TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-493/10

M.E and Others

Appellants

- And -

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

Respondents

- And -

The AIRE Centre (Advice on Individual Rights in Europe) And Amnesty International Limited United Nations High Commission for Refugees

Interveners

WRITTEN OBSERVATIONS OF THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE) AND AMNESTY INTERNATIONAL LIMITED

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Submitted pursuant to Article 23 of the Protocol of the Statute of the Court of Justice

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1. Background

1. The AIRE Centre and Amnesty International were admitted as joint Interveners in the present case by the Irish High Court ("the Referring Court"). In addition, the organisations were also admitted as interveners by the High Court of England & Wales and by the Court of Appeal of England & Wales in the case of *NS v The Secretary of State for the Home Department* which is also the subject of a preliminary reference before this Court (Case C-411/10). The AIRE Centre and Amnesty International's joint observations concerning the preliminary reference before this Court in that case were lodged on 1 February 2011. By order of this Court, Case (C-411/10) and the present proceedings have been joined for the purposes of the written procedure.

2. Since 1993, the AIRE Centre has provided information and advice on European Union ('EU') law and international human rights law, particularly on the European Convention on Human Rights ('ECHR'). It provides advice and representation to those who wish to assert their European law rights before national and international tribunals. The Centre also trains judges, public officials, lawyers and non-governmental organisations across Europe. The Centre's staff have written widely on the interrelationship between the EU asylum *acquis* and relevant international standards.

3. Amnesty International is a worldwide movement of people working to promote respect for and protection of internationally-recognized human rights principles. It monitors law and practices in countries throughout the world in the light of international human rights, refugee and humanitarian law and standards. The movement has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. It has consultative status before the United Nations Economic and Social Council and the United Nations Educational, Scientific and Cultural Organization, has participatory status at the Council of Europe, has working relations with the Inter-Parliamentary Union and the

African Union, and is registered as a civil society organization with the Organization of American States.

4. The AIRE Centre and Amnesty International were also joint third party interveners before the European Court of Human Rights ('ECtHR') in *M.S.S. v Belgium & Greece,* (application no. 30696/09), Grand Chamber, judgment 21 January 2011.

5. In the observations the AIRE Centre and Amnesty International are referred to as the "**First Interveners**".

Question 1

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

(i) *Introduction – succinct outline*

1. The First Interveners submit that the obligation to respect fundamental rights guaranteed in the EU legal order prohibits Member States from returning or transferring individuals, including asylum-seekers, *to countries or territories where there are substantial grounds for believing there is a real risk that they would suffer violations of their fundamental rights*.

2. It is manifest that applicants for asylum will be exposed to a real risk of violations of their fundamental rights if they are transferred under Regulation 343/2003 (the "Dublin II Regulation") to a Member State that does not give effect, in practice, to the right to asylum enshrined in Article 18 of the Charter and the related EU secondary legislation on asylum.

3. Consequently, *whether or not the Member State to which transfer is proposed is complying with Article 18 and EU secondary legislation on asylum* is a relevant and necessary consideration when a Member State is determining whether or not to order the transfer of an asylum seeker under the Dublin II Regulation.

4. It follows that a transferring Member State has a general duty to satisfy itself that the receiving Member State will respect the fundamental rights of the asylum-seeker and that if there are indicators that this is not the case, the Member State has a specific duty of inquiry into the matter. It may not simply assert that there is an irrebuttable presumption of conformity and so refuse to assess evidence to the contrary.

(ii) *The Obligation not to transfer individuals to situations in which there are substantial grounds for believing that they face a real risk of violation of their fundamental rights, including violation of the right to asylum and related EU secondary legislation on asylum.*

5. It is well established that fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures (Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 283). Under Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ('the Charter'), 'which shall have the same legal value as the Treaties'. Article 6(2) TEU states that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights.

6. The duty to respect and protect fundamental rights, as enshrined in the Union legal order, does not merely prohibit violations of fundamental rights by Member States in their own territories. It also prohibits Member States from transferring individuals to situations outside their own jurisdiction where they will be exposed to a real risk of violations of their fundamental rights. This prohibition applies equally to the transfer to other Member States where they would be exposed to such a real risk. Such a prohibition is inherent in the rights contained in the Charter and in particular in the Right to Asylum enshrined in Article 18 of the Charter as well as in the express wording of Article 19 of the Charter. The prohibition goes to the very core of those rights.

