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# The formulation of the right to family life beyond ZAT & Others in recent UK jurisprudence

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*Introduction*

In *ZAT and Others* [1] the Upper Tribunal affirmed the positive legal duty under Article 8 of the Convention on Human Rights [2]on the State to admit four unaccompanied children to the territory in order to achieve family reunification with their siblings who had refugee status in the UK. The case firstly showed that family reunification is an essential component to the right to family life under Article 8 and its mirror provision Article 7 of the Charter of Fundamental Rights [3], secondly that the dysfunctional operation of the Dublin Regulation [4] can disproportionately interfere with Article 8 and, thirdly that the Article can be used, in certain circumstances, as a right of entry to the State. Following ZAT, a series of UK case law has shed further light on family unity duties under Article 8 both within the context of Dublin and the family reunification framework.

*Article 8 and the operationalisation of family unity under Dublin*

Two recent cases have served to reiterate the free-standing nature of Article 8 as a right to ensure family reunification and as a by-product have led to the reinforcement of existing, yet often dormant, positive obligations regarding family unity in the Dublin Regulation. The first of such cases is *MK, IK and HK* [5].

Whilst the factual setting of *MK* was similar to *ZAT* and others in that it concerned two children who were siblings residing in the Calais jungle, the case differed from the former in that the applicants IK and HK were already within the Dublin procedure which resulted in a take charge request from the French authorities to the British on grounds that the mother of the children was legally resident in the UK. As a result of the Home Office?s disbelief that the applicants? relationship was genuine, yet undertaking no action to facilitate or verify this through evidence such as DNA, the case fell squarely upon the procedural aspect of Article 8 Convention/ 7 Charter. As a consequence the Tribunal firmly established that beyond the substance of Article 8 there is a concomitant dimension grounded in the Article?s procedure to properly enquire, be informed and have regard to all relevant material considerations when assessing the welfare of any child. This duty originates from the best interests of the child (see below) which is further bolstered by public law duties. Therefore in the context of family reunification, the Tribunal crystallises the investigative and informative obligations which Article 8 subsumes whilst also reiterating the pro-activity and expeditious nature of such duties. The argumentation is reminiscent of ECtHR jurisprudence, namely *Senigo* [6] and *Tanda-Muzinga* [7], whereby the Court held that the efficiency and speed of examining an application for family reunification is part and parcel of the respect of family life.

Crucially, the Tribunal states that these pro-active duties are clearly codified within the Dublin Regulation which takes the form of positive obligations on States to identify family members of unaccompanied children and the requirement to undertake necessary checks when receiving a take charge request. Such checks can, *inter alia*, be sought through probative evidence such as DNA tests, the financial burden of which is, read implicitly from the judgment, upon the Home Office. These duties are clearly built in to the requirement of establishing responsibility for an asylum application to a certain Member State as well as the numerous recitals, hierarchy criteria and discretionary clauses within the Regulation which also serve to emphasise the importance of family unity (Recital 14 ? 18, 35 and Articles 6 ? 11, 16, 17, 20, 31 and 34). Therefore, the Home Office?s passiveness and flawed stance towards identification and evidence verification of family ties not only leads to a violation of Article 8 framed in best interests and public law terms but also to a violation of the Dublin Regulation itself. Indeed, the result of the decision is to make clear that Member States have positive duties which must be expeditiously fulfilled in relation to the identification and verification of family links which are, in and of themselves, elements to the reinforced family rights provisions within the Regulation. Where the oblgiations are not undertaken it leads to a violation of the Regulation and is subject to appeal. Moreover, the association of Article 8 Convention/ 7 Charter procedural guarantees with Dublin procedures has the effect of clearly anchoring the responsibility mechanism within the realm of adherence to fundamental rights and their procedural components, fortifying the right to family unity under both the Convention, the Charter and the Dublin Regulation, indeed, a trajectory which has been recently followed by the CJEU in its judgments; *Ghezelbash* [8] and *Karim* [9].

