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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

AS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT DATED 24 JULY 2015

IN THE MATTER OF AN APPLICATION BY AS FOR JUDICIAL REVIEW

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Before: Weir LJ, Deeny J and Keegan J

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KEEGAN J (delivering the judgment of the Court)

Introduction

[1] This is an appeal from a decision of Maguire J delivered on 15 November 2016 wherein he dismissed the appellant's application for judicial review. Mr McQuitty BL represented the appellant and Mr Henry BL represented the respondent. We are grateful to both counsel for their written arguments and for their focussed oral submissions.

[2] Leave to apply for judicial review was granted in March 2016 after a contested hearing. The Order 53 Statement is dated 30 July 2015. The relief sought is an order of certiorari, an order of mandamus and a declaration that the decision taken was unlawful. The grounds given for the challenge were twofold, namely:

(a) that the decision was contrary to Article 3 of the European Convention on Human Rights ("ECHR") in that the Home Office declined to seek the proper assurances from the Italian authorities; and

(b) that the decision was in breach of Section 55 of the Border, Citizenship and Immigration Act 2009 ("Section 55")

[3] The appeal notice is dated 22 December 2016. It sets out a large number of grounds, however, wisely, Mr McQuitty focused on the two core points which appear in the Order 53 Statement and which may be characterised as the 'Tarakhel' point emanating from application of the principles of the European Court of Human Rights ("ECtHR") Grand Chamber decision of Tarakhel v Switzerland [2015] 60 EHRR 28 and the 'best interests' point which involves application of Section 55.

Factual Background

[4] In support of her application the appellant filed an affidavit dated 9 November 2015 and a rejoinder affidavit dated 19 May 2016. We have recited the salient parts of those affidavits when dealing with the history of this case.

[5] The appellant is a Somali national who was born on 8 January 1988 and who is now 29 years of age. She states that she left Somalia in 2010 by herself after her husband was kidnapped by Al-Shabaab. She says that she travelled to Kenya, Sudan and Libya before boarding a boat to Italy. The appellant states that she fled to Bari in Southern Italy where she sought asylum and where she was ultimately granted refugee status on 12 April 2012. The appellant avers that she took this course to avoid persecution in Somalia at the hands of Al-Shabaab.

[6] In her affidavit the appellant describes her life in Italy in unfavourable terms. This is despite the grant of refugee status. She states that she was initially provided with accommodation and lived in a two-bedroom house. However, according to the appellant seven people lived in the house and there was no food. The appellant refers to overcrowding and states that she only obtained food thanks to the benevolence of a local church. The appellant also states that she could not speak the Italian language or write Italian. The appellant states that she was not provided with benefits or support. The appellant describes how these circumstances led to a situation where she became homeless. She then developed gastric problems and internal bleeding and she states that she required hospital admission in Bari. The appellant states that after this medical intervention the Somali community in Bari helped her fund a flight to return to her homeland of Somalia. In December 2013 the appellant flew from Italy to Addis Ababa and returned to live with her husband.

[7] Following from her return to Somalia on 2 February 2014 the appellant states that she and her husband encountered further difficulties with Al-Shabaab. When the appellant said that she was pregnant a query was raised by her accusers over whether her husband was the father. This was framed as a question due to the appellant's previous stay in Italy. The appellant states that she was accused of having an illegal marriage. The appellant then states that she was asked to prove her marriage and when she could not provide the documentation she had to flee the

home that she had returned to with her husband. The appellant states that she obtained a lift to Mogadishu and that she stayed with various relatives until 2 June 2014. At that stage the appellant states that the Somali community and a relative banded together to raise funds to facilitate her flight from the country. The appellant arrived in Belfast on 5 June 2014.

[8] When the appellant arrived in Belfast she was apprehended by the authorities. The appellant accepts that she did not inform them of her previous stay in Italy. By this stage the appellant was five months pregnant. Her son was born in the Royal Victoria Hospital, Belfast, in October 2014. An asylum screening interview is contained in the papers. It refers to information about the appellant's background and states that she left the country because of persecution by Al-Shabaab. The screening interview states that the appellant indicated that she was in her fifth month of pregnancy, that she had not seen a doctor, but that in Somalia "I got a scan, everything is fine".