7. Articles 18 and 19 of the Charter may be considered to constitute "portal" provisions, in that they lead to the obligation to respect a range of other fundamental rights enshrined in the Charter in an asylum context. These rights include, among others, Article 1 (human dignity), Article 2 (right to life), Article 3 (right to integrity of the person), Article 4 (right to be free from torture or other ill-treatment), Article 5 (prohibition of slavery, forced labour), Article 6 (right to liberty and security), Article 7 (Respect for private and family life), and Article 47 (rights to fair procedures and an effective remedy) of the Charter. Articles 18 and 19 also enshrine

the principle of non-refoulement within the meaning of the 1951 Geneva Convention on Refugees.

8. This Court has confirmed that the case-law of the European Court of Human Rights "is taken into consideration in interpreting the scope of rights enshrined in the European Convention of Human Rights within the Union legal order" (Case C-465/07 *Elgafaji* [2009] ECR I-921, paragraph 28). Article 52(3) of the Charter requires such an approach when courts are interpreting rights protected in the Charter which correspond to rights the ECHR guarantees.

9. The European Court of Human Rights has long held that states which are party to the European Convention on Human Rights (also referred to herein as 'ECHR') are prohibited from transferring asylum seekers to other ECHR Contracting States where there are substantial grounds for believing that there is a real risk they will be exposed to a violation of their fundamental rights by onward expulsion to the state from which they originally fled. The European Court of Human Rights first set out this principle in the context of a Dublin Convention case (the Dublin II Regulation's predecessor) in *T.I. v UK* (app. no. 43844/98). This case concerned the proposed transfer of an asylum seeker from the UK to Germany in circumstances where there was an alleged risk of *refoulement* to Sri Lanka. The Court held that

> "the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.
>
> Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. **It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility**

under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports* 1999, § 67)" (Decision, p.15, emphasis added).

10. This approach was very recently confirmed, and expanded, by the Grand Chamber of the European Court of Human Rights in relation to the Dublin II Regulation (as opposed to the Dublin Convention) in the case of *M.S.S. v. Belgium and Greece* (Judgment of 21 January 2011, paragraph 342). The Grand Chamber held that Article 3 ECHR imposes upon a State proposing a transfer under the Dublin II Regulation an obligation to assess whether, in practice, the receiving state is in compliance with its relevant obligations under the European Convention on Human Rights. That Court emphasised that it is:

> *in fact up to the* [*competent authorities of the transferring State*] ***not merely to assume*** *that the applicant would be treated in conformity with the Convention standards* ***but, on the contrary, to first verify*** *how the Greek authorities applied their legislation on asylum in practice.*
> (M.S.S., paragraph 359, emphasis added)

11. The European Court of Human Rights concluded in *M.S.S.* that, in ordering the transfer of the applicant to Greece under the Dublin II Regulation, Belgium had violated Article 3 ECHR on two counts because it not only exposed the asylum seeker to the risk of onward expulsion (which was the issue in *T.I.*) but also exposed him to other risks, including conditions of detention and living conditions contrary to Article 3 ECHR.

12. The First Interveners submit that since Member States are prohibited from transferring individuals to other Member States where there are substantial grounds for believing that they face a real risk of a violation of their fundamental rights,[1] ***it follows that Member States are prohibited from transferring individuals to other Member States where there are substantial grounds for believing that there is a***

[1] This is the standard that the European Court of Human Rights has found applies in cases where an individual is alleging her/his expulsion will breach Article 3 ECHR by exposing him to torture or inhuman or degrading treatment. See, e.g, *Saadi v Italy*, judgment of the ECtHR of 28 February 2008, § 125.

real risk of noncompliance with Article 18 (or Article 19) of the Charter in that State. This is because noncompliance with the essentials of Articles 18 or 19 of the Charter by a Member State exposes asylum seekers to a real risk of violation of their fundamental rights, including absolutely protected fundamental rights.

