

ECRE/ELENA CASE LAW NOTE ON ACCESS TO THE TERRITORY AND THE ASYLUM PROCEDURE



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INTRODUCTION¹

This case law note gathers domestic jurisprudence on the topics of access to the territory and access to asylum procedures for those seeking protection. It has been compiled with the legal and factual context in mind. The legal backcloth is based on European legislation and jurisprudence from both the Strasbourg and Luxembourg courts which delineate appropriate standards in the context of accessing asylum procedures. The factual backcloth is a proliferation in many Member States of border controls, construction of fences and transit zones, denial of entry at States' borders or territorial waters, immediate detention upon arrival, delays or even suspension of registering asylum applications, to name but a few. The coalescence of legal guarantees and factual realities has provided a structure for the note and the specific topics included, therefore, relate to some of the most pressing challenges which asylum seekers face when accessing the asylum procedure. Each section is introduced by the applicable legal safeguards followed by a collation of relevant domestic case law and a commentary. The aim of the note is to show how Courts are shaping the law relating to access and to highlight argumentation which may be useful for future litigation.

The scope of the note is restricted to access to fair and efficient asylum procedures and does not cover the guarantees associated with the determination or appeal of an asylum claim (although analogies have been made where applicable). Moreover, in order to give as a correct portrayal of domestic jurisprudence as possible the case note includes jurisprudence which may be deemed as being restrictive. Whilst every effort has been made to extrapolate relevant jurisprudence for this note it is, of course, subject to the resources available within the ECRE Secretariat and amongst ELENA National Coordinators. Due to limitations in accessing case law from certain jurisdictions, not all countries which EDAL/ELENA covers have been included. Finally the [FRAME Booklet on the implementation of the Charter to asylum procedural law](#) covers many of the overarching European standards which are applicable to the subject matter of this note. Instead of reciting information already contained in the booklet, reference will be made to the chapters of the publication where relevant.

ACCESS TO THE TERRITORY

Under EU law access to an asylum procedure is contingent on access to a Member State's territory, which includes access to its territorial waters or transit zones. However, whenever EU law governs a particular situation, the application of the [EU Charter](#) follows. The commission of acts as well as the omission of the EU to act must be in line with the Charter. The rights laid down in the Charter including the right to asylum (Article 18), the prohibition of *non-refoulement* (Articles 4 and 19(2)) and collective expulsions (19(1)) as well as the general principles of good administration, effectiveness and legal certainty will apply when EU law applies. It is uncontested that the Charter applies to the EU's external relations and hence extraterritorially (*Front Polisario v. Council*). As for the [ECHR](#), whilst it does not regulate access to an asylum procedure as such, signatory States are bound to apply its articles within their jurisdiction (Article 1 ECHR). The concept of jurisdiction under the ECHR is not restricted to the Contracting States territory. Where a State, through its agents, exercises effective control over a territory and/ or control and authority over an individual outside its own territory, jurisdiction is triggered. In addition the Court has accepted that acts carried out on board vessels and registered aircrafts flying a State's flag and activities of a State's diplomatic or consular agents abroad signifies that the State is extraterritorially exercising jurisdiction over individuals (*Banković and Others v Belgium and Others*, *Loizidou v. Turkey*; *Al-Skeini and Others v. the United Kingdom*; *Medvedyev and Others v. France*; *Hirsi Jamaa and Others v. Italy*). Therefore the rights under the Convention which have been assimilated to access, i.e. prohibition of *non-refoulement* and collective expulsions can apply extra-territorially. Similarly, the application of Articles 31(1) and 33(1) of the [1951 Refugee Convention](#), as well as Article 3 [UN CAT](#) and Article 7 [ICCPR](#) are not restricted to the Contracting State's territory.

Beyond the extra-territorial application of fundamental rights recent case law has shed light on the interpretation to be given to rights pertaining to access to the territory. A [Canadian Supreme Court decision from 2015](#) regarding the arrival by vessel of Tamils from Sri Lanka to Canada confirmed that Article 31(1) of the 1951 Convention "provides immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. The state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety." With regards to collective expulsions *Hirsi Jamaa and Others v Italy* and *Sharifi v Italy and Greece* confirmed that Article 4 Protocol 4 requires an analysis of each individual's situation and their protection needs. This necessarily depends on the provision of interpretation facilities and legal representation. The rights attached to the prohibition of collective expulsions apply even where Dublin is