[9] An immigration factual summary is also provided in the papers. We set this immigration history out verbatim as follows:

"5 June 2014	The Applicant comes to the asylum intake unit in Belfast to make an asylum case.
5 June 2014	She is 5 months pregnant.
18 September 2014	Attends the asylum intake unit in Belfast to have her fingerprints taken.
18 September 2014	A eurodac fingerprint database search reveals that she was a hit in Italy on 19 October 2011.
October 2014	She gives birth to her dependent child.
10 November 2014	Formal request to Italy under Article 18.1(b) of the Dublin 3 Regulations to accept responsibility.
19 November 2014	Italy replies that she was granted refugee status under the UN 1951 Convention on Refugees.
1 February 2015	Asylum refused on safe third country grounds."

[10] A letter was sent by the Home Office dated 1 February 2015 confirming the refusal of asylum. This states that:

> "You have applied for asylum in the United Kingdom on the grounds that you have a well-founded fear of persecution in Somalia for reasons of race, religion,

> nationality, membership of a particular social group or political opinion. However, Somalia is not the only country to which you can be removed. You have been recognised as a refugee in Italy. You are, under paragraph 8(1)(c) of the Immigration Act 1971, returnable to Italy which is a signatory to the 1951 United Nations Convention relating to the status of refugees. Paragraph 345 of the statement of changes in immigration rules (H3395) provides that the Secretary of State will normally decline to examine the asylum application substantively if there is a safe third country to which the applicant can be sent. There are no grounds for departing from this practice in your case."

The letter goes on to refer to a third country certificate and a certification that:

> "(a) It is proposed to remove you to Italy.
>
> (b) In the Secretary of State's opinion you are not a national or citizen of Italy.
>
> (c) In the Secretary of State's opinion Italy is a place:
>
> (i) where your life and liberty would not be threatened by reason of your race, religion, nationality, membership of a particular social group or political opinion; and
>
> (ii) from which you will not be sent to another state otherwise than in accordance with the Refugee Convention."

[11] Following from this correspondence the appellant approached solicitors and they began to correspond with the authorities by letter dated 7 May 2015. In this correspondence the appellant claims, *inter alia*, that if she had to return to Italy, she and her child would face a real risk of suffering ill treatment contrary to Article 3 of the ECHR as per the test in Soering v UK [1989] 11 EHRR 439. The letter specifically states:

> "Our client instructs that there are inadequate accommodation opportunities in Italy for her and her dependent child. Our client instructs that she was homeless and without social assistance in Italy previously and that her circumstances would be even more vulnerable now as she has a child to care for."

[12] The Home Office issued correspondence dated 1 July 2015. This sets out removal directions for 30 July 2015 including flight details for the appellant and her child. The solicitors on behalf of the appellant follow up with a further letter dated 22 July 2015. In this letter reference is made to the removal directions and the notice of the immigration decision dated 1 July 2015 and the appellant raises an objection to the removal.

[13] This chain of events leads to the impugned decision which is comprised in a letter dated 24 July 2015. This is a substantial decision letter of 9 pages. The decision making is set out under a number of different heads, namely immigration history, Article 3 consideration, Section 55, Article 19 consideration and conclusion. The decision is to confirm the removal having considered the above.

[14] Following from this correspondence a pre-action protocol letter was sent to the respondent dated 29 July 2015. On the same date there is a response from the Home Office which refers to the alleged breach of Article 3 of the ECHR. This correspondence refers to the guarantees in cases of transfers of family groups with minors in compliance with the Dublin Regulation. The letter refers to the framework of the System for the Protection for Asylum Seekers and Refugees ("SPRAR") provided by the Italian authorities and it points to the fact that details can be accessed via the website. The letter refers to the fact that specific places have been reserved for family groups in the framework for the implementation of local reception projects. It states as follows:

> "This will be available to your client upon her return to Italy tomorrow. … It is therefore considered that in regard to your client's case there are assurances in place for her and her child as advised by the Italian authorities. Your client and her child will be adequately accommodated in a manner adapted to the age of the child."

[15] It was accepted during the course of the hearing by counsel that notice of the removal was also given to the Italian authorities on 16 July 2015.

[16] The affidavit of the respondent is dated 20 April 2016. In that affidavit various points are made in relation to the applicant's case. In particular, the respondent stresses that the appellant failed to declare the fact that she had been granted refugee status in Italy to the UKBA upon her arrival or when she was interviewed. Paragraph 6 of the affidavit states as follows:

> "Refugee status confers on her the same rights as an Italian national. Those rights include the right to state provided social housing, state benefit/welfare and health care. Her son will also be entitled to avail of state provided education."

