The substance of the report is to be found in section C, which addresses reception and living conditions for Dublin BIPs. In bare outline, and confining myself to the points relevant to NA’s case, the authors’ evidence, based on what they are told by “their” BIPs, is that no assistance of any kind is made available to Dublin BIPs at the airport. When they leave the airport they may get in touch with an NGO, who may then be able to arrange for accommodation in a SPRAR or ERF facility (if they have not been so accommodated in the past), but the waiting-lists are very long, sometimes as long as a year: the authors make it clear that they do not have access to authoritative figures for waiting times but are dependent on what the BIPs tell them. Unless and until they can enter a SPRAR they are dependent on the ordinary services available to the homeless, which are limited, and many accordingly have to live in squats or on the street. They give a number of individual examples of Dublin BIPs who are destitute.
3. At para. 12 of the report the authors address the availability of facilities for peculiarly vulnerable BIPs. Their evidence is that only a very small number of such facilities exist. They refer to official national figures for the years 2010/11, 2011/12 and 2012/13, which say that places for vulnerable persons represent about 16% of the total SPRAR places, though they say that the true figure in Tuscany is much lower. They refer to thirteen cases of people encountered between September 2013 and March 2014 who were seriously ill but had been living in a squat with no access to medical help or other support: several did not receive immediate accommodation even when MEDU referred their cases to the authorities. It is not clear whether all or indeed any of these were Dublin BIPs or BIPs at all. (Mr Husain argues that they were, but that is not stated in the report itself.)
4. The Judge deals with the MEDU report at para. 121 of his judgment, as follows:

“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 international 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.”

1. The statement at the start of that passage that MEDU’s clients are BIPs “who have ceased to be eligible for places in SPRARs” is, with respect to the Judge, wrong. The authors say in terms that “based on our experience, we can confirm the presence of large numbers of Dublin BIPs on Italian territory who do not have access to accommodation or support *although they are entitled to it* [my emphasis]” (section C, para. 8). The thrust of the entire section is that the Dublin BIPs on whom they have data are living in squats because they have not known how to get into a SPRAR and/or because the waiting lists are too long; and all the individual cases which they describe are of that kind.
2. It does not appear, however, that that error is relevant to the Judge’s decision that no tribunal could rely on the MEDU report. It seems that his reasons for that conclusion are based on the “inherent limitations” which he specifies. With respect to him, I do not accept that those limitations are such as to justify discounting the report entirely. Specifically:

(1) Although the data is indeed limited to Dublin BIPs in Florence, on the face of it it constitutes a sample of sufficient size to form part of the Court’s overall evaluation.

(2) I do not accept that the thirteen individuals described in para. 12 of the report are the only cases that are relevant. Ms. Giovannetti submits that that is the case because they are the only individuals identified as peculiarly vulnerable, and it is only such people whose article 3 rights may be breached by being denied accommodation. But the difficulties encountered by Dublin BIPs more generally in accessing SPRAR accommodation seems to me a material part of the evidence.

It is another matter how much weight should be accorded to the evidence from MEDU. At this stage I say only that I do not think it was right to exclude it altogether.

The Amnesty Report

1. Mr Tom Southerden of Amnesty International UK’s Refugee Programme wrote a report for the claimants in *MS* dated 13 February 2015 reviewing conditions for asylum-seekers and refugees in Italy. Although it covers a number of other issues, at a level of some generality, the relevant parts for our purposes are those relating to the availability of SPRAR accommodation, and more particularly for Dublin returnees. As to that, the report gives a figure of 13,020 SPRAR places as at January 2014. It says that there are plans to expand numbers to 19,000 but says that it is not known how close to achievement those plans are. It says that the quality of provision is variable. In relation to Dublin returnees it makes a particular point, irrelevant for our purposes, about the position of asylum-seekers whose claim has been rejected. Otherwise it says only (at para. 49):

“In relation to accommodation provision, to Amnesty’s knowledge, absent some special provision for an individual return a Dublin returnee will face the same risks as any other asylum arrival in relation to the overcrowding and related chronic under supply of appropriate accommodation. As a result, in Amnesty’s view, they would face a risk of homelessness on return to Italy.”

1. The Judge addressed the Amnesty report at para. 122 of his judgment, as follows:

“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 analysis 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.”

1. Mr Husain describes that reasoning as “opaque”. I do not agree. It gives reasonable reasons for finding the Amnesty report of little assistance on the essential issue before him, certainly as regards the availability of SPRAR accommodation. I note in particular the Judge’s points (a) that Amnesty’s data about the availability of SPRAR places is out-of-date and (b) that the report does not address the position of Dublin returnees returned under arrangements of the kind that will apply in NA’s case.
2. Mr Husain is also critical of the Judge for treating the essential question as being whether the report was “capable of supporting a conclusion that the evidential presumption that Italy would comply with its obligations is rebutted”, saying that the real question was whether it shed light on whether, as a matter of (in Lord Kerr’s phrase) “practical reality”, there was a risk that the claimants would suffer serious harm if returned to Italy. But the Judge’s language simply reflects the way that he had formulated the issues. I have already said that I do not believe that his references to the presumption of compliance distracted him from addressing the essential question: see para. 155 above.
3. Following the judgment Mr Southerden wrote to Wilsons setting out a number of concerns about the Judge’s reasoning. Mr Husain referred to that letter in his skeleton arguments, though not in his oral submissions, and it was included in the bundle before us. This is an inappropriate procedure. Amnesty was fully entitled to draw the claimants’ advisers’ attention to what it believed to be errors in the Judge’s approach, but if those advisers believed the points to be good the right course was to adopt them in counsel’s submissions.[[16]](#footnote-16) It appears that Amnesty understood Lewis J’s observation to the effect that the report was not based on specific data-gathering or studies of the kinds embodied in some of the other reports as meaning that no value could be accorded to its experience based on its presence in Italy and its ongoing monitoring of the position of migrants there. I do not think that that is what the Judge meant; but he was entitled to point out that the report is more in the nature of a general overview than, say, those of MEDU or SRC. I am quite sure that the English courts and tribunals will approach any report emanating from Amnesty International with careful attention, but of course what weight should be given to it in any particular case will depend on the extent to which its contents add to the knowledge available from other evidence.