On the opposite side of the Dublin coin and in the more typical Dublin litigation context, namely the prevention of transfers due to conditions in the proposed receiving State, *CK(Afghanistan)* [10] assessed the use of Article 8 as a stand-alone right to argue against a potential Dublin transfer. Whilst the decision rejects the appeal on Article 8 grounds and makes clear that the facts of the case must be particularly strong the decision resuscitates the *Abdullahi* debate [11] whereby the CJEU ruled that the only way to challenge a decision under the Dublin II Regulation is to plead systematic deficiencies in the asylum procedure and reception system of a Member State. Implicitly discrediting the CJEU?s argumentation in *Abdullahi* [12] the Tribunal counter-argues with reference to *K v Bundesasylamt* [13], the UK Court of Appeal?s judgment in *AM(Somalia)* [14] and the family unity provision listed within the humanitarian clause of the Regulation to advance that an Article 8 claim against a proposed removal can be justiciable and may have merit depending on the facts, this is the case even where a Dublin decision, itself, may not be justiciable. The use of Article 8 as a means to hold Member States account for a potential transfer in the context of the Dublin II Regulation (which has less procedural guarantees for applicants than its successor) is crucial since it confirms the use of a non-Article 3 argument in litigation on transfers and makes clear that the operation of Dublin cannot circumvent the fundamental rights framework.

*Keeping it in the family: the importance of Best Interests assessment in an Article 8 examination*

The vehicle of Article 8 ECHR as a means to achieve family unity within the Dublin context has not only imbued the Regulation with fundamental rights obligations, which must also clearly be adhered to by virtue of Article 7 and 24 of the Charter, it has also strengthened Article?s 8 use itself as an autonomous right. An additional by-product of this has, in turn, been the clarification of the best interest of the child concept, and in *MK* and *AT and another* [15] the Tribunal uses Article 8 to achieve family unity and reunion through the examination of the best interests of the child as codified in international law. The cases not only serve to show that the UNCRC [16] and other instruments are crucial elements to the proportionally assessment of a potential Article 8 violation, but that the best interests of the child should be the point of departure in this examination against which other (public interest) considerations are weighed [17], rather than the inverse. This starting point is applicable for both procedural and substantive elements of Article 8, the former also being

a feature of *ZAT and Others*.

In *AT and Another* the Tribunal uses the best interests of the child within the context of an Article 8 proportionality examination to quash a refused entry clearance decision of a mother and brother who wished to reunite with a child refugee in the UK. The decision thereby allows for the family reunification of the appellants with the sponsor. The Tribunal?s ruling is salient not least since domestic immigration rules do not provide for family reunification where a child has been granted status in the UK. Grounding the case in Article 8, then, the Tribunal infuses the Article, as in *MK and Others*, with a myriad of international instruments including the UNCRC and a UN General Comment on the treatment of unaccompanied children [18], particularly noteworthy given that the child had since reached the age of majority. Shedding light on the positive obligation upon States within Article 8 and inherent in respect for family life (*Mayeka & Mitunga [19]* and *Senigo*), the decision clarifies that the national authority, again, had the proactive duty to give effect to certain European and international instruments which either codify directly or pray aid to the primary considerations of the best interest of the child when making immigration (and related) decisions affecting children. In a domestic context which has been marked by hermetic tendencies towards international law to the point of disapplication of the UN Convention on Rights of the Child (see *MK India* [20] and *EV Philippines* [21]) the decision is one which reifies the status of the Convention and, arguably, furthers its reach. It does this via different means.

The first is done by setting the assessment of Section 55 [22] (the mechanism by which Article 3(1) of the UNCRC [16] is enforced) and its guidance (which refers to other international instruments) in a teleological interpretative context with reference to legislation which has not been incorporated into domestic law. Consequentially the assessment of the best interests of the child is to be done in a broader human rights framework, and should take into account*, inter alia*, the child?s view as well as durable solutions for unaccompanied children, the first of which should be the possibility of family reunification done in a positive, humane and expeditious manner. Reference is made to Article 23 of the Qualification Directive (maintenance of family unity) and even to certain elements of the Family Reunification Directive, which the UK has specifically opted out of but which nonetheless, according to the Tribunal, may have indirect effect on national authorities.

Secondly, the Tribunal applies Section 55 to the sponsor who is now an adult, confirming that 18 years should not necessarily be a definitive cut off point for applying the best interest?s principle, which is reminiscent of the Court of Appeal?s finding in *KA (Afghanistan) & Ors* [23], albeit concerned with the risk of persecution, in which the Court stated that ?there is no ?bright line? or dateline which when crossed by the appellants reaching 18 years of age means that the risks to children suddenly disappear.? Indeed, the Tribunal states that at the age of 19, due to the sponsor?s ongoing vulnerability, the need for family reunification is greater than ever.