13. Article 18 of the Charter guarantees the right to asylum. The adoption of the asylum *acquis* and the development of the Common European Asylum System ('CEAS') seek to give effect to that right. The First Interveners submit that failure to comply even with the minimum standards set out in the secondary asylum legislation engages Member States' obligations under Article 18 of the Charter.

14. The CEAS seeks to further the establishment of an EU space in which the right to asylum and other forms of international protection are guaranteed. This is clear from the Preamble to the Dublin II Regulation and the Dublin Convention which it superseded and in the Preambles to the Reception Conditions Directive (Directive 2003/9, recitals 1, 2, 3, 4, 5, 6 7) the Qualification Directive (Directive 2004/83, recitals 1, 2, 3, 4, 5, 6, 8, 10) and the Procedures Directive (Directive 2005/85 recitals 1, 2, 3, 4, 5, 7, 8, 10).

15. Common to each of the measures adopted as part of the asylum *acquis* are the following premises:

    (1) the objective of the CEAS is for the European Union to be an area of freedom, security and justice open to those, who, forced by circumstances, legitimately seek protection (recital 1 of the Preamble to the Reception Conditions Directive, the Qualification Directive and the Procedures Directive and the Dublin II Regulation);
    (2) the CEAS is based on full and inclusive implementation of the Geneva Convention relating to the Status of Refugees (recital 2 of the Preambles);
    (3) the CEAS respects the fundamental rights and observes the principles recognised in particular by the Charter (recital 8 preamble to the Procedures Directive, recital 10 preamble to Qualification Directive, and recital 5 of the preamble to Reception Conditions Directive);

(4) Member States are bound by and comply with obligations under instruments of international law to which they are party and which prohibit discrimination.

In addition, the Reception Conditions Directive expressly provides for minimum standards to ensure a dignified standard of living for asylum seekers.

16. The First Interveners submit that a Member State is equally prohibited from ordering the transfer of an asylum seeker where there are substantial grounds for believing that the Member State to which transfer is proposed is not in compliance with *EU secondary legislation on asylum*.

17. EU secondary legislation on asylum sets minimum standards for the determination of asylum applications, inter alia in respect of access to the asylum procedure (Article 6 of the Procedures Directive), examination of asylum claims (Article 8 of the Procedures Directive) and decisions made by the determining authority (Article 9 of the Procedure Directive). The First Interveners submit that the systematic failure to adhere to the EU minimum standards in the asylum processing system is liable to result in flawed assessments and incorrect decisions which entail a real risk of violations of the very rights that the asylum *acquis* seeks to protect, namely, the right to asylum enshrined in Article 18 of the Charter. The effect of a breach of the minimum standards of EU secondary legislation nullifies and impairs the very essence of the right to asylum.

18. In addition to the risk of onward *refoulement*, the failure of the receiving Member State to comply with the measures adopted as part of the asylum *acquis* may lead to breaches of other provisions of the Charter (and the corresponding provisions of the ECHR).

19. In *M.S.S.* the Grand Chamber of the European Court of Human Rights found that the conditions of detention of the applicant in Greece were degrading and in violation of Article 3 ECHR (see paragraphs 233, 234, 263, 264, and 366 of the judgment) which corresponds to Article 4 of the Charter. Unlawful detention and sub-standard conditions may also give rise to a violation of the right to respect for human dignity and the right to liberty and security enshrined in Articles 1 and 6 of the Charter in

circumstances where the "threshold of severity" necessary to engage Article 4 of the Charter is not met. [2]

20. Recital 5 of the Reception Conditions Directive explicitly refers to Article 1 of the Charter. In *M.S.S.* the Court specifically held that the obligation imposed by Article 13 of the Reception Conditions Directive to secure adequate material reception conditions constituted an aspect of a Member State's positive obligations under Article 3 ECHR (MSS paragraphs 250, 263, 264). By operation of Article 52(3) of the Charter, that obligation must therefore also engage a number of Charter provisions, such as the right to the respect and protection of human dignity (Article 1) and the prohibition of inhuman or degrading treatment (Article 4).