Ms Leo’s Reports

1. Ms Leo is a lawyer at the Rome bar specialising in immigration and asylum law. She is active in the Association for Legal Studies on Immigration (“ASGI”) and has participated in various studies under its auspices. Three reports from her were submitted to the Court. They were written in Italian. Only the English translations were before the Court.
2. Ms Leo’s first report is dated 15 September 2014. It is 30 pages long and divided into six sections. Sections I and II contain introductory matter and section III gives an overview of the Italian asylum system. Sections IV and V address the position of Dublin returnees. Like other witnesses and reports, Ms Leo refers to the number of BIPs who are homeless or living in and in circumstances of destitution: she refers to the Selam Palace. The specific points that she makes that bear directly on the risk that NA might not receive SPRAR accommodation if returned are twofold.
3. First, she gives evidence about the availability of SPRAR accommodation. In section IV (d) she says:

“With regard to the possible access to SPRAR facilities, it should be noted that although there has been a recent increase in the number of places available, the centres are now largely filled, as reported by the Ministry of the Interior in the above-cited circular dated 19.03.2014 where is written: “*all the centres of government and those backed by some local authorities within the SPRAR system were saturated*” [a footnote gives a link is given to the report]. For this reason, the waiting list for a SPRAR place is very long: according to reports by some operators, it is now around 2-3 months.”

1. Secondly, in section V (b) she deals with the assistance available to Dublin BIPs at Fiumicino and Malpensa. In her first paragraph she makes the point that they have no rights *qua* asylum-seekers. In the next two paragraphs she acknowledges that although they will be entitled to SPRAR accommodation, that is only so if they have not previously had such accommodation and that there are in any event waiting lists of up to three or four months. She then continues:

“As has already been stated, [ASGI] is, during three months, doing a thorough research on the situation of asylum seekers and the beneficiaries of protection when they arrive at Fiumicino airport. Although, as has been said, the results of the research have not yet been made public, it is possible to predict what will be revealed by the research from the data gathered to date. The beneficiaries of protection on whom data was collected as part of the research and who had been returned to Italy did not receive any kind of reception on their arrival in the country. Indeed, after the initial formalities at the relevant border police station, the beneficiaries of protection were invited to leave Fiumicino airport and were not offered any form of reception or social support. It is important to note here that Fiumicino airport is the arrival point of most of the people sent back to Italy under the Dublin Regulations. Many of the people sent back to Italy are, in fact, beneficiaries of protection.

It is reasonable to assume that the same thing occurs when beneficiaries of protection arrive at other airports because, as has been shown, in Italy, a beneficiary of protection does not have an enforceable right to reception and social support.”

She goes on to quote from a report commissioned by the operators of Malpensa airport about reception procedures there.

1. A second report from Ms Leo was submitted dated 18 March 2015 and addresses various points made by Mr Dangerfield and the procedure for obtaining a replacement for a lost residence permit.
2. Lewis J characterised Ms Leo’s first two reports, at para. 124 of his judgment, as follows:

“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.”

In support of that conclusion he makes at paras. 125-126 four particular criticisms of Ms Leo’s reports, though he says that they are not comprehensive. He concludes:

“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.”

1. Mr Husain submits that the Judge’s particular criticisms are unfair and unfounded, and that the rejection of Ms Leo’s evidence in support of which they are made is unjustified. He also relies on the fact that the Respondent did not in her evidence or written submissions prior to the hearing advance the criticisms relied on by the Judge, so that neither she nor he as counsel had the opportunity to answer them. In support of his submissions Mr Husain seeks to adduce a further witness statement from Ms Leo, dated 31 July 2015: I will refer to this as her “appeal statement”. He submits that the statement should be admitted because its purpose is to give factual evidence relevant to procedural and other mistakes made by the Judge. To the extent that that is indeed what it purports to do I can see no objection to it being admitted. In fact much of what it contains is argumentative and could have been made by way of submission; but the convenient course is to admit it in its entirety.
2. In order to address that submission I need to consider the Judge’s four particular criticisms in a degree of detail which risks obscuring the overall pattern of this judgment. I accordingly relegate the exercise to an appendix. For the reasons there given, I accept substantial parts of Mr Husain’s submissions. I do not believe that the Judge’s particular criticisms, to the extent that they were valid, justified his conclusion that “no tribunal could possibly treat [Ms Leo’s] reports as constituting reliable evidence of the position in Italy generally or the position in relation to what … these Claimants … would face if returned to Italy”.
3. I would add that I also see force in Mr Husain’s point that there is a real risk of unfairness in a Court reaching conclusions about the reliability of an expert witness on the basis of particular criticisms which the witness has had no opportunity to rebut. Where a criticism is flagged up in advance (for example in the other party’s skeleton argument), there is usually an opportunity to answer it by way of submission or by provision of a further statement or other clarificatory material, though there will occasionally be cases – even in judicial review proceedings – where oral evidence and cross-examination may be appropriate; but the problem in the present case is that the criticisms in question were not foreshadowed in submissions of any kind. Having said that, I would not wish to be understood as saying that a judge in judicial review proceedings must always ensure that a witness has the opportunity specifically to meet every point of criticism that may contribute to their evidence being rejected, in whole or in part.   In many, perhaps most, cases the nature of the issue will be sufficiently clear to enable the judge to make a fair assessment without such an opportunity being given. What justice requires will inevitably depend on the circumstances of the particular case.
4. However, my conclusion about the Judge’s particular criticisms of Ms Leo’s evidence is not the end of the matter. Those criticisms were put forward in support of his conclusion that the reports did not give a “fair, balanced [and] objective picture” and were “partisan”. I have carefully read both reports in full, and I believe that he was entitled to form the impression that they were written more from the standpoint of a campaigner than as a dispassionate observer. Although I do not in any way question Ms Leo’s integrity or her knowledge of her subject, her reports do at some points have the flavour of advocacy.  It is because of the importance of obtaining, so far as possible in this difficult field, dispassionate evidence that the courts tend to put particular weight on the reports of established institutions such as UNHCR or the Commissioner for Human Rights of the Council of Europe or AIDA.  I do not propose to lengthen this already lengthy judgment by giving examples of where Ms Leo may have erred in this direction, since, even though I think the judge’s overall assessment was legitimate, that does not affect my view that he was wrong to exclude her report from consideration altogether. It is necessary to distinguish between the weight to be given to her broader conclusions about the risks facing NA if returned and the factual evidence that she gives on specific points. Even if the former are discounted the latter still require to be considered.