Thirdly, by virtue of the finding that Entry Clearance Officers should also give effect to guidance on section 55 and, therefore, the UNCRC and international instruments, the territorial scope of Section 55 is broadened considerably. As a result national authorities must abide by the best interests of the child and related principles when making an immigration related decision affecting a child who is outside the territory of the UK.

The cumulative effect of these assessment duties within the Tribunal?s Article 8 proportionality exercise, in which the margin of appreciation for public interest is deemed to be lesser where blanket prohibitions and non-primary legislation is at play, is demonstrative of the requirement for the national authority to firstly and positively consider what is actually in the child?s interests. The particular vulnerability, duration of time spent apart, and social and living conditions of the young person(s) all play a crucial role in making up the best interest?s assessment and, on the basis of

the facts of the case, could apply by analogy to vulnerable adults. The scope of such a finding goes well beyond the UK and should be undertaken by all jurisdictions in the operationalisation of the concept. Interestingly and commendably the Tribunal makes its own judgment of the Government?s view of public interest, criticising the lack of substantiation of pull-factor and economic arguments and instead affirms the strong and stable effect on societies where a family unit is together.

The decision is a reaffirmation of *ZH (Tanzania)* [24] by the UK Supreme Court in which the starting point should always be the consideration of the child?s best interests and only then whether these interests are outweighed by the strength of other considerations. Family reunification, in this decision, is, therefore, achieved through the body of Article 8, the backbone of which is a holistic best interest assessment for children/teenagers both within and outside the territory.

The force of the child?s best interests has also been at the centre of procedural components to Article 8 and, by virtue of the article?s influence on Dublin, has also run as a strong current in the procedural mechanisms of responsibility under the Regulation. As highlighted above the positive investigative and evidentiary obligations in *MK and Others* stemmed as much as from the Dublin Regulation as the UNCRC itself. Interestingly the Tribunal couples the rule of procedure of best interests of the child and establishment of facts alongside the right to family life and direct contact with parents within the Charter (24(2) and (3)) and the right to an effective remedy (Article 47). This signals that the procedural elements of the best interest assessment requires a pro-active, holistic evidentiary gathering and examination exercise as well allowing the child to be heard and an effective appeal being available where a negative assessment is made. As a result, the decision serves to confirm that the proportionality exercise within Article 8 will also hinge on the procedural assessment of the best interests of the child.

*Conclusion*

Put very simply, the family unity cases of asylum seekers and refugees in the wake of ZAT have all confirmed the fundamental importance of the right to family life where children, but arguably also vulnerable adults, are concerned. AT and Another is particularly clear in this regard; the prevention of family reunification under Article 8 in this case not only violates Convention rights but it is an affront to the ?philosophy and rationale of the Refugee Convention itself.? The cases serve to provide substance to the constituent elements of the right to family life which consist of numerous layers that need to be considered in sequence. When applying Dublin both the substance and procedural machinations of the Regulation must adhere to Article 8; the application of Article 8 must also be done in accordance with its substance and procedure, these elements must be read in line with international law, notably the substance and procedures of the best interest of the child, the latter being the starting point of any proportionality exercise. All Member States should take due note of this recent case law given the increasing number of asylum applications made by unaccompanied minors,  the oft ignored or deliberate restrictive reading of the family clauses and procedural components in Dublin III, the conditions [25] in which children [26] are forced to live in pending take-charge requests and the tightening of family reunification rules more generally.

It is with these deeply rooted obligations in mind that the Commission proposal of Dublin IV [27] leaves such a bitter taste in one?s mouth. Amongst the many other eye-brow raising amendments it is difficult to square the proposal with, *inter alia*, the ECHR, the Charter and the UNCRC when what is being advanced is a resort to inadmissibility first before the application of family clauses (annihilating the proposal to expand the family definition), the abandonment of best interests of the child in a move which overturns *MA* [28] and the thumbs up to lengthy determination procedures in

the manner which the corrective allocation and responsibility mechanism could play out. Maybe the Commission should focus on monitoring and enforcing the well encoded family rights in Dublin instead of proposing a document which essentially acquiesces to Member States current fundamental rights violations, giving rise to (human) costly litigation as analysed above?

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

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**Links:**
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[2] http://www.echr.coe.int/Documents/Convention_ENG.pdf
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