[17] There are various other averments in the affidavit which highlight the appellant's lack of candour about her immigration history and inadequacies in the explanation about her relationship with her husband and the circumstances of her travels to and from Somalia. There is a criticism of the appellant in terms of her failure to set out details of her past attempts to secure assistance whilst in Italy. At paragraph 15 of the affidavit reference is made to the fact that the appellant could have brought any particular matters of health to the attention of the authorities. Paragraph 16 of the affidavit states as follows:

> "Italy is a country bound by the qualification directive and must provide minimum standards of welfare to the applicant and her son upon return there."

[18] Paragraph 18 states:

> "Whilst Italy has experienced an influx of immigrants seeking protection and asylum in recent years and whilst individual consideration is given to each individual applicant, Italy is presumed to provide the minimum acceptable standard of welfare unless sufficient evidence is provided to the contrary. The previous country of origin authority in 2012 confirmed that the presumption of satisfactory welfare provision remained in place for Italy. The more recent 2015 version of that country guidance came to the same conclusion ie that unless sufficient evidence was provided to the contrary, Italy could be assumed to be capable of providing an acceptable minimum standard of welfare."

[19] At paragraph 21 of the affidavit reference is made to the Home Office receiving a memorandum from the Italian authorities in June 2015 setting out assurances on the member state's behalf for vulnerable cases pursuant to the Dublin Regulations. They specify that this categorisation includes family groups. This was the most contemporaneous communication between the UK and Italy preceding the impugned decision. The affidavit refers to the SPRAR system. The affidavit explains that it consists of a network of local bodies in which specific places have been reserved for family groups at local reception centres. The affidavit states that SPRAR provides for "immediate accommodation for a refugee thus allowing them to apply for social housing once they get there". The affidavit also avers at paragraph 28 that there are no exceptional characteristics in the applicant's case. It states that she will have enhanced status as a refugee upon arrival in Italy and she will have all the rights and resources of an Italian national as well as the immediate SPRAR services available to her. It states that there are no specific health concerns raised about the applicant or her son, but even if there were the Italian health care system would be able to cope with most eventualities. Reference is made to the fact that any

medical evidence the applicant feels should be supplied to the Italian authorities in advance can be arranged. Finally, it states that it will also be easier to accommodate a single parent with one child than a larger family group such as the family of eight in Tarakhel.

[20] The affidavit concludes with the following averment:

> "All of the above factors were taken into account when arriving at the removal decision and as such the decision is argued to be justified."

[21] The relevant circular letter has been provided in the papers and this is dated Rome June 8 2015. It is directed to all Dublin units. It is entitled "Guarantees for vulnerable cases: Family groups with minors re: Dublin Regulation No: 604/2013." It is clear that the circular is to replace a previous circular. It states that it is being sent out in relation to the current European case law concerning the guarantees in cases of transfers to family groups with minors in compliance with the Dublin Regulation. There is a list of SPRAR projects enclosed which can provide reception to the international protection applicants. There are 161 facilities noted in this circular. Reference is made to the SPRAR website and to the following description:

> "These projects of integrated reception are financed by means of public resources on the basis of calls for tender with specific requirements, on a continuous basis, they are implemented by the municipalities with the support of the voluntary sector; they also provide for information, guidance, assistance and orientation measures, by creating individual and family paths of socio-economic integration (autonomy and social inclusion paths) as well as specific paths for minors. These projects also ensure the family unity, Italian language courses and job training."

[22] The final paragraph of the circular states:

> "We are therefore of the opinion that, despite the objective difficulties which Italy is facing on the grounds of the high number of migrants and international protection applicants who reach Europe through the Italian coasts, the guarantees requests by member states concerning the reception standards specifically ensured to family groups with minors can be regarded as fulfilled, also in consideration of the principle of mutual trust, underlying the legislation which regulates the relations among member states."

[23] We note that the memorandum has been updated as of February 2016 and, whilst we were not provided with a copy of this, it is clear that it refers to fewer available facilities. However, counsel accepted that the relevant circular at the time of the impugned decision was the circular of 8 June 2015. We proceed on that basis. We have also been provided with a report from the Swiss Refugee Council in relation to reception conditions in Italy. This is dated October 2013 and it was before the lower Court. Again, it appears that there is an updated report of 2016 which counsel accepted could not form part of this challenge. In any event, the 2013 report refers in particular to the vulnerability of persons within the Italian asylum system.

[24] During the course of the hearing, upon enquiry by the Court, further information was obtained from counsel in relation to the appellant's position. In particular, it was confirmed that her husband is the father of her child. It was also confirmed that he is in Somalia but that there is contact between the spouses once a week by telephone.