1. ECRE/ELENA would like to thank the national ELENA coordinators for providing us with case law information and their feedback on this note.

at play and where Contracting States face pressure on their asylum systems due to migratory fluxes. Whilst the line of reasoning in *Hirsi* and *Sharifi* on individual examination of personal circumstances, individual interviews and an individualised decision was carried on in *Khlaifia v Italy* by the second section of the ECtHR, the Grand Chamber, on appeal, has provided a somewhat hermetic interpretation of collective expulsions under the Convention. Instead of an emphasis on national authorities' obligations to create an environment conducive to the applicant indicating his or her need to receive protection (i.e. individual interview, linguistic and information support) the Grand Chamber places the onus on the individual to notify the authorities of the reasons why they cannot be returned. According to the Grand Chamber Article 4 Protocol 4 does not guarantee an individual interview in all circumstances but instead requires that an individual has a genuine and effective possibility of submitting arguments against expulsion. Moreover, the Court seemingly restricts the scope of Article 4 Protocol 4 to only apply where the individual alleges a risk to their life or to inhuman or degrading treatment and further concludes, in a circular argument, that a person arguing expulsions of a collective kind do not benefit from a suspensive effect of an appeal against removal. Instead, they must raise an Article 2 or 3 argument against return for the removal decision to have suspensive effect.

The Grand Chamber ruling should be set against the factual circumstances of the case, which arguably limit the scope of the judgment. First of all the Court emphasised the fact that the individuals in *Khlaifia* had not applied for international protection whereas others in the group had. Moreover, according to the Court a form of individual interview and information taking into account personal circumstances was undertaken in the presence of cultural mediators. Second the Court makes no reference to EU law despite the obligations listed within the recast Asylum Procedures Directive (rAPD) concerning national authorities proactive obligations of identification, training, communication, provision of information, and where the individual is intercepted at sea, disembarkation duties (see page 32 of the Booklet). These arguments were brought forward in a third party intervention by the AIRE Centre and *ECRE in Khlaifia* as well as in *N.D. and N.T. v Spain* (judgment is currently pending) where the ICJ also intervened. In *N.D. and N.T.* the submission reiterates the rationale of *Hirsi Jamaa* and *Sharifi* (see further *Khlaifia* para 241) and refers to the application of the Charter to *Frontex coordinated operations* and border guards at the maritime border and those present in a third country where there is a *shared border crossing point agreement*. The submission further states that under the rAPD, authorities, whether those at the external borders, territorial waters, border crossing points or in detention, have the duty to proactively identify and provide information to persons on making an asylum application. Where there are indications that an individual may wish to apply for international protection, authorities have to register that they are applicants for international protection as soon as possible (Recital 27 rAPD). Since a wish is analogous to making an application for protection (Recital 27 rAPD and Article 2 rRCD) not only does the individual enjoy the right to remain in the territory and benefit from the protection of non-refoulement, but applications made to authorities which are not responsible for assessing an asylum application must ensure that registration takes place no later than six days after it is made (Article 6(1) rAPD). Non-competent authorities must facilitate the lodging of applications (Article 6(1) rAPD) through information and translation provision and referral. In order for this facilitation to take effect within the time limit non-competent authorities should record information or statements of the asylum seeker relating to the substance of their request for international protection (ECRE, *Information Note Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, p 10).

Case law from certain national jurisdictions has discussed the refusal of entry to the territory for persons in need of international protection.

France – Nice Administrative Tribunal, 31 March 2017, No.1701211

The case concerned two Eritrean applicants and their child who had attempted to apply for asylum in France but were removed from the French territory and sent back to Italy by French border police. Upon a second attempt to enter the French territory the applicants asked the prefecture of Nice for a confirmation of their asylum request, arguing that they could not reach the administrative authorities themselves due to a fear of being returned to Italy again. The authorities denied the applicants' request, arguing that Italy was the Member State responsible for processing the asylum claims, but without showing a proof of initiating a transfer in accordance with the Dublin Regulation. The Administrative Court ruled that refusing to register their asylum claims, while the applicants were in French territory and had been in contact with the authorities for that purpose, was a serious violation of their right to asylum. Moreover, due to the vulnerable situation of the applicants, who were living irregularly with few resources and while taking care of a child, the Court ordered the local authorities to register their application within three days from the decision.