21. In *M.S.S.*, the European Court of Human Rights furthermore found that the transfer of an asylum-seeker to another EU Member State that violated Article 3 ECHR, inter alia, because of its failure to comply with the asylum *acquis*, in itself violated Article 3 of the Convention (*M.S.S.*, §§ 365-368). The obligations arising out of Article 19(2) of the Charter correspond to the obligations under Article 3 ECHR in relation to expulsion cases. By operation of Article 52(3) of the Charter, a transfer under the Dublin II Regulation in such circumstances would similarly violate Article 19 of the Charter.

22. Although, the referring court only refers to Article 18 of the Charter, and none of the other articles of the Charter referred to above or the corresponding rights found in the ECHR, this Court has consistently held that it may provide a referring court with all the elements of interpretation of Community/ Union law which may be of assistance in adjudicating in the case pending before it, whether or not it has referred to them in the wording of its question (see, Case C-321/03 *Dyson* [2007] ECR I-687, paragraph

[2] See, e.g., *Costello-Roberts v the United Kingdom* (judgment of the European Court of Human Rights of 25 March 1993) paragraph 36 (finding that treatment that does not reach the threshold of Article 3 may nonetheless, if it has sufficiently adverse effects on a person's moral or physical integrity, engage Article 8); and *X and Y v the Netherlands* (judgment of the European Court of Human Rights 26 March 1985), para 22 ("There was no dispute as to the applicability of Article 8 (art. 8): the facts underlying the application to the Commission concern a matter of "private life", a concept which covers the physical and moral integrity of the person, including his or her sexual life").

24; Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited; Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraph 23, and Case C-229/08 *Wolf* 12 January 2010, not yet reported, paragraph 32). It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of Union law which require interpretation in view of the subject-matter of the dispute (see Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 81 and the case-law cited).

23. The First Interveners therefore submit that the prohibition on transferring individuals to a Member State where there are substantial grounds for believing there is a real risk of a violation of their fundamental rights includes a prohibition on transferring individuals to Member States which are not complying with their obligations under the Charter, including Articles 1, 3, 4, 6, 7, 15, 18, 19, 24 and 47 of the Charter or their obligations to give effect to associated minimum standards set out in the EU secondary legislation on asylum.

(iii) *The nature and scope of a Member State's duty to inquire, prior to transfer, whether the receiving Member State is complying with Article 18 of the Charter and EU secondary legislation on asylum*

24. Given that Member States are prohibited from ordering the transfer of an asylum seeker to another Member State where there are substantial grounds for believing that there is a real risk of noncompliance with the Charter, including in particular, Articles 1, 3, 4, 6, 7, 15, 18, 19, 24 and 47 of the Charter, as well as with the relevant provisions of EU secondary legislation on asylum, it follows that the compliance of a Member State with such provisions of the Charter or EU secondary legislation is a relevant criterion in determining whether or not to order the transfer of an asylum seeker in accordance with the Dublin II Regulation to the Member State in question.

25. Consequently, the First Interveners submit, there is a general duty on Member States to satisfy themselves that other Member States to which they are proposing to transfer individuals are in compliance with fundamental rights and the related provisions of the asylum *acquis*. Furthermore, where there are indicators that the receiving Member State is not complying with Article 18 of the Charter or the

minimum standards set out in EU secondary legislation on asylum, there is a requirement for the Member State proposing transfer to inquire into suspected noncompliance with the applicable norms (see below, paragraphs 31-37).

26. Relieving the Competent Authorities of Member States of the obligation to consider or assess evidence of noncompliance would essentially give rise to an irrebuttable presumption of compliance. This is because the concept of "rebuttable presumption" necessarily implies that evidence against a particular presumption will be considered and assessed by the relevant adjudicating authority.

27. The First Interveners accept that the Union is founded on the principle of mutual respect between Member States. However, it is submitted that even among Member States, presumptions of conformity must have their limits, particularly in fields pertaining to an individual's fundamental rights.

28. The effect of an automatic and conclusive presumption that a receiving Member State will necessarily observe fundamental rights, precludes competent authorities from considering or responding to the ***actual*** **situation or circumstances in that Member State**. It therefore permits a situation where individuals would be systematically returned to a Member State in circumstances where the facts identified do not in fact correspond with the legal presumption made, and where the individual is liable to be exposed to a breach of fundamental rights protected in the Union legal order. It is submitted that such an interpretation is incompatible with the obligation to protect fundamental rights of all human beings in the Union legal order.

