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Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*

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1. Introduction

The judgment of the Grand Chamber of the European Court of Human Rights (ECtHR or 'Court') in *M.S.S. v Belgium and Greece*[1] is rich with significance in several important areas relating to refugee and human rights law. MSS was an interpreter who had fled Afghanistan in early 2008 after, as he claimed, an attempt was made on his life by the Taliban. His first entry to Europe was through Greece, where he was fingerprinted on arrival but did not claim asylum. He travelled through France and made his asylum claim in Belgium in February 2009, where his fingerprints, registered on the Eurodac system, showed that he had passed through Greece. Pursuant to Council Regulation EC 343/2003 ('the Dublin Regulation'),[2] an order was made in Belgium that he be returned to Greece. MSS lodged challenges to this decision with the Belgian Aliens Appeals Board but his applications were rejected for procedural reasons, and their merits were not considered. In parallel, in June 2009 he applied to the ECtHR to have his transfer suspended under Rule 39 (which enables the Court to make a provisional measures order). The Court refused to apply Rule 39, but informed the Greek Government that its decision was based on confidence that Greece would honour its obligations under the

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1 Application No 30696/09, Merits, 21 January 2011.
2 Council Regulation 343/2003, 18 February 2003, [2003] OJ L 50.

European Convention on Human Rights (ECHR) and comply with European Union (EU) legislation on asylum.[3]

Accordingly, in June 2009 MSS was removed to Greece. On arrival he was detained in a building next to the airport. He was held in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, given very little to eat and made to sleep on a dirty mattress or the bare floor. When he was released after four days of detention in these conditions, MSS was notified that he was required to report within two days to the Attica police station to declare his home address so that he could be informed of the progress of his asylum application. Believing that a home address was a condition of proceeding with his claim, MSS did not report to the police station. A further deficiency in the asylum procedure occurred when MSS was given a written notice in Greek that referred to an asylum interview. However, the notice was given at the renewal of his registration card, and the interpreter made no mention of an interview date. In August 2009, the applicant attempted to leave Greece on a false identity card but was arrested, detained for seven days in the same conditions as before. He claimed that he was beaten in detention. He was sentenced by a criminal court for attempting to leave Greece using false papers. For much of his time in Greece the applicant had no means of subsistence and slept in a park.

MSS complained to the ECtHR about his treatment by both Greece and Belgium. Against Greece he alleged breaches of Article 3 of the ECHR by reason of his conditions of detention, his conditions of living, and a breach of Article 13 of the ECHR because of the deficiencies in the asylum procedure and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application or access to an effective remedy. His complaint against Belgium was that Belgium had breached Articles 3 and 13 by sending him to Greece and exposing him to these risks. The Court found in favour of the applicant and held that both Greece and Belgium were in violation of their obligations under Articles 3 and 13.

2. Impact on the Common European Asylum System

The major legal and practical significance of the ECtHR's judgment is in its impact on the Common European Asylum System (CEAS). The Dublin Regulation, pursuant to which MSS was transferred back to Greece, is an important component of that system. It establishes a hierarchy of criteria upon which EU Member States must decide which state bears the responsibility for an asylum application. The usual rule is that an application is decided in the

3 In particular the Procedures and Reception Directives referred to below.

first EU country in which the applicant arrives, and an additional Regulation[4] defines the system whereby subsequent states to which the applicant travels may request the first state to take the individual back and determine their application. The Dublin Regulation prevents multiple asylum applications in different states, and prevents asylum seekers from travelling through the EU and choosing where to make their claim.

The Dublin Regulation was entered into in the name of 'burden-sharing'. However, the reality in operation is that it is the more northerly Member States that are enabled to decline responsibility for asylum claims, given that most overland travellers in search of asylum enter the EU from the south.[5] The state where the asylum claim is made is not obliged to request a transfer back to the state of entry. Under Article 3(2) the state in which the claim is made may instead decide to take responsibility for the claim (the so-called 'sovereignty clause'), though no criteria for doing so are laid down in the Regulation. There are also limited grounds, such as family connection, on the basis of which the asylum seeker may challenge a transfer.