Other Reports

1. In his original skeleton argument Mr Husain confined his challenge to the Judge’s reasoning to the way in which he dealt with the four reports discussed above – that is, the reports from the SRC, MEDU, Amnesty and Ms Leo. In his supplementary skeleton argument he added some criticisms of how the Judge dealt with other reports in the evidence – such, for example, as the Brunswick report (see para. 66 (1) above) – though these were not developed in oral submissions. In the circumstances I can deal with those criticisms compendiously. Not all the reports in question were concerned with SPRAR accommodation, or the position of Dublin BIPs, at all; but to the extent that they mentioned those aspects none of them addressed the situation as it stood in late 2014.

Overview of the Judge’s Treatment of the Reports

1. It follows from the foregoing discussion that I believe that the Judge was over-dismissive of the evidence of MEDU and Ms Leo. But it does not follow that the appeal must be allowed. It remains to decide whether, giving their reports such weight as they merit, the evidence overall showed, or arguably showed, that NA was at real risk of not being found SPRAR accommodation if returned to Italy. I consider that question at paras. 213-221 below.

(3) THE EVIDENCE OF THE CLAIMANTS’ EXPERIENCES IN ITALY

1. Mr Husain submits, as part of ground 4, that Lewis J failed to consider, save very indirectly, the relevance of the experiences of the individual claimants while they were in Italy first time round. I have given a sufficient outline of NA’s experience at paras. 11-13 above and of MS’s and SG’s at para. 125. Mr Husain says that those experiences were “central to the enquiry” for a number of reasons. They were evidence of the practical realities of the Italian system, as opposed to how it might be supposed to work, showing that there was, to put it no higher, a real risk that the claimants would be exposed to homelessness and destitution if returned. He submits, on the basis of such cases as *Demirkaya v Secretary of State for the Home Department* [1999] EWCA Civ 1654, [1999] INLR 441, that “past ill-treatment is a good indicator of future risk, absent a material change of circumstances”. Finally, he submits that their experiences tended to show that they were the kinds of person who would not be able to cope with the system if returned.
2. I do not accept that the Judge erred in this respect.  Generalisations about past ill-treatment being a good indicator of future risk are well enough in the context of the risk of persecution, but they should not be unthinkingly applied in a different context.  On her account NA had to live on the streets, where she had the appalling experiences that she did, because she was compelled to leave Cassa Calenga, and she was never offered, or given help to apply for, SPRAR accommodation or other support that would have prevented her undergoing those experiences.  But the question is whether she will now receive that support if she is returned in the different circumstances of a Dublin BIP.   That was the question on which the Judge had to focus, and her past experience sheds no real light on that.  The Judge was well aware that what is supposed to happen in theory does not always happen in practice; and he did not need to refer to the claimants’ particular experiences to make that point.
3. I should make it clear that I accept that NA’s experiences in Italy are relevant to the extent that they establish that she is peculiarly vulnerable, not least, though not only, because they will have contributed to the serious depression from which she is suffering. But that only brings us back to the question whether she will in fact receive proper accommodation, healthcare and support if returned.

DOES THE EVIDENCE ESTABLISH THE RISK OF A BREACH OF ARTICLE 3 ?

