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Allocating responsibility for an asylum application through Convention rights: The potential impact of ZAT & Others

Date:
Thursday, March 3, 2016
This journal entry should be read in conjunction with the EDAL case summary available here [1], where a summary of the facts is also available.

Introduction:

The presence of migrant and refugee camps in northern France, on the edge of the Schengen zone and just 21 miles away from the UK has long been symbolic of the practical failings of the CEAS and in particular the Dublin III Regulation [2] (DRIII). The lack of account taken for the preference of the asylum seeker in the current responsibility allocation mechanism along with the absence of safe and legal channels to reach the UK has led to numerous international protection seekers living in purgatory in deplorable conditions stuck in a ?migratory dead-end? while attempting to enter the UK by dangerous irregular means. While its professed aim is to make a single EU Member State (MS) responsible, the operation of DRIII for those in Calais means that none are, with both the UK and France shirking responsibility. The criteria relating to family unity and the best interests of the child are rarely applied in practice, effectively amounting to a dead letter.

However, a landmark recent ruling by the UK Upper Tribunal (UT) in *ZAT and Others* has highlighted the role of fundamental rights and family reunification in providing a solution, as well as challenging the current operation of Dublin mechanisms.

Commentary

Family reunification: a channel for safe and legal entry across the Channel?

This was an atypical Dublin case given that most challenges to the allocation of responsibility are based on the negative obligations of States to refrain from removing the applicant from their territory to a country where there is a real risk of Article 3 ECHR [3] harm (now enshrined in Art 3(2) DRIII). However what was at issue in this test case were the positive obligations generated by Article 8 ECHR, effective compliance with which required the UK to allow the applicants to enter its territory.

While the applicants had not applied for asylum in France and therefore there had been no ?take charge? request it is apparent that at the forefront of the UT?s considerations was the impact of the extremely lengthy procedure under DRIII in France upon the **primacy of family unity** in the hierarchy of criteria in DRIII, as well as the controlling factor of the **best interests of the child**

(recital 13, recital 14, article 6, article 9, 10, 11). It acknowledged that the Dublin regime coexists with the ECHR but where they ?tugged in different directions? some compromise had to be found. The proportionality exercise considered the applicants? family life rights against the legitimate interests of the State in effective immigration control which required a strict application of DRIII mechanisms.

It is well-established in ECtHR jurisprudence that in order to effectively respect family rights under Article 8, States may have a positive obligation to allow the entry of non-nationals. The applicants relied on *Tuqabo Tekle v. the Netherlands* [4] and *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* [5]. These cases too have a compelling factual background with the bar set high for a finding of breach. The ECtHR in *Mayeka* in particular emphasises the ?extreme vulnerability? of unaccompanied minors as a decisive factor which ?takes precedence over considerations relating to the status of illegal immigrant?. Taking its cue from this case law and the proportionality assessment, the UT considered that the individual personal circumstances of the applicants must be given more weight as compared to the general and abstract notion encompassed by the State interest (R (SB) v Governors of Denbigh High School). Unlike in the abovementioned ECtHR cases, here the applicants sought to be reunited with siblings, rather than with their parents, a family relationship given lesser status in the EU legal framework which holds fast to the concept of ?nuclear family?. However in the context of asylum seekers, ECtHR jurisprudence emphasises the particular double vulnerability of children, who have specific needs related to their age and lack of independence as well as being part of the ?particularly underprivileged? population group of asylum seekers (see *inter alia* Tarakhel v. Switzerland [6] paras. 118-119). Furthermore, the DRIII provisions on family unity for unaccompanied minors are equally binding whether in relation to family members, relatives or siblings, thus incorporating an extensive definition of family member for minors (Article 8(1) and (2)). Thus it is apparent that while the applicants did not have formal asylum seeker status, the UT looked at their *de facto* circumstances in applying more protective standards.

This is not completely novel, with parallels to *K v. Bundesasylamt* [7] (para 47-54) where the CJEU focused on effective access to procedures and the aim of rapidly processing asylum applications to give effect to binding responsibility criterion in the absence of formal take charge procedures. *M.A. and others* [8] also emphasised the importance of unaccompanied minors having prompt access to procedures for determining refugee status (para. 61). In line with these decisions and the factual backdrop of administrative difficulties in making a claim for asylum in France, the UT takes a purposive approach looking at the underlying intention behind the ?humanitarian? provisions of DRIII which exist to protect fundamental rights and operate to make a certain MS automatically responsible in the absence of compliance with procedural provisions of the Regulation.

