

UK - R (on the application of EM (Eritrea)) and Others (Appellants) v Secretary of State for the Home Department (Respondent)

Country of Decision:

United Kingdom

Country of Applicant:

Eritrea

Iran

Date of Decision:

19-02-2014

Citation:

[2014] UKSC 12

Court Name:

United Kingdom Supreme Court, before Lord Neuberger (President), Lord Kerr, Lord Carnwath, Lord Toulson, and Lord Hodge

Keywords:

Dublin Transfer

Inhuman or degrading treatment or punishment

Material reception conditions

Procedural guarantees

Reception conditions

Relevant Legislative Provisions:

International Law

International Law > [1951 Refugee Convention](#) [1]

Council of Europe Instruments

Council of Europe Instruments > ECHR (Frist Protocol)

European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [2]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [4]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [5]

Headnote:

The Supreme Court held that a person who is resisting a Dublin transfer to the Member State responsible for processing the applicant's asylum claim need not show that there is a 'systemic deficiency' in that Member State's asylum system, rather that the conditions in that Member State would expose the person to inhumane and degrading treatment as prohibited by Article 3 ECHR.

Facts:

This case was an appeal from the Court of Appeal's judgment. All four applicants had first entered Europe in Italy and had their fingerprints recorded there. They subsequently left for the United Kingdom where they applied for asylum. When approached by the United Kingdom, Italy did not respond, and thus were deemed to have accepted responsibility for the processing of the asylum application. The Secretary of State therefore set removal directions for all four applicants to be returned to Italy. All applicants argued that the nature of the asylum procedures and reception conditions in Italy were so bad that they were at risk of experiencing degrading or inhumane treatment as prohibited by Article 3 ECHR. Its procedures were 'dysfunctional' and in practice lead to 'destitution'. Protection from such treatment is protected by Article 3 ECHR, and thus in order for their Article 3 rights to be upheld, the applicants requested the Court to halt such return.

The Court of Appeal held that an objection to removal by an applicant cannot be 'clearly unfounded' if a reasonable doubt about their chances of success exists. Despite this, the Court ultimately found that as the applicants fell short of providing evidence that proved Italy's systemic and not sporadic failure to protect human rights, the applicants could not successfully resist return. Raising an arguable case was not enough; there had to be convincing evidence that Italy is in consistent and systemic breach of its obligations.

The Court based its test on the CJEU's stance on systemic deficiency, which had been laid out in the *NS* case. There the Court of Justice ruled that where a Member State has 'major operational problems' which could give rise to inhumane and degrading treatment, the presumption of compliance may be rebutted. The applicants argued that the Court of Appeal's choice to interpret this as meaning true systemic deficiencies as opposed to operational problems was incorrect, thus leading them to appeal to the House of Lords.

Decision & Reasoning:

Lord Kerr began his reasoning by outlining the presumption of compliance that exists between Member States of the European Union. At its heart is the presumption that all Member States are in compliance with their legal obligation, removing the need to investigate each other's systems before transfer. It reflects not only principled but also pragmatic considerations. If a state were required to conduct an in-depth investigation into the merits of another state's asylum system every time a return was imminent, all efficiency and co-operation would be lost, resulting in 'bureaucratic quagmires'.

However, in line with the very nature of legal presumptions, they are not set in stone. Where evidence is presented that show that fundamental rights could be infringed upon return to another Member State, this presumption of compliance can be rebutted.

Therefore, in light of this, the Court was tasked with shaping the exact nature of this presumption of compliance. Lord Kerr found that the Court of Appeal's requirement that a 'systemic failure'

exists in the Member State of origin for return to be resisted was wholly inappropriate to ensure that fundamental rights, specifically Article 3 ECHR, are respected. Its interpretation of *NS* was therefore incorrect as it was too restrictive in nature. Although the Court of Justice in *NS* did refer to systemic deficiencies, this was in the context of determining whether the Member State was aware of such deficiencies, not when determining the type of deficiency required. Rights infringement can be evidence of a systemic deficiency, however there was nothing to suggest that a systemic deficiency had to be present in order for return to be resisted.