Consideration

[25] This case involves application of European law within what is known as the Common European Asylum System. There are interlocking rules which govern this network. These rules form the mechanism by which the right to asylum guaranteed by Article 18 of the European Charter of Fundamental Rights and Freedoms is protected. During the course of this hearing no particular point was taken about the wording or application of the various regulations and directives and so we simply summarise the relevant directives as follows:

(i) Council Regulation EC No: 343/2003 establishes the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national (the Dublin Regulation regime). This regime is based on the Dublin Convention and is given effect in a series of regulations.

(ii) Council Directive 2004/83/EC sets minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive").

(iii) Council Directive 2003/9/EC lays down minimum standards for the reception of asylum seekers (the Reception Directive).

(iv) Council Directive 2005/85/EC sets minimum standards and procedures in member states for granting and withdrawing refugee status (the Procedures Directive).

[26] The Qualification Directive provides for qualification for refugee status and for subsidiary protection and for the consequences of the recognition of such claims.

The thrust of this directive is that refugee status provides the refugee with the same rights as a national of a member state in terms of provision for health, education, welfare benefits and housing.

[27] Article 1 of the Dublin Regulation states that:

> "The Dublin Regulation lays down the criteria and mechanisms for determining the member state responsible for examining an application for asylum lodged in one of the member states.

[28] Article 3(1) provides that:

> "Member states shall examine the application of any third country national who applies for asylum at the border or in their territory. That application is to be examined by a single member state which is the state which, according to the criteria in Chapter 3, is the member state which is responsible. There is a derogation by way of Article 3(2) which provides that member states are free to examine an asylum application even if they are not the state responsible for it under the Dublin Regulation."

[29] The Dublin regulatory framework effectively means that if there is an asylum claim in one country but there has been a previous asylum claim, the previous country, if it is a safe third country, should be seised of the matter. That is unless the derogation by way of Article 3(2) is successfully invoked. That derogation is argued whenever an applicant makes a claim based on Article 3 of the ECHR that a return to the third country would result in the applicant suffering from ill treatment. This flows from the Convention provision which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[30] The test to be applied when Article 3 is engaged is long established and flows from Soering v United Kingdom [1989] 11 EHRR 439. This authority has been applied in the context of the Dublin Regulation cases. The burden is upon the applicant to show that he or she faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country if returned. Paragraph 90 of that decision reads as follows:

> "The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international

> law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

[31] The issue was highlighted in sharp relief in the decision of MSS v Belgium and Greece [2011] 53 EHRR 2. In that case the Soering test was applied. This was in relation to the treatment that an asylum seeker may have been subjected to in Greece. In particular, Belgium's decision to return the applicant in that case to Greece, knowing the risk that he would suffer such treatment constituted a breach of Article 3. It was acknowledged that there was a presumption that the Greek authorities would respect their international obligations in asylum matters but the Court held that the presumption had been rebutted.

[32] It has been consistently stated in a line of cases that the situation in Greece is different to that in Italy. That is the current position. In the MSS case it was pointed out by the ECtHR that the situation that the applicant found himself in was particularly serious. The Court referred at paragraphs 347-8 of the judgment to numerous reports and materials. These were based on field surveys which highlighted the practical difficulties involved in the application of the Dublin system in Greece and the deficiencies of the asylum procedure. The Court specifically relied upon reports from the UN High Commissioner for Refugee ("UNHCR") and the Council of Europe Commissioner for Human Rights and from a number NGOs. It also said at paragraph 349 that it attached critical importance to a letter sent by the UNHCR in April 2009 to Belgium containing an unequivocal plea for the suspension of transfers to Greece.

[33] The Supreme Court has also examined this issue in the case of EM Eritria & Others [2014] UKSC 12. At paragraph 58 of that judgment Lord Kerr explains the correct approach to be adopted in evaluating whether there has been a violation of Article 3 as follows:

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

[34] Also, at paragraph [40] Lord Kerr states as follows:

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

[35] This leads us to a consideration of the case of Tarakhel decided by the Grand Chamber of the ECtHR. This case concerned an Afghan family of two parents and six children who argued that their removal to Italy which had been their first port of call violated Article 3 of the Convention. In particular, the case was made that guarantees could not be given by the Italian authorities regarding the family unit being maintained in suitable accommodation. The decision of the Grand Chamber at paragraphs 93-99 sets out a recapitulation of general principles. Paragraphs 100-105 explain the application of those principles to the present case. Paragraph 105 reads as follows:

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

[36] Paragraphs 106-115 set out the situation in Italy which the court expresses some concerns about. Then paragraphs 116-122 set out the individual situation. Paragraphs 121 and 122 formulate the conclusion:

> "12. … Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.
>
> 122. It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention."