The Dublin Regulation is predicated on shared minimum standards throughout the EU. These standards apply to reception conditions (pursuant to the 'Reception Directive'[6]), procedures for dealing with the application (pursuant to the 'Procedures Directive'[7]) and the application of the 'refugee' definition (pursuant to the 'Qualification Directive'[8]). However, in its intervention before the ECtHR, the Office of the UN High Commissioner for Refugees (UNHCR) presented evidence to the Court that demonstrated inequities in outcomes, as well as procedure. Less than 1% of refugee claims in Greece are granted at first instance, compared with between 25% and 36% in other EU states with a comparable number of claimants. At the time of MSS's application, the ECtHR had more than 960 cases before it relating to the Dublin Regulation, many of them relating to Greece.[9] The evidence presented in *M.S.S.* exposes not only the inequalities experienced by the asylum seeker, but also the uneven bargain struck between EU Member States regarding their responsibility for asylum applications. This, especially in the context of

4 Commission Regulation 1560/2003, 2 September 2003, [2003] OJ L 222/3.

5 According to FRONTEX data, 90% of overland asylum seekers enter the EU through Greece (press release from the Greek Ministry of Citizen Protection, 15 March 2011).

6 Council Directive 2003/9/EC, 27 January 2003, [2003] OJ L 31/18, laying down minimum standards for the reception of asylum seekers ('the Reception Directive').

7 Council Directive 2005/85/EC, 1 December 2005, [2005] OJ L 326/13, on minimum standards on procedures in Member States for granting and withdrawing refugee status ('the Procedures Directive').

8 Council Directive 2004/83/EC, 29 April 2004, [2004] OJ L 304/12, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted ('the Qualification Directive').

9 *M.S.S. v Belgium and Greece* was chosen by the Court as the lead case.

the present economic crisis, may be seen as casting doubt on the viability of not only the operation but also the concept of the CEAS.

The judgment of the ECtHR in *M.S.S.* interupts the system of transfers under the Dublin Regulation, by ruling unlawful Belgium's decision to apply the Regulation and to request Greece to take MSS back and determine his application. The Court's findings against Belgium mean that Member States of the EU can no longer take it as given that the system established by the Dublin Regulation absolves a sending state of responsibility for the procedure applied to asylum seekers in the receiving state nor for their living conditions, nor that the receiving state's membership of the CEAS entails that an asylum seeker will be safe from *refoulement* there.

This marks a significant change from the earlier position taken by a Chamber of the ECtHR in *K.R.S. v United Kingdom*.[10] In its decision in that case, the ECtHR found that a complaint regarding the return of an asylum seeker to Greece pursuant to the Dublin Regulation by UK authorities was manifestly ill-founded. In that case, there had been significant evidence before the Court about procedural deficiencies in the Greek asylum system and about the poor standards of detention there. However, the ECtHR held that these matters could and should have been taken up by KRS directly with the Greek authorities in Greece, and that none of the evidence suggested that applicants would not have access to the Strasbourg Court from Greece, where they could apply for a Rule 39 provisional measures order if needed. The ECtHR was satisfied with the evidence that Greece was not removing asylum seekers without a hearing to countries of obvious danger, including Iran from where KRS came, and so there was no risk of *refoulement* contrary to Article 3 of the ECHR. Finally, as a member of the EU, Greece had to be presumed to abide by the Procedures Directive and the Reception Directive. Any deficit in this respect should be taken up by the applicant with the Greek authorities. Although the ECtHR had before it the judgment of the European Court of Justice from 2007[11] in which it was held that Greece had failed to implement the Reception Directive, the Strasbourg Court decided that, as Greece had subsequently introduced legislation which purported to implement it, these Directives should be presumed to be effective.

Whereas the case of *K.R.S.* concerned only the responsibility of the UK as a possible sending state, in MSS's case he had already been sent to Greece, and had suffered the poor conditions that were the subject of KRS's fears (though not actual *refoulement* to Afghanistan). MSS's claim was also against both the sending and the receiving state. In a sense, MSS did what the ECtHR had recommended in *K.R.S.*, and launched his action against Greece. The further question was whether Belgium should have foreseen what would happen to