1. The first question is whether there is a real risk that if she is returned NA will not be given the support and advice necessary to enable her to access SPRAR accommodation. The starting-point is that she is peculiarly vulnerable. There is no reason to reject Mr Dangerfield’s evidence that accordingly, in accordance with established procedures, her return would be pre-notified to the Italian authorities, who would also (unless she maintains her refusal to consent) be provided in advance with her medical records.
2. I accept that there is at first sight a conflict in the evidence about what the consequences of such pre-notification would be. Mr Dangerfield says that it means that NA would on arrival be referred by the border police to the airport NGO, which would give her the necessary support and advice. That is consistent with what UNHCR told SRC (see para. 178 above). It is also consistent with the passage from the AIDA March 2015 report quoted at para. 134, though I would not attach decisive importance to it because of the ambiguity there referred to. Against that is the evidence of MEDU that the airport NGOs do not assist Dublin BIPs (para. 188); of SRC that what they were told by the airport NGOs was different from what they were told by UNHCR (para. 178); and of Ms Leo that Dublin BIPs “did not receive any kind of reception on their arrival in the country” (para. 201).
3. I do not believe that the existence of that conflict meant that Lewis J was obliged to conclude that there was a risk that NA might receive no assistance or support at the airport to which she was returned, or in any event that there was an area of factual dispute that meant that the claim could not properly be certified. It may be – though I express no view either way – that the evidence relied on by NA raises a real question as to whether BIPs whose arrival has not been pre-notified in the way described by Mr Dangerfield would be referred to the airport NGOs. I take the point that the formal position is that a BIP has the full rights of an Italian citizen and does not, other things being equal, require any support: that would explain the response which SRC and Ms Leo apparently received on this question. But the evidence relied on by NA does not relate to the particular case of a “pre-notified” peculiarly vulnerable Dublin BIP. I do not think it could reasonably be regarded as outweighing the specific evidence of Mr Dangerfield about what happens in such cases. That evidence is consistent with the presumption of compliance: to put it less technically, it conforms to what one would expect of a country like Italy which, for all the stresses which it is encountering, has been recognised by UNHCR as having a functioning system for the treatment of asylum-seekers and BIPs. It is in truth most implausible that a peculiarly vulnerable person, returned in accordance with the procedures described by Mr Dangerfield, and in all probability accompanied by a medical escort, would be offered no assistance by the airport NGOs.
4. I should also mention in this connection a particular point made by Mr Husain. It is said that whereas when the Italian authorities accepted responsibility for MS and SG under the Dublin procedures their letter requested at least ten days’ notice “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” – which would in practice require the provision of her medical records – no such request appears to have been made when it was first sought to remove NA in May 2013. Mr Husain suggests that this reflects the fact that the Ministry did not believe that they had any responsibility for her as a BIP and thus also that it would take no steps to assess her condition on arrival. It is not clear from the papers before us what communications there were between the UK and the Italian authorities on that earlier occasion. I accept that it is not implausible that the standard forms employed would be different in the case of a returning BIP – though in fact MS was also a BIP – and thus there might not have been an explicit request from the Italian authorities for ten days’ notice of any medical condition. But even if that were so it could not possibly be the basis for rejecting the explicit evidence of Mr Dangerfield that NA’s medical records would be sent (if she consented) and that the Italian authorities would conduct an assessment accordingly.
5. Mr Husain also refers in his skeleton argument to two passages in reports that were before the Court. The former says that “Italy … do[es] not have standard practices in place to conduct a vulnerability assessment”; and the latter that assessments are not performed “systematically” and are performed only in the accommodation to which the asylum-seeker is allocated, where the quality will depend on the expertise available. He complains that the Judge did not deal with this evidence. It is far from clear to me that the evidence in question was ever relied on by the claimants: I see no reference to it in their skeleton argument below, and the documents referred to were in the Respondent’s bundle rather than the claimants’. But even if the Judge was referred to these passages I can understand why he felt it unnecessary to address them specifically. Once it is accepted, as he found, that NA’s return would be pre-notified to the Italian authorities, with notice of her vulnerability and (subject to her consent) a copy of her health records, there is no reason to believe that there is a real risk that that vulnerability will simply be ignored – still less, again, if she is accompanied by a medical escort. It may be that the procedures for assessment are variable and that some may be sub-optimal, but that fact alone cannot come close to the attaining the minimum threshold of severity required to give rise to a breach of article 3.
6. The question then is whether there is a risk that even if NA is offered support and assistance by the airport NGO – and by any other organisation to which they may refer her – they will be unable to offer her SPRAR accommodation (in which term I include other forms of accommodation suitable to her condition). I do not believe that such a risk has even arguably been established. There was no doubt an acute shortage of SPRAR accommodation in 2012, when there were only some 3,000 places. But the official figures, relied on by both parties, show that by 28 February 2015 over 20,000 people were being accommodated in SPRARs: see para. 163 (2) above. I accept that SRC, MEDU and Ms Leo all refer to the existence of waiting lists, and SRC and MEDU refer to the waiting time sometimes being as long as a year. But SRC’s data comes from the period before the recent increase in provision (as it explicitly acknowledges), and MEDU’s is of uncertain date and admittedly anecdotal. Ms Leo’s is the most recent. It refers to a circular from the Ministry of the Interior from March 2014 referring to the SPRARs being “saturated”, and to evidence of waiting-lists experienced by “some operators” of two to three months: see para. 200 above. The lack of particularity about the “operators” in question is unsatisfactory, but I would not for that reason discount it altogether. However, the date of the Ministry’s circular is almost a year before the date with which the Judge was concerned. In other circumstances such a time-lapse might not be significant, and I appreciate that it will never be possible to present the Court with evidence that is completely up-to-date. But the crucial point about the present case is that it was accepted by all concerned that the SPRAR system was being expanded as a matter of urgency, and that the figures showed that its capacity had grown very rapidly over the previous year: in those circumstances the passage of time was likely to have made a real difference. I note also that the possible waiting period of two to three months referred to by Ms Leo’s evidence is already much less than that reported in the earlier reports. Taken as a whole, this evidence does not in my view justify the conclusion – contrary to the evidence of Mr Dangerfield – that there is a real risk that NA would not if returned be found a SPRAR place if she were judged sufficiently vulnerable to require one.
7. In reaching that conclusion I do not exclude the possibility that all may not go perfectly for NA if returned. It is not realistic to suppose that the recent efforts by the authorities to improve support and provision for Dublin BIPs, among others, have removed all the problems previously encountered; and it is possible that there may be some difficulties, delays and uncertainties before she is fully assessed and securely settled in SPRAR accommodation. But temporary inadequacies in provision would not meet the minimum level of severity on which the ECtHR case-law insists. What, on the evidence, I am sure of is that as a Dublin returnee NA will not be simply abandoned by the system in the way that occurred when she was required to leave Cassa Calenga and be left homeless and destitute. I should also say that Mr Husain expressly accepted that the evidence showed that if NA is adjudged to be in need of immediate medical attention she will receive it.
8. I should also say that my conclusion does not ignore the evidence that there are many BIPs, including some Dublin BIPs, in Italy living in deplorable conditions, and also that some at least of them are peculiarly vulnerable. But the individual histories that led them to that condition will be very variable. The evidence does not support the proposition that they include BIPs who have been returned from this country, in the circumstances that NA would be returned, and have nevertheless ended up on the streets because no provision has been made for them.
9. Although I have, as I believe was necessary, engaged with the particulars of the evidence before Lewis J, and the points taken on it, my conclusion is consistent with that reached by the ECtHR in similar cases. In *Hussein* the applicant was, like NA, a vulnerable BIP. The evidence about the problems in the Italian system for both asylum-seekers and BIPs was similar to that in the present case: indeed in some respects it showed a worse position, particularly as regards the availability of SPRAR accommodation. But the Court found that there was no risk of a breach of her article 3 rights, having regard to the fact that her return would have been pre-notified and that she was entitled to special consideration as a vulnerable person: see paras. 76-78 of its judgment, quoted at para. 71 above. *Daytbegova* is not on all fours because the applicants were not BIPs, but it is nevertheless significant that the Court was prepared to proceed – without requiring specific assurances – on the basis that hand-over arrangements could and would be made between the Austrian and Italian authorities which would meet the daughter’s particular health needs.

CONCLUSION ON GROUNDS 2-4

1. I believe that the Judge was correct to conclude on the evidence before him that the conditions for BIPs returned to Italy under the Dublin Regulation were not such that there was a real risk that NA would suffer inhuman or degrading treatment if so returned.