[37] To fully grapple with the import of this decision we have examined some of the pre-Tarakhel and the post-Tarakhel decisions. We have found this a helpful exercise which we summarise as follows.

[38] Firstly, as regards the cases pre-Tarakhel, Mr Henry referred us to Hussein v Netherlands and Italy [2013] 57 EHRR SE 1 and Daybetgova v Austria [2013] 57 EHRR SE 12. It is important to note that both these cases are admissibility decisions and both cases were rejected on their specific facts on the basis of the assurances given about reception facilities. Mr Henry then referred to the fact that on 27 August 2013 the ECtHR declared inadmissible nine applications from asylum seekers in the Netherlands resisting return to Italy under the Dublin II Regulation. These are categorised as the "Hassan cases". In those cases reference is made to the Hussein case. Mr Henry also stressed that the Court noted that the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee who has been explicitly granted permission to settle in the country of refuge.

[39] It is clear to us that the Tarakhel case which followed caused some ripples in the pool of asylum jurisprudence. The ensuing debate focussed upon what exactly the Grand Chamber meant or intended. The Grand Chamber raised some concerns about the Italian situation without explicitly referencing that it breached Article 3 and the presumption of compliance. Also, on the particular facts of that case the Grand Chamber determined that specific assurances were required from the Italian authorities. Reliance was therefore placed on the case to argue that particular assurances should be given in other cases.

[40] Mr McQuitty referred to some of the post Tarakhel decisions particularly three decisions emanating from the Netherlands. These are decisions of the ECtHR in ATH v The Netherlands 54000/11, SMH v The Netherlands No: 5868/13 and JA v The Netherlands 21459/14. None of the applicants succeeded in these cases.

However, we recognise that there was argument about exactly what assurances were required. We can see that in the ATH case the Dutch authorities were requiring a specific assurance by way of letter. However, in the case of JA the court reiterated the point that in the absence of any concrete indication on the case file the applicant's case that one of the 161 places earmarked would be insufficient was not made out. Paragraph 30 of that judgment states:

> "As to the applicant's personal situation the court has noted that the Italian government had been duly informed by the Netherlands authorities about the applicant's family situation and their scheduled arrival. Further taking into account that the first applicant refused to give a consent to the transfer of medical data about her to the Italian authorities – they have been informed that the first applicant will be escorted in order to avert the risk of suicide. The court understands from the circular letter dated 8 June 2015 that the applicants being a family with a minor child, will be placed in one of the 161 reception facilities in Italy which have been earmarked for families with minor children."

[41] We also note the considerable domestic jurisprudence in this area including that of the Upper Tribunal. In Weldegaber v The Secretary of State for the Home Department [2015] UKUT 70(IAC) McCloskey J stated that no specific assurances were required by virtue of the Tarakhel decision. The decision of Laing J in Tabrizagh & Others v The Secretary of State for the Home Department [2014] EWHC 1914 (Admin) is a comprehensive analysis of the law. Maguire J also refers to the decision of Cranston J in R (BG) v The Secretary of State for the Home Department [2016] EWHC 786 (Admin) which seems to us to have been the most recent decision to hand. The cases are fact specific and different judges have analysed and applied the law accordingly. Without dissecting each and every ruling we consider that the law has developed to a settled point in relation to the provision of assurances.

[42] We now turn to the legal context regarding the "best interests" point. Firstly, we set out the test in relation to this. Section 55 of the Borders, Citizenship and Immigration Act 2009 reads as follows:

> "Duty regarding the welfare of children –
>
> 1. The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in sub-section 2 are discharged having regard to the need to safeguard

and promote the welfare of children who are in the United Kingdom; and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in sub-section 2 are provided having regard to that need.

2. The functions referred in sub-section 1 are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

3. A person exercising any of those functions must in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section 1."

[43] The origin of Section 55 is found in Article 31 of the UN Convention on the Rights of the Child 1989 which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. "

[44] This principle was highlighted by the Supreme Court in ZH (Tanzania) [2011] UKSC 4. Section 55 was also considered in Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690. It is clear from those cases that there is an interaction between Section 55 and Article 8 of the ECHR. At paragraph [46] of the ZH case Lord Kerr refers to the principle as follows:

> "This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank

> higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them."