Austria - Administrative Court of the Province of Styria, 9 September 2016, LVwG 20.3-912/2016

This case is just one amongst many others where the rejection of persons wishing to apply for asylum at the Austrian checkpoint was unlawful. Whilst the individual expressed his intention to seek asylum in Austria,

during the questioning he was denied the possibility to state reasons for his international protection claim in Austria. By reason of the prejudicial assessment of his claim through the interpreter or rather border control authorities, the claimant could not submit an application for asylum. The Court found that there is a duty to introduce interpreters to the fundamentals of their work whilst equally officials are to be introduced to their work with interpreters. An assessment of the submitted reasons for asylum cannot only depend on an assessment by an interpreter as was the case here, but must be decided through the responsible authority or court. Furthermore, Art.13 (2) of the Schengen Borders Code requires the precise indication of reasons for the refusal of entry. The claimant is entitled to a factual protection against deportation (right to remain pending a decision on his asylum application).

Spain - High Court of Justice of Andalucía. N° 3567/2015,13 February 2015 (Appeal Ref. 138/2014)

The Spanish administration is not entitled to refuse the applicant's transfer to the Spanish peninsula from Ceuta. The Spanish government is bound by the Geneva Convention and the Schengen Borders Code which provides an exception to the travel documents and visa requirements in Article 6(1) where humanitarian grounds, on grounds of national interest or because of international obligations dictate.

See also: High Court of Madrid, Decision STSJM 490/2015, 11 May 2015.

ACCESS TO AN ASYLUM PROCEDURE AT THE BORDER AND TRANSIT ZONES

At the border and transit zones Member States should furnish information on the possibility to make an asylum application, provide interpretation services and give effective access to organisations, who advise and counsel applicants (Article 8 rAPD). As said above, where non-competent determination authorities receive an application they must have the relevant information and training to inform applicants as to where and how applications for international protection may be lodged. National jurisprudence has interpreted these guarantees to mean that States should not only provide information on the possibility to make an asylum application and on the asylum procedure generally but also on the possibility to communicate with the UNHCR and provide applicants the opportunity to receive legal advice from a lawyer.

Germany – Administrative Court Munich, M 4 E9 16.36467, 3 January 2017

In light of the seminal jurisprudence from the Federal Constitutional Court, BvR 1516/93, 14 May 1996, an applicant for international protection subject to the airport procedure must have the opportunity to be able to get advice from a lawyer.

France - Council of State, N° 386558, 8 June 2016

Where an applicant presents himself at a transit zone (Roissy airport) and wishes to apply for asylum he must be given information on the asylum procedure in a language he understands or is reasonably supposed to understand. He must also be given information on the possibility to communicate with the UNHCR. Information on this possibility was not provided to the applicant and thus the decision to refuse his admission to the territory was annulled.

Italy - Cassazione civile, sez. VI, n. 5926, 25 March 2015

Whenever there are indications that third country nationals or stateless persons who are at the borders want to seek international protection, Italian competent authorities have the obligation to provide them with the necessary information to do so, also by granting interpretation services. If this is not the case, subsequent expulsion and detention measures are invalid.

Where border procedures to examine an asylum application are provided in national law most Member States allow the applicant entry into their territory once the prescribed period of time to issue a decision has expired.

Spain - Supreme Court, Administrative Chamber, STS 4756/2016 7th November 2016 (Appeal ref. 1656/2016)

The decision concerning the request for re-examination of a claim lodged in the border procedure must be given within two days, which is computed as including weekends. Where a decision is not notified to the applicant within two days, the individual must be given access to the ordinary procedure and entry and stay within the territory.

ACCESS TO AN ASYLUM PROCEDURE IN DETENTION (AT THE BORDER, TRANSIT ZONES AND IN THE TERRITORY)

As above, Member States are obliged to provide information on the possibility of making an asylum application (where and how to do so), they must provide interpretation services to facilitate access to the asylum procedure and allow access to the UNHCR (Recital 25 and 28, Articles 8, 12(b) and 29 and [ECRE, Information Note Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection \(recast\)](#), p 14). French jurisprudence on procedural guarantees in detention for those seeking asylum is extensive and touches upon linguistic and informative obligations as well as the transmission of the claim to the competent authorities. Recent Czech jurisprudence from the Constitutional Court also signals the importance of providing effective legal aid to persons in detention so that they may submit an international protection application and have a practical access to an effective remedy in order to appeal an expulsion decision.