**(J) GROUND 5: MENTAL HEALTH AND SUICIDE RISK**

1. NA’s pleaded case under this head is that the Judge treated his conclusion that NA would receive appropriate accommodation and support if returned to Italy as a complete answer to her case that her removal would arguably amount to a violation of her article 3 rights by reason of her mental ill-health; and that that involved him failing to take into account other factors which were relevant to the assessment of whether she would in fact commit suicide on return.
2. That case was not developed by Mr Husain in his oral submissions. He did, however, put in a note summarising the way the case was put, which in turn cross-referred to his supplementary skeleton argument, and I can best address this ground by reference to that.
3. There is now a good deal of law about the application of article 3 in cases where it is said that a returnee is liable to commit suicide if returned. The position was most recently summarised in my judgment in *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] 1 WLR 2793: see para. 44 (p. 2807). There would certainly normally be no arguable breach of article 3 in returning a person who is at risk of suicide as a result of mental illness to a country such as Italy where appropriate treatment is readily available. That is illustrated by the decisions of the ECtHR in both *Daytbegova* and *AS (Switzerland)* – see paras. 75-78 and 102 above.
4. However Mr Husain contends that NA’s case falls within the exceptional category recognised by this Court in *Y and Z (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362, [2010] INLR 178. In that case the appellants were Sri Lankan Tamils, brother and sister, who had been the victims of torture and rape by the security forces and suffered from PTSD and depression in consequence. Their claims for asylum in the UK failed on the basis that there was, objectively, no risk of further ill-treatment if they were returned; but they resisted removal to Sri Lanka on the basis that if they were returned they were likely to be driven to suicide. Their case was they had a genuine and overwhelming fear, whether or not well-founded, that on return they would again be tortured and abused by the security forces, and also that they had no-one to turn to there for support because their entire family had been killed in the tsunami. That case was accepted by this Court. Its essential reasoning appears from para. 61 of the judgment of Sedley LJ, where he said:

 “… [A]lthough some psychiatric care is available in Sri Lanka, these two appellants are so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they will not be capable of seeking the treatment they need. Assuming (what cannot be certain) that they come unscathed through interrogation at the airport, with no known family left in Sri Lanka and no home to travel to, the chances of their finding a secure base from which to seek the palliative and therapeutic care that will keep them from taking their own lives are on any admissible view of the evidence remote.”

Mr Husain submitted that NA’s case was substantially comparable to that of the appellants in *Y and Z.* She too had suffered rape and ill-treatment in the country to which it was proposed to return her and was traumatised at the prospect of return to the scene of her suffering. He conceded that that treatment was not at the hands of agents of the state, but he said that it was nevertheless the consequence of the authorities’ culpable neglect in ejecting her from Cassa Calenga without any means of support. She too had no family to support her.

1. I do not accept that submission. The circumstances of the present case are materially different from those in *Y and Z*. The relevance of the appellants’ past experiences in that case, coupled with the total absence of any home or family support, was that those circumstances rendered it practically impossible for them to seek the support and treatment from the authorities that they needed. But it follows from Lewis J’s conclusion that on NA’s return to Italy she will be found SPRAR accommodation, and that she will receive the support necessary to enable her to access the treatment which she needs. If that is correct, the issue of whether or to what extent the Italian authorities were responsible for her previous suffering does not arise.
2. My conclusion on this point is consistent with the decision of the ECtHR in *AM v Switzerland*, where the applicant’s mental ill-health appears to have been caused at least in part by the treatment which he had received from the police in Italy: see para. 103 above.
3. Mr Husain submitted that any argument based on the availability of support and treatment in Italy foundered on the fact that NA’s medical records would not be available to the authorities there. He makes three points, which I take in turn.
4. First, it is said that on a previous occasion when it was sought to remove her no attempt was made to transfer her records. I will assume that that is the case, but the fact that the Respondent failed to comply with her policy on that occasion, if she did, is no basis for concluding that she will not do so if and when NA is removed in the future; and the importance attached to the issue in this case in fact makes it all the more certain that she will (subject to the question of NA’s consent).
5. Secondly, he relies on the point with which I have already dealt at para. 216 above.
6. Third, it is said that NA’s refusal of her consent to the transfer of her records means that if she is returned the Italian authorities will have no details of her medical history[[17]](#footnote-17). Mr Husain seeks to equate this with the unwillingness of the appellants in *Y and Z* to seek treatment. The Judge noted at para. 31 of his judgment that there was no suggestion that she lacked capacity to make that decision, and no such suggestion was made before us. However, Mr Husain did rely on a paragraph in Dr Obuaya’s second report which reads as follows:

“I note that [NA] has refused to give consent for her medical records to be shared with the Italian authorities. Irrespective of whether or not this is a wise decision, from a clinical perspective, this is an understandable reaction to her previous experience of being left unsupported and vulnerable in Italy; she has clearly developed a strong sense of distrust of the Italian authorities due to the trauma she has described there.”

Given the nature of these proceedings, that opinion should be accepted: that is, it would not be right to treat NA’s refusal as tactical. But I do not think that it follows that a decision to return her to Italy would constitute a breach of her rights under article 3. In the first place, there is no certainty that she will persist in her refusal: on the contrary, it must be more likely that, when she appreciates that she will indeed be returned and has the benefit of further advice, she will change her mind. But, even if she does not, the result of her refusal will not be to deprive her of access to treatment. It will still be the Respondent’s responsibility to notify the Italian authorities of her vulnerability and of Dr Obuaya’s diagnosis, including the risk of suicide, and explain why it has not been possible to supply her records. The lack of the records may be a hindrance to treatment but it will not mean that she cannot be treated at all or that appropriate steps cannot be taken to ensure against the risk of suicide.

1. That conclusion means that I need not consider a further question raised in Mr Husain’s skeleton argument which may not be entirely straightforward. There is plainly a powerful argument that even if the non-transfer of the records did prevent steps being taken to treat NA and mitigate the risk of suicide, that is the result of her own deliberate decision and not of the act of the UK government in returning her to Italy: it would be different if she were not competent to take that decision, but that has not been argued. However, Mr Husain seeks to draw analogies with the situation considered by the ECtHR in *Saadi v Italy* (2009) 49 EHRR 30 and/or with that considered by this Court in *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000, [2000] Imm AR 96, which both in (very) different ways involve the proposition that in an article 3 context it may be necessary to disregard risks created by the applicant’s own conduct. I doubt if those are useful analogies. If I had a concern in this area it would be more about whether the question whether NA was legally competent to take the decision to refuse to consent to the disclosure of her notes is the only touchstone: perhaps it might be enough for her to show that, as Dr Obuaya says, her decision was significantly affected by her mental ill-health. But I am not willing to express any definitive view on these points where it is unnecessary to do so and where we did not have the benefit of oral argument.
2. I have reached my conclusion on this aspect of the case without reference to the Strasbourg authorities. I do, however, note that a very similar situation arose in one of the post-*Tarakhel* cases referred to at para. 104 above – *JA v Netherlands –* where the mother of the family in question, who was said to be suffering mental ill-health and to be at risk of suicide, refused to give her consent to the transfer of her medical data to the Italian authorities. The ECtHR held that this did not mean that her return to Italy would constitute a breach of her article 3 rights. It said, at para. 32:

“The first applicant having refused to give consent to communicate her medical data to the Italian authorities, it cannot be said that the latter have not been duly notified of her mental health condition, or that she runs a real risk of not receiving the required medical care in Italy.”