29. This Court in a number of different contexts has held that irrebuttable presumptions are disproportionate and incompatible with Union law precisely because they fail to consider the actual circumstances in specific cases (See for example in relation to exclusion from public works contracts, Case C-376/08 *Serratoni* [2009] ECR I-0000, paragraphs 39 and 40; or in relation to Customs debtors, Case C-414/02 *Spedition* [2005] ECR I-8633, paragraphs 42-45; or in the context of VAT, see Case C-73/06 *Planzer Luxemburg Sarl* [2007] ECR I-5655, paragraphs 43 and 47 to 50, or in the context of administrative sanctions in export refunds see Case C-274/04 *ED & F Man Sugar* [2006] ECR I-3269, paragraphs 14-19).

30. In the context of the eighth VAT Directive, the Court has held that "taking account of the economic reality constitutes a fundamental criterion for applying the common system of VAT (Case C-260/95 *DFDS* [1997] ECR I-1005, paragraph 23)."[3] The First Interveners submit that such principles elaborated in an economic context must apply *a fortiori* in the context of safeguarding the fundamental rights of asylum applicants.

31. Indeed, in the specific context of the Dublin II Regulation, the First Interveners submit that the application of a *rebuttable* presumption is also inappropriate, given the nature of the rights at issue (including those enshrined in Articles 4 and 19(2) of the Charter, which are absolute), and given the particular vulnerabilities of asylum seekers (*M.S.S.* paras 233, 238, 259 and 263), who cannot necessarily be expected to raise issues or produce evidence about conditions in another EU Member State, and particularly about an EU Member State's compliance with its obligations under the asylum *acquis*.

32. It is, as proposed above (para 25), incumbent upon the transferring Member State to satisfy itself generally that the receiving Member State will respect the asylum-seeker's fundamental rights. Furthermore, in the context of the Dublin II Regulation the case-law of the European Court of Human Rights has expressly recognised that where there are indicators of noncompliance with fundamental rights norms, a Member State has a more specific and enhanced obligation to inquire further as to whether such a transfer would be in conformity with rights enshrined in the ECHR (and, therefore, the Charter). In particular, in the case of *M.S.S.* the European Court of Human Rights found that indicators of noncompliance included:

    a. reports and materials from bodies and mechanisms of international governmental organizations and from non-governmental organisations including, UNHCR, mechanisms and bodies of the Council of Europe, Amnesty International, Human Rights Watch, Pro Asyl and the European Council on Refugees and Exiles as well as national non-governmental organisations operating in the relevant Member States. (M.S.S., Paragraphs 347 and 348);

[3] See also Case C-73/06 *Planzer Luxembourg Sarl* [2007] ECR I-5655, par. 43

b. letters sent by the UNHCR to the relevant Government Department, in this case, the Belgian Minister in charge of immigration, with copies to the Aliens Office) (paragraph 349); and

c. the general context of the European Asylum system and in particular proposals by the European Commission to reinforce and strengthen fundamental rights (paragraph 351).

33. This is not an exhaustive list and the First Interveners submit that indicators of noncompliance may also arise from additional sources, including, but without limitation, the decisions of European or international courts, evidence of infringement proceedings initiated against the relevant State by the European Commission under Article 258 of the Treaty on the Functioning of the European Union, reputable country of origin information, or statistics that show abnormally low recognition rates of refugees.

34. The First Interveners further observe that the ruling of the Grand Chamber of the European Court of Human Rights in *M.S.S.* provides guidance on the scope and nature of the assessment requirement imposed on Member States who have been alerted to the fact that another Member State may not be complying with obligations under the Charter or EU secondary legislation on asylum. In particular, the European Court of Human Rights has made it clear that it is not the applicant who should be expected to shoulder the burden of proof in such circumstances (paragraph 352). On the contrary, the Court held:

a. before ordering the transfer of an asylum-seeker from Belgium to Greece under the Dublin II Regulation, the Belgian authorities **were obliged to consider** the factual situation in Greece, insofar as it was relevant to the fundamental rights of the asylum-seeker in question: (paragraphs 345-352);

b. "the existence [in Greece] of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly

contrary to the principles of the Convention (see, *mutatis mutandis, Saadi v Italy* [GC], no. 37201/06, para 147, ECHR 2008)": para 353;

c. diplomatic assurances given by Greece were not a sufficient guarantee among other reasons because they were worded in **stereotypical terms without guarantees concerning an individual applicant** and merely referred to the applicable legislation, with no relevant information about the situation in practice (paragraph 354);

d. 'it was in fact up to the Belgian authorities, faced with the situation described above, **not merely to assume that the applicant** would be treated in conformity with the Convention standards but, on the contrary, **to first verify** how the Greek authorities applied their legislation on asylum in practice' (paragraph 359).

35. The test established by the European Court of Human Rights to determine whether a Member State has transferred an asylum seeker in violation of the Convention is whether the Member State making the transfer "*knew or ought to have known*" that the asylum application in the receiving Member State would not be examined in accordance with applicable minimum standards (*M.S.S.* paragraph 357).

36. It is implicit from this test, as well as from the nature of the obligations of inquiry set out above (paragraph 34 of these submissions), that Contracting Parties are not entitled to assume compliance or rely solely on information raised by a particular asylum seeker to the exclusion of examining information that is generally known or ought to be known. On the contrary, it is manifest, that where there are indicators as to possible risks, a Contracting Party is positively obliged to make inquiries and to inform itself as to whether there are substantial grounds to believe that there is a real risk that a receiving Member State is not complying with its obligations under the Convention.

37. A similar standard of knowledge and duty of inquiry has been recognised to exist in other areas of European Convention on Human Rights law. In the context of human-trafficking, for example, the European Court of Human Rights applied a test according to which national authorities "were aware, or ought to have been aware, of

circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited" (*Rantsev v Cyprus and Russia* (judgment of 10 January 2010, paragraph 286). In *Rantsev*, the European Court of Human Rights held that a positive obligation arose to investigate without delay and to take any necessary operational measures to protect [the individual when] there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation" (*Rantsev v Cyprus and Russia*, paragraph 296 - emphasis added).

38. It is submitted that, at a minimum, Article 52(3) of the Charter means that such a standard must apply equally in the context of the Union legal order.

(iv) *The obligation to interpret the Dublin II Regulation in conformity with fundamental rights principles identified above*

39. As noted above, respect for human rights is a condition of the lawfulness of Union acts. Measures incompatible with respect for human rights are not acceptable in the Union (C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, paragraph 284). EU legislation must be capable of being interpreted and applied in a manner consistent with fundamental rights (see to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87 and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28). The Court has held that a provision of EU law requiring - or expressly or impliedly authorising - Member States to adopt or retain national legislation inconsistent with fundamental rights would itself violate EU law (Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 23).

40. It follows that the Dublin II Regulation must be interpreted in a manner that is consistent with fundamental rights as enshrined in the Union legal order, in particular, the Right to Asylum. Moreover, Recital 15 to the Dublin II Regulation expressly states that the Regulation observes fundamental rights acknowledged in

particular in the Charter and that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter.

41. Consequently, to interpret the Dublin II Regulation so as to relieve a Member State of its duty of inquiry to ascertain whether the Member State to which transfer is proposed is complying with its obligations under Article 18 of the Charter and EU secondary legislation would be incompatible not only with the general principles of EU law but also incompatible with the specific object and purpose of the Regulation, under whose authority the transfer is proposed.

42. In light of these considerations, the First Interveners propose that the Court answer the first question as follows:

A Member State considering whether or not to transfer an applicant for asylum under the Dublin II Regulation is under a positive duty to inquire into whether there are substantial grounds for believing that the Member State to which transfer is proposed is not in compliance with its obligations under the Charter, including Articles 1, 3, 4, 6, 7, 15, 18, 19, 24 and 47 or its obligations under Council Directives 2003/9EC, 2004/83/EC and 2005/85/EC.

Question 2

If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member State obliged to accept responsibility for examining the application under Article 3(2) of Council Regulation (EC) No. 343/2003?