Czech Republic – Constitutional Court, I. ÚS 630/16, 29 November 2016

» Legal aid

The real possibilities for persons to find legal counsel in detention, to receive counsel on legal matters and benefit from efficient legal aid, is significantly limited compared to persons who are not deprived of their liberty... to fulfil the constitutionally guaranteed right to legal aid, a purely formal access to legal aid does not suffice... In criminal procedures there is a rule that courts have to examine whether the accused person had, during detention, the possibility to access a lawyer and if their choice not to benefit from the right to have legal aid can be regarded as free and voluntary. The Constitutional Court is of the opinion that the above mentioned principles can be analogically applied to the situation of detained foreigners. Both groups are deprived of personal freedom, and the harm for a foreigner at risk of deportation is comparable or even higher than a risk for a person accused in a criminal procedure.... It can be summarised that persons deprived of personal freedom are in an unfamiliar environment, do not speak the language, do not have knowledge of the legal system of a particular state, and are at serious harm risk upon return, have a special need to have effective legal aid. Only with help of high quality legal aid can these persons fully understand the meaning and consequences of all legal procedures and all legal avenues that apply to them. Where a person is being threatened with removal, is in detention and runs the risk of being subject to an Article 2 or 3 Convention breach, it is the obligation of a State to provide the individual with effective access to legal aid. The presence of NGOs in detention centres does not suffice as, during an appeal, it is not evident whether the individual actually had access to legal aid explaining the correct legal procedure. The Constitutional Court adds that these conclusions are valid for the seven day time limit to submit the application for international protection. This is not an effective remedy against a real risk of breach to their Article 2 and 3 rights if during that time the individual has no effective access to legal aid.

» Provision of information on the asylum procedure

The information given to the applicant does not explain that the expiration of applying for asylum within seven days in detention means that they lose their right to apply for asylum in any EU Member State since they can be removed to their country of origin after this deadline. The information is misleading and insufficient, it therefore does not fulfil the legal criteria.

Germany – Federal High Court of Justice, V ZB 29/15, 12 October 2016

The principle of conducting proceedings expeditiously and without delays applies to the state of the individual in the transit area of the airport. This requires that the person is immediately questioned after entry. The period of a week between the lodging of the asylum applicant and the interview is too long.

France – Tribunal Grande Instance (TGI) Rouen, 15/02978, 24 September 2016

The recast APD explicitly provides that UNHCR are to have access to detainees yet no such information on the possibility to contact the UNHCR was given to the applicant. The lack of information affects the rights of the applicant to appeal against the detention measure and thus the prolongation of the detention order is unlawful.

*Similar finding in Court of Appeal Rouen, 15/04099, 21 August 2015 and Court of Appeal Versailles, 15/06429, 9 September 2015 who held that **regardless of the fact that the applicant had not applied for asylum** he had been given no information on the possibility to contact the UNHCR, leading to an infringement of his rights in detention.*

TGI Lille 16/00533, 17 June 2016

No information brochure on the asylum procedure was given to the applicant after he had applied for asylum and thus the order to prolong the detention was annulled.

TGI Lille 16/00445, 13 May 2016

The applicant applied for asylum in detention yet there was a two day delay in transmitting the request to the competent authority, French Office for the Protection of Refugees and Stateless Persons (OFPRA). The measure to prolong detention was therefore found to be unlawful.

Similar to TGI Lille 15/00351 14 April 2015, there was no proof that the request had been transmitted to OFPRA.

TGI Rouen, 16/241, 15 April 2016

Prolongation of detention was found unlawful since information was neither given on the provision of an interpreter to make an asylum application nor was information provided on the time limit of 5 days to lodge the asylum application.

Administrative Tribunal Marseille, 1600528, 25 January 2016

The applicant was not informed of his rights in line with Article 12 APD after having made an asylum application. Where such information obligations are not adhered to the individual is deprived of his guarantees. As a consequence the order to leave the country is rendered unlawful as well as the order of detention (imposed in order to enforce the removal decision).

TGI Lyon, 15/01872, 24 December 2015

The delay in providing interpretation assistance in order to help fill out the form for asylum meant that the applicant's maintenance in detention was unlawful.

TGI Bologne sur Mer, 15/00817, 5 December 2015

Whilst the applicant was informed that he could make an asylum application within 5 days he was not informed of the possibility to receive linguistic or legal assistance. By virtue of this omission the procedure was held to be irregular and the decision to prolong the detention unlawful.