10 Application No 32733/08, Admissibility, 2 December 2008.
11 C-72/06, *Commission v Greece* [2007] ECR I-57.

him, and prevented it by not returning him. Judge Bratza in *M.S.S.* delivered a partly dissenting opinion. He had no doubt that the conditions in Greece violated the ECHR, but held that the Belgian Government, returning MSS there only six months after the decision in *K.R.S.*, was entitled to rely on that decision. The majority held otherwise on the basis of evidence from *inter alia* the UNHCR, Human Rights Watch, the European Commissioner for Human Rights, the European Committee for the Prevention of Torture, Amnesty International and the European Council on Refugees and Exiles (ECRE). The majority of the Court noted that adverse reports about the treatment of asylum seekers in Greece had become more frequent in the latter part of 2008 and in 2009. Although it was relevant that the evidence that had been before the Court in *K.R.S.* had been augmented in *M.S.S.*, when finding Belgium responsible the Court attached critical significance to a letter sent by UNHCR to the Belgian Minister of Migration and Asylum Policy in April 2009. The letter called for a suspension of transfers to Greece. Added to this was the fact that the European Commission was examining proposals for strengthening the protective aspects of the CEAS, which included suspending Dublin transfers pending a review.

The Court also found specific flaws in the Belgian system, which resulted in their finding of a breach of Article 13 of the ECHR. For instance, the form filled in by the Aliens Office in administering the Dublin Regulation allowed no possibility of stating reasons for objection to the transfer, suggesting that Belgium was operating Dublin transfers as a matter of routine. Where an applicant did attempt to challenge their transfer under the Dublin Regulation, scrutiny by the Aliens Appeal Board was very limited. This, and an inappropriately high standard of proof, resulted in almost all such challenges being rejected without proper consideration. In the earlier case of *T.I. v United Kingdom*[12] a Chamber of the ECtHR had held that the system under the Dublin Regulation did not absolve the sending state of responsibility for protection against *refoulement* in the receiving state. Following *M.S.S.*, despite the presumption of shared minimum standards on which the Dublin system is based, the Court requires there to be an opportunity for the asylum seeker to have a proper hearing of their objection to the Dublin transfer where Article 3 violations are anticipated.

For sending states, *M.S.S.* has an impact which is simple to state in outline but which leaves much to be worked out in the detail: transfers to Greece are suspended pending changes there, but what of transfers to other Member States? What is now required of a state that wishes to effect a Dublin transfer to these states? Based on *M.S.S.* and *T.I.* it seems that there must be an opportunity for the asylum seeker to put a case as to why the Dublin transfer should not go ahead. However, the Court's approach to the evidence in *M.S.S.*

12 2000-III.

makes it clear that it is not only the asylum seeker's objection that is relevant. The numerous reports about the situation in Greece relied upon by the Court were all in the public domain. In *K.R.S.* they were not enough to undermine a transfer, whereas in *M.S.S.* they were. What puts the sending state on notice that they should make enquiries as to the evidence about conditions in the receiving state? Presumably once a decision about an individual is being made, the human rights standard is the usual one: has it been shown that there are substantial grounds for believing that there is a real risk of treatment contrary to Article 3?[13] But if the presumption upon which the CEAS is based is undermined, does this roll back the whole Dublin system and mean there should be enquiry in every case? Or is it left to chance as to whether evidence comes to the notice of the sending state? And if there is such evidence, are the sending state's authorities entitled to follow *K.R.S.* and discount it, leaving the asylum seeker to their remedies in that state, or must they enquire whether the Procedures and Reception Directives are being implemented effectively in the destination state? What level of doubt will render the transfer illegitimate? If the standard is to protect against a breach of Article 3, must there be an active enquiry on this point, or is Greece alone in being effectively outside the Dublin system at present? One of the interesting aspects of *M.S.S.* is the part it plays in the development of an integrated system of human rights protection for asylum seekers in the EU, and these questions are likely to be addressed in recent references to the Court of Justice of the European Union (CJEU), which are discussed briefly below.[14]

3. Treatment of Asylum Seekers

In addition to the impact of the *M.S.S.* judgment on the system established under the Dublin Regulation, the Court's findings against Greece have a direct impact on standards of treatment of asylum seekers throughout the Council of Europe region. There are three areas in which the Court found violations: MSS's conditions in detention, his general living conditions and the inadequacy of the asylum determination system.