The reasoning is very condensed, but the decision is nevertheless consistent with that which I have reached.

**(J) MR’s APPEAL**

1. It will be recalled that Whipple J’s reason for refusing MR’s claim was essentially that she should follow the decision of Lewis J in *MS*. Unsurprisingly, therefore, MR’s grounds of appeal adopt those in *MS*, in the form of the summary appearing in the original skeleton argument. No separate skeleton argument was lodged in MR’s case, but it was understood that the submissions directed to the case of SG, as an asylum-seeker rather than a BIP, were applicable to MR, and any further points peculiar to him could be identified in the supplementary skeleton argument (though in the event none were).
2. As regards ground 1 – that is, the effect of the judgment in *Tarakhel* – my reasoning and conclusion in NA’s case apply equally to MR. As regards ground 5, MR’s case differs from NA’s only by being weaker: he can rely neither on a history of previous ill-treatment in Italy nor on any refusal to consent to the transfer of his medical records.
3. However, the position as regards grounds 2-4 requires slightly fuller consideration. The primary difference between MR’s case and NA’s is that he is an asylum-seeker rather than a BIP. As explained above, the legal positions of asylum-seekers and BIPs in Italy are different, and that difference has practical consequences as regards accommodation and support. The essential question is thus whether Lewis J was entitled to find that there was no risk that SG – in whose shoes MR stands for these purposes – would be subjected to inhuman and degrading treatment if returned to Italy. Again, the focus of the case is squarely on the availability of suitable accommodation: see para. 99 of the judgment, quoted at para. 121 above. I consider in the following paragraphs whether that question is answered by the conclusions that I have reached in NA’s case.
4. As we have seen, there is an issue in NA’s case as to whether she would have access to the airport NGOs because she was a BIP. That issue does not arise in MR’s case. It is common ground that as a returning asylum-seeker he would be referred to the NGO for appropriate advice and support. The question is whether, even with that assistance, he would be found appropriate accommodation pending the determination of his claim.
5. As to that, it is MR’s case that, like SG, he has serious mental health problems – see paras. 22-23 above – and accordingly that he is peculiarly vulnerable. Asylum-seekers who are peculiarly vulnerable are typically accommodated in SPRARs. It follows from my conclusions in NA’s case that appropriate accommodation will be available for MR if required.
6. On that basis it is unnecessary for me to consider what the position would be if MR were not peculiarly vulnerable and accordingly did not qualify for accommodation in a SPRAR and fell to be accommodated in a CARA. Although some of the reports relied on by the claimants in *MS* dealt with the availability of CARA places and the conditions of accommodation there, Lewis J did not consider that evidence, and it was not the focus of the submissions before us. I would only observe that the clear message of the post-*Tarakhel* decisions of the ECtHR discussed at paras. 100-104 above – and indeed of *Tarakhel* itself – appears to be that the acknowledged problems about reception conditions for asylum-seekers in Italy are not such as to act as a bar to the return of those without any peculiar vulnerability: see in particular the passages from the judgment in *AME v Netherlands* quoted at para. 101 above. That is consistent with the fact that UNHCR has not made any general recommendation against returns to Italy equivalent to that made in the case of Greece.

**(K) DISPOSAL**

1. I would dismiss both appeals.
2. There is one observation that I wish to make by way of coda. I think it is a pity that the issues raised in these cases have had to be decided in the context of a judicial review challenge to a certification decision. In a certification challenge the Court has to focus not on what it believes is the right decision but on what a tribunal – which is in principle the primary forum for determination of the underlying issues – might decide: that is an inherently awkward exercise, and it carries the risk that if the Court believes that the answers are less than clear-cut the litigation will have to start all over again in the tribunal (as nearly happened in *EM (Eritrea)*). Also, the judicial review procedure is less well-adapted to deciding disputed issues of primary fact or expert evidence: indeed the types of issue raised by a case of this kind would be peculiarly suitable for the employment of a version of the “country guidance” procedure of the Upper Tribunal. To the extent that the Respondent enjoys a discretion whether to certify a claim of the present kind, I would urge her to consider very carefully whether that is always the best course, at least if a challenge is practically inevitable by one route or another. However, I appreciate that the scope for the exercise of any discretion is constrained by the way in which the applicable provisions are drafted: by paragraph 5 (4) of Schedule 3 to the 2004 Act she is positively obliged to certify the claim unless “satisfied that [it] is not clearly unfounded”.

APPENDIX: THE JUDGE’S FOUR CRITICISMS OF MS LEO’S REPORTS

*The first criticism: what Mr Muižnieks said in March 2014*

(1) On 4 March 2014 Mr Muižnieks (who was, it will be recalled, the Council of Europe’s Commissioner for Human Rights[[18]](#footnote-18)) gave a lecture in London entitled “Refugee Protection, Migration and Human Rights in Europe: Notes from the Field”. It was wide-ranging in character but it included a paragraph on returns under the Dublin regime which reads as follows:

“Another challenge faced by those who reach Europe is the risk of ‘Dublin returns’ to countries whose asylum systems are dysfunctional. At the end of my thematic visit concerning Syrian refugees last December I urged EU member states to refrain from using the “Dublin Regulation” for returning Syrian refugees to other European countries whose asylum systems are already overstretched or highly dysfunctional, in particular Bulgaria, Greece, Italy and Malta. Bulgaria was caught unprepared for the influx, and its staffing levels and reception conditions are woefully inadequate. Shortly after my visit, UNHCR came to a similar conclusion about ‘Dublin returns’ to Bulgaria. I was glad to learn that on 5 February the Danish authorities announced their decision to suspend the return of asylum seekers to Bulgaria.”

(2) In section III (a) of her first report Ms Leo summarised that passage by saying that in his lecture Mr Muižnieks had “urged European Union member states to not return refugees to EU countries whose asylum systems are not functioning, particularly, Bulgaria, Greece, Italy and Malta”. The Judge pointed out that Mr Muižnieks had in fact referred to the countries in question as countries where the asylum systems are “already overstretched or [my underlining] highly dysfunctional” and that there was a clear distinction between the two: he said that the Italian system was indeed plainly overstretched in March 2014 but that it did not follow, and Mr Muižnieks could not fairly be taken as saying, that it was “highly dysfunctional”.