By ruling that the ?strict adherence? to Dublin **in this case** was disproportionate and, thus, infringed the applicants ECHR rights the judgment is a powerful vindication for the strength of Article 8, notwithstanding that it is a qualified right, and family unity obligations, over and above the formal mechanisms of transfer set out in DRIII.

The interface between the ECHR and the Dublin Regulation

As indicated above the Tribunal?s acknowledgment that the procedural operation of Dublin in France disproportionately interferes with Article 8 ECHR is significant not least since it confirms that the functioning of Dublin contravenes fundamental rights other than Article 3 ECHR. In this setting and crucially, therefore, is the admission that the mechanism for allocating responsibility under Dublin can breach fundamental rights at either the pre-application or early application stage. Indeed, the Tribunal accedes to the argument that Dublin?s operation, including its cumbersome

formalities, are so detrimental to the family life rights of the applicants that its application needs to be side-stepped and Article 8 used instead as a means to effectively implement the legal right to family unity. This is of interest for two particular reasons. Firstly, it reifies an increasing amount of jurisprudence on the violation of applicants? fundamental human rights as a consequence of the operation of Dublin (on a European level see ECtHR *M.S.S. v Belgium and Greece [9]; Tarakhel v. Switzerland [6]; CJEU N.S. v United Kingdom and M.E. v Ireland [10]* and on a national one *EM(Eritrea) [11]*). Additionally, the pre-emption of Dublin and the justiciability of the case on Article 8 grounds highlights the role that EU and international human rights safeguards play in the administration of Dublin and, arguably, provides cause to advance the human rights compliant procedural context in which Dublin III should operate in (points which are to be discussed in upcoming CJEU references, see D. Bouteillet-Paquet?s analysis [12] of *C-155/15 Karim and C-63/15 - Ghezelbash [13]*).

Secondly, from a Convention angle it provides scope to the content of Article 8, which is predominately litigated in the context of preventing removal within the domestic jurisdiction. Where it is used as a channel for entry into a particular State it is usually done so in the context of immigration law with the family member not necessarily requiring protection in their own right but seeking re-unification on the basis of their relationship with the individual who has status. The Tribunal has, therefore, used Article 8 as a channel through which asylum can be sought and notwithstanding the Tribunal?s clear positioning on the specific factual matrix of the case such a determination could have substantial reverberations across the EU. Indeed, in light of the consistently documented shortcomings in access to asylum procedures, dire or non-existent conditions of reception and redundant identification mechanisms in countries such as Greece [14] (see ECRE comments [15] on the European Commission?s Recommendation on the urgent measures to be taken in view of the resumption of Dublin transfers to Greece), Italy [16] and Austria [17], the evidential framework of this case is clearly mirrored in other Member States and the Tribunal?s finding could pave the way for the use of Article 8 as a means of entry for asylum seekers elsewhere.

The broader impact of the judgment is not only felt with regards to the Tribunal?s hailing back to Convention rights (also undertaken in *EM(Eritrea) [11]*), but its manoeuvre of giving a hat tip to DRIII by requiring the applicants to ?make? an asylum claim provides insight as to the requirements of making an asylum application referred to in Article 2(h) of the Recast Qualification Directive [18] 2011/95 EU. The obligation to send a letter to the French authorities implies that this is sufficient to constitute the making of an application for international protection and as a consequence the associated rights of reception under the recast Reception Conditions Directive. Indeed, a similar approach has also been argued by a Belgian Labour Court [19] that submission of an asylum claim form by fax to the Immigration Office constituted an application for asylum and, therefore, reception rights under the recast Directive were triggered. In light of the substantial delays in applying for asylum, as demonstrated below in the case of France, such an interpretation could have important consequences elsewhere.

A spotlight on the asylum system in France

In spite of the Tribunal?s assertion that the case was highly fact specific; the evidential setting in which the litigation took place merits particular attention given credible reports that conditions in Calais are symptomatic of a greater and ongoing malaise in access to asylum procedures and concomitant reception rights in France, as alluded to in para 24 and 32 of the judgment. A noticeable tension between domestic practice and France?s EU and international obligations towards asylum seekers is, in turn, apparent.