The aspect of the judgment concerning detention conditions was of course important for MSS individually and for its impact on practice in Greece. In law it repeats earlier ECtHR cases in which appalling overcrowding[15] and

13 See *Soering v United Kingdom* A 161 (1989); 11 EHRR 439.
14 C-411/10, *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21; and C-493/10, *M.E. v Refugee Applications Commissioner* [2011] OJ C 13/18.
15 *A.A. v Greece* Application No 12186/08, Merits, 22 July 2010.

a lack of clean water,[16] sanitation[17] and beds or mattresses[18] in detention facilities in Greece have been found to breach Article 3.

A. Failings in the Asylum Determination Procedure

The findings concerning the asylum determination system are potentially very important, and passages of the judgment on this issue illustrate the detrimental effect of dysfunctional asylum procedures. In particular the partly dissenting opinion of Judge Sajó describes how devastating the impact of poor processes can be:

> Waiting and hoping endlessly for a final official decision on a fundamental existential issue in legal uncertainty caused by official neglect arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and therefore it may be characterised as degrading. The well-documented insufficiencies of the Greek asylum system . . . turn such a system into a degrading one.[19]

The ECtHR's judgment however is not based principally on this, but rather on the risk that poor processes result in the lack of an effective remedy against *refoulement*, that is, return to ill-treatment in the country of origin. With pertinence to asylum procedures, the Court said:

> In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. . . .[20]

The specific defects in the Greek procedure included that MSS was detained without reasons on arrival, and on release was simply told to go to the Attica police station within two days to register his address. He did not do so because he had no address to register. He understood that having an address was a prerequisite for the asylum procedure to be set in motion. He subsequently did present himself at the Attica police station on several occasions. Eventually a place in a reception centre became available for him, but this was reallocated when the authorities were unable to contact him owing to a lack of address.[21]

16 Ibid.
17 *S.D. v Greece* Application No 53541/07, Merits, 11 June 2009.
18 Ibid. See also *A.A. v Greece*, supra n 15.
19 *M.S.S.*, supra n 1 at Partly Concurring and Partly Dissenting Opinion of Judge Sajó.
20 Ibid. at para 290.
21 While the defects in the Greek procedure may be more gross and obvious, the impenetrable nature of the process and the double binds it presents will sound a familiar note for asylum seekers elsewhere. For instance, destitute refused asylum seekers in the UK are normally required to report regularly to UK Border Authority. This entails providing an address. To

The repercussions of the Court's finding of a breach of Article 13 against Greece may be far-reaching, as asylum procedures may often be, on the one hand, cursory, and on the other, labyrinthine.[22] '[T]he "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant'[23] and the standard represented by Article 13 as applied in *M.S.S.* does not require more than effective protection against *refoulement*. Nevertheless, this is the ultimate issue behind criticism of asylum decision-making, and the Court's recognition of the impact of serious failings in the application and determination process may provide a benchmark and a starting point for scrutiny of asylum procedures.

The finding of a breach of Article 13 in *M.S.S.* is an important development also because of the exclusion of asylum claims from the guarantee of a fair hearing in Article 6 of the Convention following the Grand Chamber of the ECtHR's judgment in *Maaouia v France*.[24] Although Article 13, unlike Article 6, does not mandate access to a court, the Grand Chamber's finding establishes that *access to a process* capable of delivering an effective remedy is a vital human right.

B. Living Conditions

The *M.S.S.* judgment breaks new ground in finding that the general living conditions facing MSS, whose situation was like that of thousands of other asylum seekers in Greece, amounted to inhuman and degrading treatment contrary to Article 3 of the ECHR. The standard of living of asylum seekers, whether at the stage of first making their claim or after the exhaustion of all legal avenues, is a contentious issue within Europe. From a legal perspective, the application of the ECHR to socio-economic conditions[25] is also

provide a false address is regarded as a breach of temporary admission, rendering the asylum seeker subject to arrest. However, by definition the asylum seeker has no entitlement to work or claim benefits or be housed and thus is unlikely to have a regular address.

22 For instance, the failings of the UK decision-making process have been documented in upwards of 20 reports since the publication of Asylum Aid, *No Reason at All: Home Office Decisions on Asylum Claims* (1995), available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3261 [last accessed 3 October 2011].

23 *M.S.S.*, supra n 1 at para 289.

24 2000-X; 33 EHRR 42.