Commentary

There are several points worth signalling from the above case law. First, the jurisprudence hinges upon the effectiveness of Articles 6, 8, 12 and 29 of the recast APD and the requirements of effective access to the procedure (see p. 37 [FRAME booklet](#) and ECRE, [Information Note Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection \(recast\)](#), p 14). In order to ensure both the individual must actually be told about the possibility to make an application, to communicate with the UNHCR (and by analogy legal advisers and organisations who provide advice) and to receive understandable information of a high quality **before** the application is made. The jurisprudence rather follows Recital 28 of the APD instead of Article 8 *stricto sensu* (which still requires indications of a wish to make an asylum application) and is in line with the judgments in *Hirsi* and *Sharifi* requiring that the onus is on the authorities to provide information to a potential applicant so that they are aware of and understand that asylum and related rights exist. Second, the information given must be actually provided to the individual and, according to Czech case law, it must be of a certain legal quality; sufficiently detailed and legally correct.

Interestingly, the French jurisprudence shows that the legality of detention and expulsion measures is contingent upon the applicant being informed of the possibility to make an asylum application, where and how to do so, to be informed of the asylum procedure, the possibility of translation/interpretation services, to receive information on legal assistance and to receive information on communicating with and have actual access to UNHCR/ other organisations. Where these procedural guarantees are not adhered to detention will be viewed, from a diligence perspective, as unlawful and the removal order, which the detention is based on, null. Third, competent interpretation services and legal aid must actually be provided to individuals who are subject to border procedures/detention. The Czech case law is highly pertinent since it hooks the right to legal aid before an application has been made to Article 13 (and by analogy Article 47 of the Charter) read in conjunction with Articles 2 and 3 ECHR. Fourth, transmission of a request for asylum to the competent authorities must be done as soon as possible in order for the registration of the claim to happen speedily (a delay of two days, despite Article 6(1) rAPD allowing for six, is viewed as unreasonable by the French courts).

With regards specifically to children it is worth pointing out that a decision from the **Lille Administrative Tribunal, No. 1508747, 2 November 2015** and a follow up to the [ZAT and Others case in the UK, R \(on the application of SA & AA\) v Secretary of State for the Home Department, IJR \[2016\] UKUT 507 \(IAC\), 12 October 2016](#), refer to the identification of unaccompanied children in order to provide access to registration and book appointments at the Prefecture. Both serve to highlight the proactive obligations on authorities to identify unaccompanied children and to facilitate their access to the procedure as soon as possible. Indeed, identification of any type of vulnerability is a legal pre-condition to ensure effective access to the procedure. For children identification is crucial in order to secure their best interests as well as their family life rights under Article 8 ECHR (see third party interventions by the AIRE Centre, ECRE, the ICJ in *Sh.D v Greece* and *H.A. and Others v Greece*, the latter with the DCR, and a recent communicated case *Farid Al Yamani v Greece* before the ECtHR). The timing of procedural access has been subject to much litigation in the UK, and in line with the *rationae* in *MA and Others*, has, in certain circumstances, required judicial intervention to “force the hand” of State authorities in taking charge of children under the [Dublin Regulation](#). Most recently this has been felt by the UK Secretary of State for the Home Department in *RSM & Anor, R (on the application of) v Secretary of State for the Home Department [2017] UKUT 00124 (IAC)*, 12 April 2017 (discussed below) and ***The Queen on the application of AO and AM v Secretary of State for the Home Department, JR/2535/2017 & JR/2486/2017, 28 March 2017*** (unpublished). In the latter the State applied for a request to stay proceedings before the Upper Tribunal regarding two children (one had just turned 18) who were originally identified under the “Managing Migratory Flows in Calais: joint declaration on UK/French co-operation” policy to be eligible to reunify with their family members under Dublin. Both were subsequently rejected with no reasoning given. Whilst the case concerned solely the request to stay proceedings pending ongoing litigation by Citizens UK concerning child refugees in Calais, the Upper Tribunal emphasised the judicial expediency and swift and effective remedy that the applicants were entitled to, especially in light of family reunification under Articles 8 and 17 of the DR III (as ruled by the Upper Tribunal in *RSM*) and the vulnerability of the specific applicants. The Tribunal accordingly denied the stay of proceedings.