[45] In the case of Zoumbas Lord Hodge articulates seven principles which have been applied in immigration law as follows:

> "1. The best interests of a child are an integral part of the proportionality assessment under Article 8 of the ECHR.
>
> 2. In making that assessment, the best interests of the child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration.
>
> 3. Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.
>
> 4. While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid risk that the best interests of a child might be undervalued when other important considerations were in play.
>
> 5. It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.
>
> 6. To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment.
>
> 7. A child must not be blamed for matters for which he or she is not responsible such as the conduct of a parent."

[46] This is an evaluative exercise as Gillen J states in RE A's Application for Judicial Review [2015] NIQB 58. Given that characterisation, some care must inevitably be applied when conducting the exercise. A warning as to the potential pit falls is found in the case of MA (Pakistan) & Ors [2016] 1 WLR 5093. Paragraph [57] of that judgment reads as follows:

> "In my judgment all Lord Hodge JSC was saying is that it is vital for the court to have made a full and careful assessment of the best interests of the child before any balancing exercise can be undertaken. If that is not done there is a danger that those interests will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations as so powerful as to assume that they must inevitably outweigh the child's best interests whatever that might be, with the result that no proper assessment takes place."

[47] After the hearing Mr Henry submitted a further case to us which is relevant to this issue. We allowed both counsel to comment upon it. This case of Hamidreza Azimi Moayed and others v Secretary of State for the Home Department was decided on 26 March 2013 by the Upper Tribunal. There is some useful guidance given in the decision at paragraph [1] which refers to the assessment of decisions affecting children. There is clearly not a rigid code. However, we consider that this case reflects and gives expression to the common principles at play.

Decision of the Learned Trial Judge

[48] We have read the careful analysis set out by the learned trial judge in relation to the two main issues in this case. We note that the judge did not have the benefit of the three Dutch decisions but in any event we refer to his analysis of the two points as follows.

[49] Firstly, in relation to the Tarakhel point, the judge examined the parameters of the decision referring to the circular letter and the affidavit of the Home Office which sets out the available facilities. In terms of his assessment of this first ground his conclusions are found at paragraphs [46 to 53] of the ruling. Secondly, the judge determined that Tarakhel is based on its own facts and that this case is a materially different situation. Thirdly, at paragraph [47] the judge states the view that the Court should be slow to regard Tarakhel as applying generally in a case of the type now before it. Finally, the Court points out that since Tarakhel there has been available the general assurance of the Italian State which is directed particularly at the position of families and how they would be treated on arrival in Italy. The judge concludes that all of the above goes to the issue of whether in the appellant's case there is a need for specific assurances from the Italian authorities. The judge followed the decision of Cranston J in R (BG) v SSHD [2016] EWHC 789 in which

Cranston J noted that there was no need for specific assurances and no breach of Article 3 had been established.

[50] In relation to the second ground, the judge examined the relevant law. In particular he referred to the Supreme Court cases of ZH and Zoumbas. He noted the fact that the decision-maker also referred to the guidance which is called `Every Child Matters: Change for Children'. The judge then analysed the decision-making. In our view it is important to look at paragraph 67 of the judgment whereby the Court took the view as follows:

> "In the court's view it is important not to lose sight of the circumstances pertaining at the date when Section 55 is being considered. At the time the applicant's child was very young – just a matter of a few months old. This is not a case where it would have been realistic to seek to discover what the child's views were as the reality of that time (and no doubt for some time to come) was and is that the child's interests are subsumed with the interests of a sole carer mother. There could be no serious suggestion that the interests of the two were different or that the child's interests could be served by separation from his mother. It is in these circumstances that the decision acknowledges the mother's position (and by extension that of the child) of wanting to remain in the United Kingdom. In the court's eyes this was a sufficient recognition that this was the preferred option of both. "

[51] The learned trial judge also stated that the decision must be read as a whole bearing in mind that the decision-maker does not have to set out in detail every matter he has considered. The judge was alive to the practical realities of decision making. Overall, the judge was satisfied that the best interest of the child was properly dealt with and that the decision was not unlawful.

The Submissions of the Parties

[52] Mr McQuitty BL, on behalf of the appellant, streamlined his submissions into the following core points:

(i) Mr McQuitty accepted that this was not a rehearing on the facts. He accepted that the decision must be viewed at a time when his client had refugee status in Italy at the time and also that the 8 June 2015 circular was current when the decision was made.

(ii) On the Tarakhel issue, Mr McQuitty wisely moved away from the argument that a specific assurance in terms of exact location of accommodation was required. He argued a narrower point that confirmation from the receiving

State that the circular position was correct and would be honoured was the appropriate course. He essentially argued that there had been no proper engagement by the Home Office with the Italian authorities on this issue and so even the general assurance could not be given.