43. In answer to the first question, the First Interveners have asserted that fundamental rights as protected in the Union legal order prohibit Member States from transferring asylum seekers under the Dublin II Regulation, in situations where there are substantial grounds for believing that there is a real risk that the Member State to which transfer is proposed is not in compliance with its obligations under the Charter, including, Articles 1, 3, 4, 6, 7, 15, 18, 19, 24 and 47, or obligations to give effect to EU secondary legislation on asylum (see paragraphs 5 to 23 of the se submissions).

44. Equally, it follows from the case-law referred to in paragraphs 39 and 40 above, that Member States interpreting and applying the Dublin II Regulation, must do so in a manner consistent with fundamental rights as protected in the Union legal order. The Dublin II Regulation cannot be interpreted as requiring – *or even permitting* - Member States to transfer individuals where there are substantial grounds for believing that upon transfer they face a real risk of suffering a violation of their fundamental rights.

45. As its title indicates, the objective of the Dublin II Regulation is to establish the criteria for determining the Member State which is responsible for examining an asylum application in a timely manner which respects human rights protected in the Union legal order. The Regulation operates on the premise that an application for asylum submitted in the territory of an EU Member State will be processed in *a* Member State of the EU, that State to be determined in accordance with the Regulation. In particular, Article 3(1) of the Regulation provides that the application for asylum "shall be examined by a single Member State" determined in accordance with criteria set out in Chapter III. Article 3(2) of the Regulation provides that a

Member State may, instead of effecting a transfer, assume responsibility for examining an application (See *M.S.S.*, paragraph 358).

46. It is apparent from an analysis of the scheme of the Dublin II Regulation, that it does not envisage a situation where no Member State would be responsible for examining the application for asylum.

47. Moreover, such a situation would run counter to the objective of the Regulation which is stated to determine the Member State responsible for processing asylum applications *in full compliance with fundamental rights and international protection obligations*. The First Interveners recall that Recital 12 of the Dublin II Regulation emphasises that, with regard to the treatment of persons falling under the scope of the Regulation, Member States are bound by obligations under instruments of international law to which they are a party. Recital 15 emphasises that the Regulation observes fundamental rights and principles acknowledged in particular in the Charter and seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter. It is manifest that the failure to examine an asylum application at all would contravene the obligations of Member States in respect of the Geneva Convention of 1951 and Article 18 of the Charter and the corresponding protection of the relevant provisions of the ECHR.

48. The First Interveners submit that if a Member State is prohibited by fundamental rights norms protected in the Union legal order (including provisions of the Convention and Charter, for example, Articles 4 and 19 of the Charter, which correspond to ECHR rights, and those, like Article 18 of the Charter and the provisions of the asylum *acquis* that give it effect) from transferring an asylum applicant to a Member State that is prima facie responsible under the Dublin II Regulation, then the Member State is obliged to assume responsibility itself for processing the application for asylum. To hold otherwise would be to rely on the provisions of the Dublin Regulation so as to deprive the asylum seeker of the opportunity to have her or his asylum claim examined in accordance with Union law, rather than to ensure its consideration as intended by the Regulation.

49. In light of these considerations, the First Interveners submit that Question two should be answered as follows:

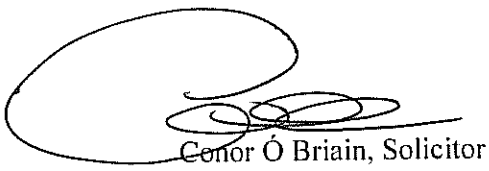
Fundamental rights as protected in the Union legal order prohibit Member States from transferring an asylum seeker from its jurisdiction under the Dublin II Regulation, if there are substantial grounds for believing that there is a real risk that the Member State to which transfer is proposed is not in compliance with its obligations under the Charter, including, Articles 1, 3, 4, 6, 7, 15, 18, 19, 24 and 47, or its obligations to give effect to EU secondary legislation on asylum or obligations under Council Directives 2003/9EC, 2004/83/EC and 2005/85/EC.

In such circumstances, it is incumbent on Member States to assume responsibility for examining the application for asylum when there is no other Member State to which the asylum seeker can be transferred for the examination of his or her claim for protection in accordance with the system provided for under Regulation 343/2003.

24 February 2011

Jonathan Tomkin BL

Bill Shipsey SC



Conor Ó Briain, Solicitor