ACCESS TO THE PROCEDURE OUTSIDE OF THE EU TERRITORY

As argued in Chapter 3 of the [FRAME booklet](#) the use of [Article 25 of the Visa Code](#) to issue a visa to persons seeking international protection may be obligatory where a refusal would negate their ability to access an EU asylum determination procedure. The CJEU in [C-638/16 PPU \(X and X\)](#) has however recently held that a limited territorial visa lodged by a Syrian family in Lebanon fell outside the scope of the Code (even if formally submitted on the basis of Article 25(1)(a)) and therefore outside the field of EU law and the Charter. As highlighted in a [blog piece](#), the CJEU held that the issuance of “humanitarian visas” is a question of national law, and therefore Member States must still adhere to national and international law obligations when issuing “humanitarian visas”. The guarantees provided by Article 3 ECHR and articulated by the AG in paras 138 – 140 of his Opinion still, therefore, hold strong. Interestingly Article 3 ECHR along with the right to asylum in national constitutions has often been the lynch pin on which the granting of humanitarian visas to those in need of protection has been based upon in national case law as shown below.

France - Administrative Tribunal of Nantes, decision of 16 September 2014, No 1407765

Issued in an emergency procedure, the Tribunal held the Consular authority’s refusal to grant a short term visa on the basis that the asylum claim was unfounded to be in breach of the **constitutional right of asylum** and the concomitant right to request an asylum decision. The Tribunal required the Ministry of Interior to subsequently grant the visa.

ACCESS TO REGISTRATION AND LODGING AN APPLICATION

Article 6 of the recast Asylum Procedures Directive is split into a three staged procedure comprising of making, registering and lodging an asylum application. Each stage is connected with different procedures, rights for the applicant and duties upon the State. Making an application (i.e. an intention made known to the authorities that the individual wishes to apply for asylum) means that an applicant is entitled to material reception conditions as per Article 17(1) of [the recast Reception Conditions Directive \(ECRE, Information Note Directive 2013/32/ EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection \(recast\), p 10\)](#). Registration must be done within three to ten days of making an application, depending on the circumstances and lodging is to be done as soon as possible. Lodging triggers the application of Dublin, the time-limits for assessing a claim, education and employment. There is much confusion over the three concepts and what they actually entail, especially since some States do not make a demarcation between making and registration, for example. Nonetheless delays are rife at each stage applicable to the national context, leading to litigation being brought before the Courts. Recent preliminary references to the CJEU by the Administrative Court of Minden in Germany ([C-670/16](#) and Case [C-36/17](#)) under the urgent procedure are to clarify what form registration and lodging should take, at which point the Dublin Regulation is triggered and the consequences of a lengthy delay between making, registering and lodging on the responsibility of a Member State for the application. When litigating against delays or prevention of access to registration and/or lodging it is important to further bear in mind the legal matrix, namely the right to asylum, prohibition of *non-refoulement*, principle of effectiveness and the right to good administration under EU law (see page 41-44 [FRAME booklet](#)).

ACCESS TO REGISTRATION OF AN ASYLUM APPLICATION

United Kingdom - *RSM & Anor, R (on the application of) v Secretary of State for the Home Department (unaccompanied minors – Art 17 Dublin Regulation – remedies)* [2017] UKUT 124 (IAC), 12 April 2017

The case follows on from the ZAT case concerning unaccompanied children in France. RSM is an unaccompanied Eritrean minor in Italy with an aunt, who has refugee status, in the UK. He suffered from post-traumatic stress disorder and encountered substantial obstacles and delays in the guardianship system in Italy. The appointment of a guardian in Italy is required for a child to lodge their application. The applicant claimed that the UK had an obligation under Article 8 ECHR to admit him and the State should make use of Article 17 of the Dublin Regulation for that purpose. The Tribunal ruled that Article 17 forms an integral part of the Dublin Regulation and should be understood and applied in a manner which furthers the aims and objectives of the Regulation in general. In other words, Article 17 does not undermine, but rather enhances the objectives of the Dublin Regulation. The Secretary of State was, moreover, wrong to assume that Article 17 only applies where the family reunification criteria in Article 8 is not satisfied. Article 17 is a justiciable right and should be particularly relied upon in circumstances where one of the overarching values of the Dublin Regulation, namely expedition, is not being fulfilled in the procedures of the host Member State, such as that of

the present case. The UK Upper Tribunal held that there had been a failure of the Secretary of State to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation and ordered the Secretary of State to admit the applicant to the UK. *(Note: this case has been appealed by the State to the Court of Appeal since it touches upon the scope and potential operation of Article 17).*

France - Administrative Tribunal Paris, 1602395/3-2, 27 May 2016

The case relates to the organisation of registration appointments for asylum seekers in the Prefecture of Paris. The Tribunal held that by fixing the number of appointments that NGO pre-registration platforms are allowed to provide per day to fifty, the Prefecture had breached the constitutional right to asylum, the corollary right to seek asylum and the right to material conditions for asylum seekers. Given the four months delay in Paris to register a claim and the ensuing breach of fundamental rights the Tribunal annuls the decision limiting the number of appointments and obliges the Police Prefect to re-examine the organisation of asylum registration to abide by the 3-10 days as specified in the rAPD and transposing national legislation.