25 The application of the guarantee of the right to property (guaranteed by Article 1 of Protocol No 1) to entitlements to social security benefits is established in the ECtHR's case law, though the extent of the ECtHR's engagement with domestic systems of entitlements is controversial. See, for example, Bossuyt, 'Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations' (2007) 28 *Human Rights Law Journal* 321. The question in cases like *M.S.S.* is not the operation of the system of entitlements but the complete exclusion from that system. In this situation, the question is not the conditions of entitlement but the *impact* of the deprivation. To be accepted as a violation of the ECHR it must be established that the lack of the socio-economic good either threatens psychological integrity, protected

contentious,[26] and the Court's application of Article 3 to MSS's living conditions may have wider implications. In addition, the finding that Belgium breached Article 3 by exposing MSS to these conditions is profoundly important in establishing that Article 3 when applied to socio-economic conditions may have extra-territorial effect. Finally, the possibility needs to be considered that *M.S.S.* may extend protection to destitute refused asylum seekers who fall outside the ambit of the Reception Directive. All these points are discussed in this section.

Arguably, access to food and shelter falls within the scope of economic and social rights, and thus outside the ambit of the ECHR. In its submissions in *MSS*, the Greek government argued that the Convention did not guarantee the right to accommodation. However, the oft-quoted case of *Airey v Ireland* is an authority that

> the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation: there is no water-tight division . . . [27]

In *M.S.S.* the Court accepted the general point:

> Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. . . . Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. . . . [28]

However, a combination of reasons led the Court to find a breach of Article 3. First, members of the Court pointed out that 'the obligation to provide accommodation and decent material conditions to impoverished asylum seekers'[29] had now entered into positive law with the Greek legislation which transposed the EC Reception Directive into national law. As this Directive lays down minimum standards for the reception of asylum seekers, standards that MSS

by the right to respect for private life under Article 8 (*Botta v Italy* 1998-I; 26 EHRR 241) or amounts to inhuman or degrading treatment under Article 3 (as in *D v United Kingdom* 1997-III; 24 EHRR 423).

26 Even where the right protected under the ECHR has an explicit socio-economic element, its scope is fiercely contested. See on the right to respect for a home (Article 8): Nield, 'Article 8 Again - The Continuing Dialogue!' (2010) 6 *Conveyancing and Property Lawyer* 498, and on social security rights, Kenny, 'European Convention on Human Rights and Social Welfare' [2010] 5 *European Human Rights Law Review* 495. This is all the more so when there is a claim under Article 3: see Bettinson and Jones, 'The Integration or Exclusion of Welfare Rights in the European Convention on Human Rights: The Removal of Foreign Nationals with HIV After N v UK' (Application no. 26565/05; decision of the Grand Chamber of the European Court of Human Rights, 27 May 2008)' (2009) 31 *Journal of Social Welfare and Family Law* 83; and Mantouvalou, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *Modern Law Review* 815.

27 A 32 (1979); 2 EHRR 22 at para 26.

28 *M.S.S.*, supra n 1 at para 249.

29 Ibid. at para 250.

alleged were breached in his case, the Greek government was obliged to ensure that these were met.

Secondly, '[t]he 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'.[30] Having considered *both* the Reception Directive *and* the vulnerability of asylum seekers as a group, the ECtHR considered whether 'a situation of extreme material poverty can raise an issue under Article 3'.[31] The Grand Chamber concluded, quoting *Budina v Russia*:

> The responsibility of the State may 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.[32]

In any such case there would need to be determination of the threshold for finding a breach by reference to the degree of deprivation or want. The Grand Chamber described MSS's situation as 'particularly serious'.[33] His account was that he had lived for months in a park in the middle of Athens. He spent his days looking for food. He had no access to any sanitary facilities or shelter. At night he lived in permanent fear of being attacked and robbed.

The implication of this finding against Greece is that, even where the Reception Directive either does not apply (that is, for those Council of Europe members outside the EU) or is breached, absolute destitution of asylum seekers is a breach of Article 3 of the ECHR. The implication of the finding against Belgium is that sending an asylum seeker to such a situation in another country is also a breach of Article 3.