(3) Mr Husain denied that there was any inaccuracy in Ms Leo’s summary. The phrase which she had used was “not functioning” – not in fact, as the Judge’s criticism suggested, “highly dysfunctional” – and that was a fair summary of Mr Muižnieks’ language.

(4) In my view the Judge’s point is formally correct. As he said, Mr Muižnieks deliberately used two phrases, and I think it likely that he included the reference to systems which were “overstretched” in order to recognise the distinction between Italy on the one hand and Greece and Bulgaria on the other, whose systems were generally recognised to be dysfunctional in a way that could not fairly be said of Italy’s: that is indeed essentially the distinction that was made in *Tarakhel*. Ms Leo’s summary ignores that distinction, and it makes no difference that she used the phrase “not functioning” rather than “highly dysfunctional”.

(5) Mr Husain submits that even if there was a trivial inaccuracy of this kind it could not rationally be regarded as undermining Ms Leo’s credibility. I agree with that as far as it goes, but it must be recalled the Judge was relying on it as an example of a generally tendentious approach on her part, and it is necessary to look at all his examples, and indeed all three of the reports, together.

*The second criticism: UNHCR’s Note*

(6) On 5 February 2015 the Southern Europe office of UNHCR published a Note containing recommendations on how Italy should transpose the recast Reception and Qualification Directives into its national law. The Note runs to some 28 pages. The version in the bundle is in English. Ms Leo says in her appeal statement that it represents a translation commissioned by the Secretary of State of an Italian original.

(7) The introductory section of the Note contains the statement that “despite major improvements, problems remain in the Italian system in terms of both the law and its implementation, particularly as regards the reception and integration of recipients of international protection”, and reference is made to the July 2013 UNHCR report. A host of detailed recommendations follow. For present purposes I need only refer to a passage in the section dealing with the Reception Directive (p. 14). A formal recommendation is made that “the transposition of the reception conditions directive should be seen as an opportunity for creating uniform and consistent regulation of the reception system starting at the initial reception of new arrivals within mixed flows”. The supporting text includes the following passage:

“Experience in recent years has demonstrated the importance of moving beyond CARAs as reception centres. The problems created by the size and management of these centres have led to a worrying drop in reception standards. Originally designed to host asylum seekers for at most 25/30 days, the lack of places across Italy and the slowdown in asylum procedures mean that seekers are held in them for extremely long periods (up to a year) at high cost to the state given the low quality of services they offer and the possibility of abuse and inefficiency within them and particularly their inability to provide the services that might assist the seekers through possible subsequent integration processes.”

(8) In the section of her second report addressing Mr Dangerfield’s evidence as to the number of places available in CARAs, SPRARs and CSAs, Ms Leo deals *inter alia* with whether Dublin returnees could be accommodated in CARAs. She says that the standards in such centres are “very very low” and quotes a Parliamentary report about a particular centre. She then refers to the UNHCR Note, describing it as “highlighting the absolute need to do away with the CARA system” and proceeds to quote from a different translation of the passage which I have set out above.

(9) As regards that evidence at para. 124 of his judgment Lewis J says:

“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.”

(10) Mr Husain submits that that is an unfair criticism. Ms Leo says in her appeal statement that the difference between the phrases “do away with” and “move beyond” simply reflect two different translators’ (i.e. those employed by the Secretary of State to translate the Note and those employed by Wilsons to translate her statement) translation of the same Italian word (*superamento*). She was not intending to use any different language from UNHCR. As to the addition of the word “absolute”, she says that that was done in her own text rather than in the passage which she quoted, and it will accordingly have been quite apparent that it represented her own emphasis. She says that it is a legitimate emphasis. She points out that in any event in a later passage the English version of the Note recommends “abandoning the CARA model”, which seems pretty “absolute”.

(11) I do not agree with most of the Judge’s criticism of this part of Ms Leo’s report. Even without the benefit of her explanation about the different translations I do not believe that there is, in this context, a substantial difference between “do away with” and “move on from”: the substance is that UNHCR was recommending that the Italian authorities abandon the CARA model because of the deficiencies to which it refers. I do not believe that that point required to be qualified by reference to other parts of the Note, which deal with other matters; and if, as seems to be implied, the Judge was intending to criticise Ms Leo for not exhibiting the full Note, which was a public document fully identified by her in a footnote, I cannot agree. I am not clear whether the Judge meant to say that Ms Leo did not quote the sentence beginning “Experience in recent years”; but if he did he was simply wrong, perhaps being misled by the different translations. The one point on which I can agree to some extent is that the use of the word “absolute”, even if it can be justified as accurate, may tend to suggest a degree of advocacy rather than strict impartiality; but it is no more than a small straw in the wind.

*The third criticism: research about reception at Fiumicino and Malpensa*

(12) This criticism concerns the passage which I have set out at para. 201 above. At para. 126 of his judgment the Judge said this:

“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.”

(13) I agree with the Judge that this part of Ms Leo’s evidence was unsatisfactory but I believe that the way that he expresses his criticism is unfortunate. He was quite right to point out that it is unsatisfactory that the data behind her statement that the BIPs who were the subject of the study “were not offered any form of reception or social support”[[19]](#footnote-19) was unavailable. It is not enough to say that the results of the research were not published: if the data was good enough for Ms Leo to rely on it in her evidence it could and should have been produced. Without it it is impossible to evaluate the reliability of her statement. But that is not the same as saying, as the Judge appears to do in his introductory sentence (though it may not be quite what he meant), that Ms Leo’s evidence was not based on research at all. On the contrary, there is no reason to doubt her statement that it was based on the three-month ASGI study: the problem is that she gives us no details. The Judge was also, with respect, wrong to describe the Milan research as “unspecified” and (which is the clear implication of his putting “a few years ago” in quotes) undated. The published report is identified in a footnote, with its date (2010). It is true that no details are given of the methodology, but that could presumably be ascertained by consulting the report.