France - Administrative Tribunal of Paris, decision of 22 February 2016, No 1602545/9

In light of the delay between the applicant's arrival at the NGO platform "France terre d'asile" and the appointment notice for registration before the Prefect, a delay which is far superior to the 10 days prescribed by Article 741-1 of the Code of Entry and Stay of Foreigners and Asylum Law and a delay which deprives the applicant of guarantees, notably material, which the applicant is entitled to by virtue of his asylum seeker status, the Tribunal held that the Police Prefect has committed a serious and manifestly illegal violation of the fundamental right to asylum. The Tribunal held that the Police Prefect must register the asylum application within 10 days of the notification of the decision. *Note: this decision is just one of over a 130 decisions given by the Administrative Tribunal of Paris within the emergency interim relief procedure. All of which provide the same reasoning as this decision and confirm that the delays for registration experienced by asylum seekers in the Paris region constitute a violation of the right to asylum.*

Notwithstanding these strong judgments from the Administrative Tribunal of Paris, a somewhat contradictory judgment from the **Council of State (No. 404484, 7 November 2016)** has recently stated that the temporary suspension of registering asylum applications in the Prefecture of Guyana from August up until December 2016 does not breach the right to asylum. The Council legitimises the suspension since the Prefecture has been faced with a large increase in asylum applications and has needed to restructure the registration procedure. The Prefecture has since re-started registration, however despite the suspension [organisations have reported](#) ongoing lengthy delays and a reduction of the number of persons registered per day.

ACCESS TO LODGING OF AN APPLICATION AND REQUIREMENTS OF LODGING

The German case law listed in this section should be set against the context of a proportionally large number of arrivals and new legislation [which came into force in October 2015](#) introducing a provisional form of registration under 63a of the Asylum Act known as a "registration certification for asylum seekers". The certificate entitles the applicants to social and material conditions.

Germany - Administrative Court Minden, 22 December 2016, 10 K 5476/16.A

The case concerns an Eritrean who after applying for asylum in Germany on 14 September 2015 could only file his asylum application at the Federal Office (BAMF) on 22 July 2016. The BAMF later lodged a Dublin take charge request to Italy on grounds that the applicant had first entered the EU territory there. The questions referred to the CJEU are listed [here](#) and principally concern the definition of lodging under Article 20(2) of the Dublin Regulation, whether a registration certificate fulfils said definition and whether delays between the certificate and the take charge request lead to a transfer of responsibility analogous to that of Article 21(1). To these questions the Minden Court answers that the application has been made upon the issuance of a registration certificate and that delays in issuing a certificate and a subsequent take charge request can oblige the requesting Member State to become responsible for the claim.

Note: Similar conclusions have been reached by the Cologne Administrative Court, 20 L 1609/16.A, 16 August 2016 and the Trier Administrative Court, 1 L 2969/16.TR, 30 August 2016. However other Administrative Courts in Germany have come to the opposite conclusion and ruled that the deadlines, as specified in Article 21 Dublin III, only apply with the formal application at the branch of BAMF and not with the registration certificate (see the Dusseldorf and Gießen judgments below). The Federal Constitutional Court (2 BvR 2013/16, 17 January 2017) has recently found that the aim of Dublin is the clarification of the responsible Member State as

quickly as possible. It is therefore reasonable to argue that the period begins with the existence of an asylum application as defined in Article 13 of the Asylum Act "(1) An asylum application shall be deemed to have been made if it is clear from the foreigner's written, oral or otherwise expressed desire that he is seeking protection in the federal territory from political persecution or that he wishes protection from deportation or other removal to a country where he would be subject to the persecution defined in Section 3 (1) or serious harm as defined in Section 4 (1)." The question is highly pertinent in the German context given the large delays between receiving the registration certificate and the actual filing of the application with the BAMF.