This analysis of the Court's judgment and the conclusions drawn from it is on the basis that the breach of the Reception Directive was influential in the Court's reasoning, but was not critical to finding of a breach of Article 3. However, this is not really clear from the Court's judgment. Lavrysen has approached the case on the basis that the breach of the domestic provisions transposing the Reception Directive is treated by the Court as critical to the finding of a breach.[34] If this is so, the Court's reasoning introduces a test of legality into Article 3 which is inappropriate. As he says, it is the qualified rights in the ECHR that permit an interference which is 'accordance with the law'. He argues that the only question in relation to Article 3 is whether a minimum level of severity of suffering was reached in order to trigger the

30 Ibid. at para 251.
31 Ibid. at para 252.
32 Application No 45603/05, Admissibility, 18 June 2009.
33 *M.S.S.*, supra n 1 at para 254.
34 See Lavrysen, 'M.S.S. v Belgium and Greece (2): The Impact on EU Asylum Law', 24 February 2011, available at: http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece [last accessed 30 September 2011].

application of Article 3. This objection demands attention. If the breach of the Reception Directive or its domestic expression is critical to finding a breach, would this imply a different standard of human rights in Contracting States that are not members of the EU?

The Court's reasoning, it is suggested, could equally be read as saying compliance with the Reception Directive does not amount to a component of the right protected by Article 3, but rather is treated as an aggravating factor that compounded the systemic frustration of MSS's needs and increased his sense of lack of redress. It is relevant in the context of the Dublin system because it is relevant to the sending State's decision whether to transfer. The critical test would be in the case of a non-EU Contracting State returning an asylum seeker to a third country to conditions of the kind experienced by MSS. Would this amount to a breach of Article 3? This question will be addressed from the EU law perspective following a reference by the British Court of Appeal to the CJEU that asks whether the protection granted by EU law and compliance with the Directives and Charter of Fundamental Rights is wider than that granted by Article 3 of the ECHR.[35]

If the breach of the Reception Directive and the context of the Dublin system is not integral to the breach of Article 3 in relation to living conditions, then it appears that the finding against Belgium has implications for *any* removal. To date, removal to face destitution abroad has been difficult to establish as a breach of Article 3, usually because the receiving state is a refused asylum seeker's home country, and the ECHR would thereby be used inappropriately to remedy international socio-economic inequities. Arguably, the development of jurisprudence on socio-economic deprivation leading to a breach of Article 3 of the ECHR entered a retrograde phase with the cases concerning medical treatment, and reached a low water mark in the case of *N v United Kingdom.*[36] There had been several cases of this kind in which the ECtHR and domestic courts were asked to find that there was a breach of Article 3 where a person suffering from an illness, which had been terminal, had attained a better state of health in a Contracting State where they had been resident, but now faced forcible return to their home country. In most of the cases that came before the courts this entailed a return to a very short life expectancy—and in N's case less than two years. In *N v United Kingdom* the ECtHR reasoned that the ECHR did not oblige states to deliver medical treatment, which was categorised as falling within the sphere of an economic and social right and thus fell outside the scope of Article 3. The judgment in *N* has been criticised as failing to apply the proper and usual approach to Article 3, instead focusing on the economic implications of requiring

35 *N.S. v Secretary of State for Home Department*, supra n 14.
36 47 EHRR 49.

contracting states to provide medical treatment to foreign nationals, a balancing exercise more suited to the qualified rights than to Article 3.[37] Nevertheless, the absence of an obligation to deliver economic and social rights was the foundation of the Court's decision, and resulted in their not examining whether it was inhuman to expel N.

Arguably *M.S.S.* offers an opportunity to curb some of the wider effects of *N* and establish the possibility that in certain circumstances removal to absolute poverty could breach Article 3. As noted above, the following elements, if the Reception Directive is not crucial, could be gleaned from the judgment as being relevant to whether there has been a violation:

(1) that the applicant is faced with official indifference in a situation of serious deprivation or want that is incompatible with human dignity;
(2) that the applicant is completely dependent on the state for the resolution of that situation; and
(3) that the applicant has a pre-existing vulnerability.

Consideration could be given to these points where it is proposed to remove someone to a country where they faced serious want, and they were for instance old and ill and without family or social support, or discrimination falling short of persecution would prevent them from obtaining food and shelter.[38] This possible application of *M.S.S.* would no doubt be strongly resisted by governments, and would require substantial evidence of the likely fate of the individual, as was available in MSS's case, in order to establish that removal would lead to a violation of Article 3 of the ECHR.