(iii) Mr McQuitty relied on the three Dutch cases in the sense that he argued that the Dutch did require an assurance, albeit a general assurance, that accommodation would be provided upon notice being given of a transfer.

(iv) Mr McQuitty accepted that Tarakhel did have particular factual circumstances in that there was a large group of children but relying upon paragraph [121] of the decision he asserted that the case was of wider application in terms of the assurances required in relation to age appropriate accommodation for a family.

(v) In relation to the decision letter Mr McQuitty argued that the best interests of the child had not been properly considered. He pointed out that the decision-maker had used an inaccurate description of the child as a "daughter" when the child is in fact male. Mr McQuitty also stated that the letter conflates issues of best interests with public policy and therefore does not deal with the issue of best interests in a lawful way. Mr McQuitty relied on the decisions of the Supreme Court in ZH and Zoumbas in this regard and the decision of Gillen J in Re A to argue that there should have been a much clearer exposition of the best interest analysis than appeared in this case.

[53] Mr Henry, on behalf of the respondent, in well-focussed oral submissions, made the following points which we set out in summary:

(i) Mr Henry submitted that Tarakhel was fact specific. He argued that it was a very unusual case given the dynamics of the family.

(ii) Mr Henry argued that the Dutch decisions strengthened his position because, notwithstanding the fact that the Dutch may have been more assiduous than other States in requiring assurances, a general assurance in the form of the circular was sufficient according to the European Court. Mr Henry submitted that simply because the Dutch may do more and require more assurances does not mean that a process of relying on the circular is not compatible.

(iii) Mr Henry bolstered his submissions by taking the court through the pre and post Tarakhel decisions which he said supported his position.

(iv) Mr Henry pointed out the marked difference between a refugee and an asylum seeker and he stressed the point that this applicant had refugee status in Italy at all material times.

(v) As regards the Section 55 point, Mr Henry frankly accepted that the letter could have been worded in a better way. However, he submitted that this was not fatal to the decision. He enjoined the court to look at substance over form. Mr Henry argued that nothing had been left out in this consideration. He pointed out that health, housing, education, social welfare and the child's attachment to the mother had all been considered in looking at best interests before being balanced against other factors in the case.

Conclusion on the Tarakhel point

[54] At the outset we reiterate the fact that a judicial review is not an appeal on the merits. It is an administrative process to determine whether decision-making has been lawful or not. In this case the review involves considerations of European and domestic law currently in force. We bear in mind the contextual backdrop which is an asylum system under strain.

[55] We also recognise that there are important issues at stake in this case given that Article 3 of the ECHR is in play. We highlight three points, two of which are matters of principle and one by way of procedure. Firstly, for the common asylum system to work properly there is an emphasis upon the avoidance of forum shopping. This is referred to as commonality. Secondly, there is an expectation that there will be an adherence to standards across those Member States within the Dublin regime. This is referred to as compliance. These first two principles are substantive in nature and they form the back bone of the asylum system. The final point is that if there is to be derogation from the regime by way of potential violation of Article 3 it must be substantiated by evidence. The burden of proof is upon the person asserting the existence of torture, inhuman or degrading treatment.

[56] We note that the ECtHR has consistently stated that the position in Italy, although not ideal, does not equate to the position in relation to Greece. That remains the current statement of law which has been applied in similar cases. We take note of the report that was placed before the Court from the Swiss Refugee Council and we recognise the concerns which it highlights. However, this does not automatically result in an outcome akin to that in the MSS case. We refer back to the *dicta* from numerous courts in relation to the strength of the evidence that was apparent in the MSS case and which led the ECtHR to its conclusion in that case.

[57] We now turn to the specific appeal point which requires us to consider what the decision in Tarakhel actually means and whether it has been properly applied. In dealing with this we understand that the case has been utilised to suggest that specific assurances must be provided in cases of this nature. However, it is very clear to us on the basis of the jurisprudence we have been referred to that the decision does not actually mean that specific assurances have to be given in each and every case. To adopt the wording of the ECtHR that would lead to an "unworkable situation". There is no rule of law that requires specific assurances. We consider the

position to be that specific assurances may be required in specific cases to deal with specific issues.