Germany – Administrative Court Düsseldorf, 6 L 2019/16.A, 26 July 2016

The transmission of the registration certificate for asylum seekers by the central alien's authority to the Federal Office (BAMF) does not fall under the definition of lodging under Article 6 (4) of Directive 2013/32/EU. Section 23 (1) of the Asylum Act prescribes that the applicant must come to the Federal Office to "file"(lodge) their application. Whilst there are considerable delays in filing before the Office the applicant is still entitled to material conditions. Moreover, no justiciable rights can be gleaned from Article 6(4) of the rAPD since the wording is not intended to be protective of the individual. It differs from the provisions of Articles 7 (1), 28(2) and 46(1) which refers to rights and guarantees for the individual.

Administrative Court Gießen, 3 L 208/16.GI.A, 29 February 2016

The applicants in this case advanced that by virtue of Articles 6 and 14 of the rAPD the applicants have a right to have their applications lodged within a reasonable time. In order to protect the individuals' interest to build an independent life the applicants requested the administration to lodge the claim within 10 days. This was refused by the Court given that there are no individual rights arising from Article 6(4) and in any case the applicants are not left unprotected since they have made an application entitling them to reception conditions.

Note similar reasoning in Administrative Court Hannover, Az. 6 B 6186/15, 30 December 2015; Administrative Court Schleswig-Holstein, Az. 12 B 88/15, 25 November 2015.

Belgium - Employment Court Brussels, 2015/3098, 7 December 2015

While domestic law provided for material reception conditions to be granted to asylum seekers from the lodging of their claim, no definition as to the meaning of lodging was given apart from that an application must be submitted to the Immigration Office. However, in view of the provisions contained in the recast Asylum Procedures Directive (Article 6(4)) and the recast Reception Conditions Directive (Article 17(1)), there was a *prima facie* case that the applicant was considered to have applied for asylum on 30 November, **by submitting the asylum claim form to the national authorities**. Since such an act was considered to constitute lodging the applicant should therefore benefit from material reception conditions, crucial since the applicant was a minor and would have had no access to reception pending submission of the application to the Immigration Office.

Commentary

As the cases above show there are many internal and pan-European inconsistencies in how a claim for asylum should be formalised. According to whether the national context deems registration or lodging sufficient to formalise the claim, courts have been willing to intervene and accede to rights violations where there are delays depending on particularly compelling facts. For example judicial intervention has come about where there are a considerable amount of individuals who are left without material assistance and/or where delays affect unaccompanied children or vulnerable persons. Courts have either requested organisational restructure or have themselves intervened to make sure that the applicant is within the official asylum procedure. This is evident from the UK R (on the application of ZAT and Others) v Secretary of State for the Home Department, 22 January 2016 (and the recent AO and AM case) where the Upper Tribunal by-passed a formal Dublin take-charge request in order to unite the children with their siblings in the UK. It is to be noted that on appeal in ZAT the Court of Appeal accepted, in principle, such a circumvention. There are many interesting elements to these decisions but for our purposes ZAT is very similar to the Belgian Employment Court decision of December 2015 in that in both cases the registration stage was skipped. Indeed, the sending of a letter can be sufficient, in these circumstances to fall under the definition of “lodging” a request.

Moreover, recent German case law appears to be split on the question of whether individuals have an enforceable right to have their asylum claim lodged. It is hoped that the CJEU can shed some light on the differences between the three stages of formalising an asylum application. Since many countries partake in a pre-registration process, thereby delaying considerably the application of Dublin, it will be interesting to see whether the Court sees such ad hoc administrative arrangements as lodging for the purposes of Dublin and whether there are justiciable rights for applicants as a result of the delays. In this context it is worth making reference to [Ghezelbash](#) and [Karim](#) but also analogous German case law which have repeatedly accepted a breach of the right of asylum due to severe delays in first instance determinations (Administrative Court München, M 17 K 16.31334, 28 June 2016; Administrative Court Ansbach, AN 3 K 15.30560, 26 January 2016; Administrative Court Dresden, A 2 K 3657/14, 13 February 2015). It is to be noted that in these cases the German courts are very clear in stating that prolonged administrative overburdening is not an excuse for not complying with deadlines listed in Article 31 of the rAPD. Additionally, when it comes to children the UK courts have made it clear that from the moment of lodging of an application any formalities associated with a Dublin transfer request and the actual transfer itself must take place expeditiously by virtue of the stand-alone right in Article 17 of the DRIII.



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