C. Asylum Seekers as a Vulnerable Group

The designation of asylum seekers as vulnerable is another interesting and potentially important aspect of the judgment. The Court cites the 1951 Refugee Convention, 'the remit and activities of the UNHCR' and the standards set out in the Reception Directive as evidence of international recognition of their need for protection. The vulnerability of asylum seekers is a reason why the neglect

37 Battjes, 'In Search of a Fair Balance: the Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22 *Leiden Journal of International Law* 583; and Clayton, 'Article 3 Jurisprudence – *N v UK*: Not a Truly Exceptional Case?' (2008) 14 *Immigration Law Digest* 6.

38 *R.S. (Zimbabwe) v Secretary of State for Home Department* [2008] EWCA Civ 839, seemed set to examine this question—whether politically motivated deprivation of basic resources would be treated differently from *N* type cases—but on remittal the tribunal found as fact that Zanu-PF would not obstruct the appellant's access to medical care, so the point was not decided.

of their physical welfare amounts to a breach of Article 3, and, in finding that the conditions of detention were a breach of Article 3, the Court said it must

> take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experience he was likely to have endured previously.[39]

Judge Sajó dissented on the grounds that the concept of a vulnerable group has a specific meaning within the jurisprudence of the Court, and asylum seekers do not fit with previous cases because they are neither socially classified or homogeneous or treated as a group, nor 'historically subject to prejudice with lasting consequences, resulting in their social exclusion'.[40] He objected that the position taken by the Court is only a short step away from a general and unconditional positive obligation to satisfy the basic needs of those deemed vulnerable, a duty not owed where the vulnerability was attributable to nature, not the state.

Interestingly, despite his dissent on vulnerability, Judge Sajó accepted that Belgium was in breach of its ECHR obligations for subjecting MSS to Greece's dysfunctional system, and his description of the psychological effect of delay in such a system (see above) encapsulates the state-created aspect of the vulnerability of an asylum seeker. This total dependence for validation of one's capacity to participate in the host society is at least part of an answer to Judge Sajó's own question as to whether a distinction between an obligation owed to asylum seekers and not owed to those with natural vulnerabilities is justifiable, and is implicit in the majority's reliance on the case of *Budina* in finding that the absence of material provision could amount to a breach of Article 3 of the EHCR. It is consistent with the Court's case law on prisoners, which has treated them as a vulnerable group because their lives are constrained by the state.[41] Vulnerability in the context of human rights violations must include the dimension of vulnerability *to* the state. Even the most wealthy and resourceful asylum seeker cannot grant their own refugee status nor give themselves access in law to the host society; they are dependent on state action for this.

39 *M.S.S.*, supra n 1 at para 232.

40 Previous case law on vulnerable groups concerns, for example, gypsies or Roma: see *Chapman v United Kingdom* 2001-I; 33 EHRR 18 at para 96; and *Oršuš v Croatia* Application No 15766/03, Merits, 16 March 2010, at para 148, in which the Court held that 'the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyles'.

41 For example, in *Davydov and others v Ukraine* Application Nos 17674/02 and 39081/02, Merits, 1 July 2010.

4. European Integration?

Dublin transfers to Greece cannot now proceed until Greece is accepted to have improved its reception conditions and procedures for asylum seekers. This is simple to state, but many questions remain outstanding. For example, to what standard must Greece improve its systems? Is it so that Article 3 is not breached? Is there a distinction between avoiding inhuman and degrading treatment, and satisfaction of the Procedures and Reception Directives?[42] *M.S.S.* is an early instance from the Strasbourg side of what is bound to be a growing area of interaction between the EU Asylum Directives and the ECHR, an area that will also encompass the fundamental rights set out in the EU Charter of Fundamental Rights. The mechanisms by which each system refers to or relies on the other, and the overlap, difference or complementarity in scope are all in the early stages of development.

In *M.S.S.*, the Strasbourg Court treated the EU Directives as relevant because they had been transposed into domestic law, and took into account the failure by Greece to comply with the Reception Directive when finding a breach of Article 3 of the ECHR. The Court's first intervention on behalf of MSS required Greece to uphold EU Directives. When MSS applied in Belgium to the ECtHR for provisional measures under Rule 39 to prevent his return to Greece, his application was refused, but the ECtHR wrote to the Greek government saying that their refusal of the Rule 39 application was 'based on the express understanding that Greece . . . would abide by its obligations under Articles 3, 13 and 34 of the Convention, and . . . Council Directive 2005/85/EC . . . on minimum standards on procedures in Member States for granting and withdrawing refugee status; and Council Directive 2003/9 . . . laying down minimum standards for the reception of asylum seekers'.[43] The ECtHR concluded with a request to the Greek government to keep the Court informed 'of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he detained on arrival'.[44] While the ECtHR did not, by this request, usurp the role of the CJEU as the enforcer of the directives and regulations which form the CEAS, it did make plain that it regarded these provisions as relevant to the delivery of Convention rights.