[58] However, following from the Tarakhel decision, a general assurance must be given in relation to compliance with Article 3. In the particular circumstances of the Tarakhel case, further information was required to make sure that the family was not split up. But we consider that in other cases such as this the circular itself provides a sufficient assurance in terms of accommodation. This coincides with the principle of commonality and the presumption of compliance. These established norms reflect the mutual trust between Member States which underpins the system. We agree with Mr Henry that Tarakhel is fact specific.

[59] During the hearing Mr McQuitty accepted that a specific facility did not have to be identified in this case. We consider that he was correct to take that course. However, Mr McQuitty pursued an argument that the circular was not sufficient in itself and that there should be an assurance that its terms would be followed. We now turn to that modified submission.

[60] We note the fact that in the earlier Dutch cases a confirmation letter was specifically sought. It appears to us that the Dutch authorities have been assiduous in relation to this. We consider that the situation may have relaxed with the progress of time and further jurisprudence on this issue. But in any event we do not consider that just because one State may have taken a more robust view that that renders the actions of another State unlawful.

[61] It is clear that the Italian authorities reacted to Tarakhel. They provided the circular of 8 June 2015 which was in force at the time of the decision-making in this case. The circular makes provision for children and that has been relied upon in other cases. In our view this circular provides sufficient general assurances to comply with the Article 3 obligation on the facts of this case. In our view it would be wrong for this Court to look behind the *bona fides* of the Italian authorities. We also consider it extremely important that notice of the removal was given to the Italian authorities in advance of arrival. We agree that if notice of arrival were not given there could be a practical issue in terms of reception facilities. But that would be because of lack of notice rather than availability. In this case notice of arrival completes the picture and enhances the argument made by the respondent. In our view nothing further was required to ensure compatibility.

[62] Accordingly, our conclusion on the Tarakhel point is that there has been no error in the judge's reasoning. We consider that the judge applied the correct legal principles to the facts of this case and his conclusion is one with which we agree.

Conclusion on the best interests point

[63] The best interests of the child is a primary consideration. This feature is at the heart of both domestic and European law. We repeat the point that the best interests of the child should not be viewed through the prism of parental misdeeds. This is a discrete and specific consideration. Section 55 is a separate legal test. However, it reflects the UN Convention on the Rights of the Child 1989 and considerations flowing from Article 8 of the ECHR.

[64] We draw from the *dicta* of the MA case and recognise the care that should be applied when conducting this exercise. It is important to identify the best interests of the child and then conduct the balancing exercise. This involves proper information gathering and then evaluation. To determine the issue we need to look at the particular facts of this case. We borrow the words of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159 that such an exercise "excludes any hard edged or bright line rule to be applied to the generality of cases".

[65] We have examined the argument that there was no express determination by the decision maker about whether it was in the child's best interests to be removed to Italy or to remain in the United Kingdom. We consider that the preference is obvious in that the appellant would prefer to stay in the United Kingdom. That position will also apply to the child. However, preference is not conclusive. The exercise is not simply concerned with a geographical determination. The focus must be on what is in the child's best interests. We consider that this is particularly pertinent when considering an infant when the interests of the child are so closely linked to the parent.

[66] We recognise the criticisms made of the decision making letter. Mr Henry acknowledged that the drafting could have been better. We also note the mistake made in referring to the child as a female. We accept that there has been some mixing of information. However, we bear in mind the context and we consider that a margin should be allowed to the decision maker in terms of the drafting. That is provided that the contents deal properly and fully with the substantive issue. We have carefully considered this and notwithstanding the fact that the formatting of the letter could have been improved we do not consider that this in itself invalidates the evaluative exercise in this case.

[67] Having examined the particular facts of this case, we consider that all of the correct considerations in relation to this young infant were highlighted and taken into account and then balanced against the other immigration concerns. The cow's milk allergy was noted and assessed as not being a serious medical issue. The letter also refers to the statutory guidance. We can clearly discern from the letter that complete information was obtained and that the proper evaluative exercise was conducted. In our view it is significant that Mr McQuitty could not really point to any matter of substance that was left out in relation to the consideration of the best interests of the child. This case involves a very small child who is clearly dependent upon his mother and as such his interests are rooted in him remaining with her.

[68] We do wish to point out that in other cases there could be issues which have not been properly considered, particularly in the case of older children or children with particular needs, perhaps of an educational or medical nature. Those cases may require a more planned approach. However, having carefully looked at the circumstances of this child we can see no error in how the Section 55 exercise was conducted and as such we agree with the determination made by the learned trial judge on this issue.

Overall conclusion

[69] Accordingly, in light of the above, we consider that the learned trial judge was correct in his determination of this case in all respects. We affirm the decision of Maguire J and we dismiss the appeal.