The Court of Justice's usage of the phrase 'major operational problems' did not necessarily point to the intrinsic deficiencies of the system itself. The word 'system' did not mean the actual system itself but the overall treatment of asylum seekers.

Lord Kerr opined that the real source of the risk of Article 3 being infringed was therefore operational problems, not systemic deficiencies. The Court noted that 'it is self-evident that a violation of Article 3 rights is not intrinsically dependent on the failure of a system'. The operation of the Court of Appeal's interpretation would be arbitrary in practice. Under this formulation, the fact that some of the applicants could be homeless upon return to Italy could not have been a consideration, as this did not originate from a systemic deficiency of the Italian asylum system. This did not provide protection of Article 3 ECHR, and thus an alternative test had to be formulated.

Having established that the Court of Appeal's approach was incorrect, Lord Kerr found that the *Soering* test was more appropriate. Removal must be forbidden if there exists a real risk that the person will be subjected to inhuman or degrading treatment upon transfer. Under Article 3(2) of the Reception Directive Member States must 'ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence'. This and the Dublin Regulation must therefore be read in conjunction with fundamental rights.

In addition, such an interpretation is favourable as it satisfies the United Kingdom's obligations to ensure conformity with the ECHR under the Human Rights Act 1998. As the ECtHR stated in *MSS*, Article 3 includes the right to be placed in living conditions which do not give rise to ill treatment. Furthermore in *R (Limbuella)*, the Court stated that Article 3 is violated if 'by the deliberate action of the state, [asylum seekers are] denied shelter, food or the most basic necessities of life'.

With these considerations in mind, if the living conditions of an asylum seeker upon transfer would breach Article 3, then transfer cannot take place.

Outcome:

Appeal granted.

Subsequent Proceedings :

All four cases were remitted to the Administrative Court so that the evidence could be examined to determine whether a threat to Article 3 existed or not. If it did, then the four applicants could not be returned to Italy.

Observations/Comments:

This case was a welcome clarification of the test to be applied by the courts in future. As the European asylum system is based on several different legal instruments and enforced by several different jurisdictions, the need for clarity and consistency is key.

This case has been pivotal in other analogous cases relating to the prevention of a Dublin transfer

on the basis of Article 3 ECHR. The most recent of which has been [Tarakhel v Switzerland](#) [6] whereby the ECtHR quoted extensively from EM (Eritrea).

<http://ukhumanrightsblog.com/2014/03/10/supreme-court-rules-on-eu-conditions-for-asylum-seekers/> [7]

<https://www.freemovement.org.uk/supreme-court-decides-on-third-country-returns/> [8]

This case summary was written by Joanna Gilbert, law graduate of University College Cork, Ireland and a graduate of LLM European Law from Leiden University.

Attachment(s):



[UKSC_2012_0272_Judgment EM\(Eritrea\).pdf](#)[9]

National / Other Legislative Provisions:

[UK - Nationality, Immigration and Asylum Act 2002](#) [10]

[UK - Asylum and Immigration Act 2004](#) [11]

[UK - Human Rights Act 1998](#) [12]

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>

[2] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive>

[3] <https://www.asylumlawdatabase.eu/node/453>

[4] <https://www.asylumlawdatabase.eu/node/19>

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[6] <http://www.asylumlawdatabase.eu/en/content/ecthr-tarakhel-v-switzerland-application-no-2921712#content>

[7] <http://ukhumanrightsblog.com/2014/03/10/supreme-court-rules-on-eu-conditions-for-asylum-seekers/>

[8] <https://www.freemovement.org.uk/supreme-court-decides-on-third-country-returns/>

[9]

https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/UKSC_2012_0272_Judgment%20EM%28Eritrea%29.pdf

[10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/1357>

[11] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7567>

[12] <https://www.asylumlawdatabase.eu/en/taxonomy/term/1721>