In parallel, two references to the CJEU were due for hearing on 28 June 2011, addressing similar issues critical to MSS, from the EU perspective. In *N.S. v Secretary of State for Home Department*[45] the English Court of Appeal asked whether a decision under the sovereignty clause of the Dublin regulation falls within the scope of EU law and, if so, whether the duty of a Member State to

42 Before the decision in *M.S.S.*, on 25 August 2010 Greece sent its National Action Plan for Migration Management to the European Commission.
43 *M.S.S.*, supra n 1 at para 32.
44 Ibid.
45 *N.S. v Secretary of State for Home Department*, supra n 14.

observe EU fundamental rights is discharged by sending the asylum seeker to the Member State which the Regulation designates as the responsible state. In particular, does the obligation to observe EU fundamental rights preclude a conclusive presumption that the responsible state will observe the claimant's fundamental rights or the minimum standards of the asylum directives? Alternatively, in what circumstances, if any, is a Member State obliged to take responsibility for a claim where the transfer would expose the claimant to a breach of either? The Court of Appeal also asked whether the scope of EU rights is wider than Article 3 of the ECHR, and whether it is compatible with Article 47 of the EU Charter of Fundamental Rights for a national law provision (such as the UK's list in the 2004 Act referred to above) to require a court to treat a Member State as one from which the asylum seeker will not be subject to *refoulement*. In *M.E. v Refugee Applications Commissioner* the Irish High Court referred similar questions.[46] Both these references were made before the Strasbourg Court gave its judgment in *M.S.S.* It will be extremely interesting to see how the CJEU answers the questions and how it treats the *M.S.S.* judgment.[47]

5. Concluding Comments

There are other points of interest in *M.S.S.* It is refreshing to read the European Court's preference for the applicant's view on the basis that his evidence

46 Ibid.

47 After completion of this article, Advocate General Trstenjak (AG) gave her opinion in *N.S.* on 22 September 2011. In brief, the AG argues that a decision under the Dublin Regulation is an EU law decision, and as such, subject to the EU Charter of Fundamental Rights. Member States are obliged to exercise their right under the Article 3(2) of the Dublin Regulation to examine an asylum application where transfer to the responsible state would expose the asylum seeker to a serious risk of violation of fundamental rights. A breach of the EU asylum directives which does not amount to a breach of fundamental rights does not trigger the same obligation. There is an obligation on Member States to operate the Dublin Regulation in a manner consistent with fundamental rights under EU law (as to which the case law of the ECtHR is a very significant, though not conclusive, guide). It follows that Member States may not operate a conclusive presumption that a transfer to another Member State will not entail a breach of fundamental rights. States, the AG proposes, may operate a rebuttable presumption to this effect, but in order to ensure that rights are effective, there must be a meaningful channel through which an asylum seeker can adduce evidence and arguments that there is a serious risk to them in the proposed destination state. The AG rejects the argument that the UK and Poland, by the limiting provision of Protocol 30, have achieved an opt-out from all Charter rights. The Protocol prevents the Charter from creating new social rights in the domestic law of the UK and Poland, but the Charter issues in this case do not refer to such rights. The AG's view that a conclusive presumption that a transfer to another Member State will not entail a breach of fundamental rights is impermissible would, if adopted by the Court, undermine the UK's statutory list of safe countries in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

coincided more closely with that of the objective evidence of other bodies. For instance:

> Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations.[48]

This is not always the method of reasoning employed in the UK, where objective evidence consistent with the asylum seeker's account may be treated as irrelevant because it does not prove that they were treated as others were, or even treated as damaging their credibility as it is alleged to be the source of their story.

The main importance of *M.S.S.*, however, lies in the subjects discussed above: the impact on the Dublin Regulation, the standard set for living conditions of asylum seekers and the emerging integration of human rights standards in Europe.

48 *M.S.S.*, supra n 1 at para 304.