(14) In her appeal statement Ms Leo says that the Fiumicino research was in fact published on 20 March 2015, i.e. a few days before the hearing, under the title *Il Sistema Dublino e Italia: un Rapporto in Bilico* (“The Dublin System and Italy: a Relationship on the Edge”), to which I will refer as “the March 2015 report”. She says that it “confirmed the interim conclusions which I reflected in my [first] report”. Ms Leo’s third report, at the end of a short section headed “Assistance at the airport”, contains the single sentence “In this regard we also refer to what is stated in [the March 2015 report] pages 39-40” and gives the link. But the third report, as I have said, post-dated the hearing and there was nothing in that brief reference to alert the Judge to the fact that the March 2015 report constituted the final version of the research referred to in the first report; and if he had nevertheless followed it up the document was only available in Italian. It was not part of Mr Husain’s submissions that the Judge erred in not referring to the March 2015 report.[[20]](#footnote-20)

*The fourth criticism: waiting-lists for SPRARs*

(15) This criticism relates to the passage that I have set out at para. 200 above. At para. 126 of his judgment, as a further example of Ms Leo’s reports giving the impression of being based upon research when in fact they are not, Lewis J says about that passage:

“Similarly, Ms Leo refers … 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.”

(16) My view about that criticism is similar to my view about the third. The Judge is right to point out that the reference to the length of the waiting list – presumably waiting lists– is unsatisfactory both because it is not specifically sourced and because it is very general. But a criticism that Ms Leo’s report is inadequately particularised is not the same as a criticism that it is not based on research at all – which would be a much more serious matter.

(17) In her appeal statement Ms Leo says that if she had been asked to particularise the sources for her statement about waiting lists she would have explained that she had interviewed twelve SPRAR operators as part of her research for the ASGI project (and forty by the time that the research was finalised) and that what she said about waiting-lists was based on what they told her. But of course that information was not before the Judge. Nor does she say how many of the twelve (or the forty) operators reported waiting lists of two or three months: her report referred only to “some”.

**Lord Justice Simon:**

1. I agree.

**Lord Justice McFarlane:**

1. I also agree.
1. This jargon term is now more widely used than the more familiar “refugee” because it covers beneficiaries of forms of humanitarian protection which fall outside the terms of the Refugee Convention.

 [↑](#footnote-ref-1)
2. I should mention for completeness that there had been some earlier cases in the ECtHR about returns to Greece in the context of the risk of refoulement – see in particular *TI v United Kingdom* (43844/98) and *KRS v United Kingdom* (32733/08), (2009) 48 EHRR SE8 – but although those cases are referred to in some of the later authorities they are immaterial for our purposes. [↑](#footnote-ref-2)
3. This is Mr Dangerfield, to whose evidence I refer at paras. 127-131 below. [↑](#footnote-ref-3)
4. I take this summary from the evidence of the Italian government recorded by the ECtHR at para. 86 of its judgment in *Tarakhel*. [↑](#footnote-ref-4)
5. Now replaced by the Asylum Migration and Integration Fund. [↑](#footnote-ref-5)
6. The recast versions of neither the Reception Directive nor the Qualification Directive applies to the UK, but that is immaterial because what matters is the Appellants’ rights in Italy if returned. [↑](#footnote-ref-6)
7. Although the Commissioner is an individual I will follow common practice and refer to “UNHCR” as if it were an institution. [↑](#footnote-ref-7)
8. The applicant’s full name was Samsam Mohammed Hussein, and the ECtHR refers to the case in later decisions as “*Mohammed Hussein*”. [↑](#footnote-ref-8)
9. The UK case-law to which it referred consisted of the *EM (Eritrea)* decision in the Court of Appeal. [↑](#footnote-ref-9)
10. It appears from the evidence that there may be equivalent accommodation available outside the formal SPRAR system, such as some “Poly-functional Centres” referred to in the MEDU report discussed below, and also perhaps the ERF-funded accommodation. But the numbers of places in these do not appear to be large, and for convenience I will refer simply to SPRARs. [↑](#footnote-ref-10)
11. A similar question had arisen in *Hussein*: see paras. 76-77 of its judgment, set out at para. 71 above. [↑](#footnote-ref-11)
12. I say “in practice” because under the Italian system she was not entitled to accommodation in a CARA, even if such accommodation would otherwise be suitable in her case. As to “equivalent”, see n. 10 above. [↑](#footnote-ref-12)
13. I use this term to cover both asylum-seekers (including very recently arrived migrants who have not yet had the opportunity to claim asylum) and BIPs entitled to SPRAR accommodation. [↑](#footnote-ref-13)
14. I am bound to say that I find the details of the reasoning in para. 110 rather puzzling. The discrepancy relied on by the Court is between the number of SPRAR places (9,630) and the number of asylum applications (14,184 in – roughly – the first half of the year, though the Court noted that the annual figure was bound to be higher). But most asylum-seekers would not be eligible for accommodation in a SPRAR as opposed to a CARA, and the relevant comparison would surely be between the number of SPRAR places and the number of migrants (mostly BIPs but including some peculiarly vulnerable asylum-seekers, such as the Tarakhel family) requiring to be accommodated in them. But it is not necessary to solve the puzzle. The point is not about the details of the comparison but that the Court reached its conclusion on the actual figures and not by the application of any burden. [↑](#footnote-ref-14)
15. It is impossible to say how many. But there was evidence before Lewis J suggesting that, as one would expect, migrants who do not intend to claim asylum in Italy do not stay for long in whatever accommodation they are offered and move on as soon as they can. Thus asylum-seekers are likely to stay longer even in temporary accommodation than non-asylum-seekers. [↑](#footnote-ref-15)
16. A similar procedure was followed as regards Ms Leo’s evidence, but the position with regard to that is rather more nuanced: see para. 204 below. [↑](#footnote-ref-16)
17. I proceed on the assumption that it would indeed be unlawful to forward NA’s records to the Italian authorities without her consent; but the point was not explored before us, and I hope that the Respondent will satisfy herself that that is really the case. [↑](#footnote-ref-17)
18. Mr Husain complained that the Judge referred to the speech as having been delivered on behalf of UNHCR, but this is a slip of no significance for present purposes. [↑](#footnote-ref-18)
19. Ms Leo complains that the Judge describes her as having said that “no persons”, rather than no BIPs, were offered support. I agree that that is not quite accurate, but the Judge was only offering a summary and there is nothing to suggest that he misunderstood what she was saying. [↑](#footnote-ref-19)
20. An English version of the March 2015 report was included in the bundles before us, though we were not referred to it. It contains a statement about the absence of any reception facilities for returning BIPs equivalent to that in Ms Leo’s first report, but so far as I can see it gives no further details about the nature or the research or the data relied on. [↑](#footnote-ref-20)