The most noticeable of these tensions has long been the requirement to obtain a temporary

residence permit from a Prefecture before an asylum application could be lodged before the French Office for the Protection of Refugees and Stateless Persons (OFPRA). The delays, resultant abeyance of rights and legal limbo that many faced has supposedly been mitigated against by recently adopted domestic legislation [20] which requires an asylum seeker to attend a pre-reception office (usually specialised NGOs) where application forms for registering a claim and an appointment at the Prefecture will be arranged. In compliance with the Recast Asylum Procedures Directive [21] (APD) this is scheduled within three days or ten in cases of an increase in applications. During the appointment the claim will be registered, accommodation and certification of the asylum claim usually given and the process of sending the asylum application to OFPRA for substantive examination (in cases other than Dublin ones) will begin.

Whilst the time limits before the Prefecture appear to be in alignment with EU legislative obligations, reduction of pre-registration waiting times is in fact illusory with delays having been shifted from the prefecture to the pre-reception offices stage. As reported in Ile-de-France [22], waiting times of four months reveal the dissonance between legal standards and reality, leaving a chasm of irregularity in its wake. The delays are evidently in contravention of Article 18 of the Charter of Fundamental Rights [23] and Article 6(2) of the Recast APD requiring Member States to provide an effective opportunity to lodge a claim as soon as possible. Indeed, during this time there is no provision of legal information or assistance, accommodation, material reception and healthcare and the threat of detention and a deportation order is a lingering possibility (See AIDA Country Report France: Fourth Update [24], 75 onwards). Risks of homelessness and destitution have been consistently reported upon [25] and conditions in Calais and Grand Synthe are arguably demonstrative [26] of the cumbersome procedural access to protection and shortage of reception in France.

Such structural failings are felt at their keenest towards unaccompanied children, who face persisting lack of adequate child protection, most notably due to accommodation shortfalls, deprivation of legal information, legal guardianship or even refusal of care by local authorities [25]. The resultant living conditions for both children and adults are, therefore, tantamount to a violation of Article 3 of the Convention, the UN Convention on the Rights of the Child (see para 75-76 Committee on the Rights of the Child Concluding observations on the fifth periodic report of France [27]), Article 1 and 4 of the Charter and Article 13 and 31 of the European Social Charter [28] as confirmed in *FIDH v. France [29]* and *Conference of European Churches (CEC) v. The Netherlands [30]*, both of which find that access to sufficient health care is a pre-requisite to human dignity and that the provision of shelter must be ensured regardless of the individual?s immigration status.

Even where the application has been registered at the Prefecture, severely overstretched accommodation [31] (capacity in regular reception centres (CADA) is a third of the number of registered asylum applications, AIDA Country Report France, 72) has resulted in an ongoing placement of persons in emergency accommodation or, instead, the provision of financial assistance. This leads to an uneven distribution of legal information and assistance in the preparation of an asylum application and interview before OFPRA and does little to alleviate conditions of destitution, in breach of Article 17 of the Recast Reception Conditions Directive [32].

The factual overlay provides not only strong cause for arguing that France is in breach of its European and international obligations towards those seeking asylum but it also indicates that the particularities of the case could easily re-emerge in other instances [33].

Conclusion

The judgment is a firm affirmation that the Dublin system of allocating responsibility is dysfunctional and attempts at making it more human rights compliant in its Recast have proven to be futile. The judgment is testament to the failings in the practical application of the Dublin criteria,

especially relating to family unity, and it confirms that Dublin?s operation either in the early stages of a claim, or even before an application for asylum has been made, gives rise to fundamental rights breaches. Reinforcing the importance of Convention rights, namely family unity, and their use as a means to rectify the detrimental impact of Dublin on those seeking asylum, or intending to do so, the judgment implicitly recognises that Dublin has caused much of the contextual settings that are evident in Calais and elsewhere.

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(This journal entry is an expression of the authors own views, and not necessarily those of EDAL or ECRE)

Keywords:
Dublin Transfer
Inhuman or degrading treatment or punishment
Best interest of the child
Family reunification
Family member
Family unity (right to)

Links:
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[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R0604
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