Is strategic litigation a way of ensuring that the rights of unaccompanied minors are fully considered in law, policy and practice?

Date:
Wednesday, February 15, 2017

Introduction

According to Hannah Arendt [1] civil disobedience is a non-violent opinion, openly expressed in public and directed at doubtful laws and policies imposed by governments. Strategic litigation could be considered as a form of civil disobedience which seeks to achieve changes in policies and raise public awareness to promote and ensure human rights. This type of litigation has developed from what some may call a "crisis of legalism [2]" caused by a dichotomy between human rights law and the political community in which these rights must operate. This is especially so in the area of refugee and immigration law. This anomaly between legal principles and practice has created a gap, which legal practitioners and human rights activists have tried to fill, inter alia, by engaging in strategic litigation.

Strategic litigation

Strategic litigation is different from normal litigation, since it combines legal and other tactics in order to change public and political opinions and ultimately reform legislation. Normally, strategic litigation does not stop after a case is won in court, making sure that legislative decisions are also followed in practice. This is why it may also incorporate tools, such as training of public officers, in order to reach its aim. Strategic litigators have two main methods of achieving justice. First they can choose to have a direct impact on society through campaigning, media, training or other tools, which in turn can lead to changes of policy-making and enforcement of rights. Secondly, strategic litigation can also be used first as a legal means (litigation of test cases) which may lead to policy and legal decisions being changed in order to achieve the desired impact. The latter is the path adopted by most organisations and legal practitioners since a court decision normally has more strength to change legal policies. This path was adopted by Citizen UK [3] and other organisations in their fight to ensure that unaccompanied minors living in the former ad-hoc camp in Calais could be safely resettled in the UK.

Does strategic litigation make a difference?: the example of R (ZAT and others) v Secretary of State for The Home Department

The case of ZAT and others [4] is a strategic judicial review litigation case, based on the question whether four refugees living in "the Jungle" in Calais could be reunited with their family already residing in the UK. The Upper Tribunal’s decision established that the Dublin III Regulation was,
in this particular case, inadequate to provide a safe resettlement for the applicants and disproportionately interfered with their right to family life under article 8 ECHR [5]. Whilst the Secretary of State was successful on appeal, the Court of Appeal [6]'s judgment did establish the jurisdiction of article 8 as a means to secure admission into the country.

ZAT was strategic in nature, because it incorporates various support strategies besides the actual litigation which was brought before the Upper Tribunal by several NGO's, including Citizens UK. Nonetheless it is inevitably difficult to measure the impact of strategic litigation, since test cases can stretch over a long period of time and political will and legal policies may vary from election year to election year.

The first question is therefore a methodological one: how does the human rights lawyer know whether a strategic case is suitable to achieve a positive impact and what happens when the outcome is a negative one? The relationship between a test case and its outcome is full of complexity, because it is often uncertain what the chain of causation will be after a decision in court was reached. On a dual reading of literature and previously established frameworks measuring the effectiveness of strategic litigation (ie from Women’s Link Worldwide [7]) it is proposed that the framework for evaluating and assessing strategic litigation could include the following:

1. establishing an existing rights framework; 2. questioning the independence of the judiciary; 3. Engaging with civil society organisations and creating a network to support and leverage the opportunities presented by litigation; 4. evaluating the impact of strategic litigation.

Turning the attention to the evaluation of the impact of strategic litigation [8] (4), it might be appropriate to distinguish between two levels of assessment: ante-strategic litigation and post-strategic litigation mechanisms. Ante-strategic litigation includes looking at legal judgements already decided in this matter and at what other strategies can be adopted to change public opinion. Here, it might be worthy to underline on the basis of which cases the applicants were able to launch their argumentation having regard to previous jurisprudence. First, the litigators relied on the decision of the Administrative Tribunal of Lille [9] and on R (EM (Eritrea)) v Secretary of State for the Home Department [10], where it was established that an individual resisting removal to a State does not have to show a "systemic deficiency" in that State and that according to the Soering principle a person cannot be removed to a place where there is a real risk that it will suffer treatment contrary to article 3 ECHR. Furthermore, in the case of Mublanzila Mayeka and Kaniki Mitunga v Belgium [11] the court underlined the "extreme vulnerability" of unaccompanied minors as a determining factor which takes precedence over considerations relating to the status of illegal immigrant?. Also, in M.A and others [12] the court established the importance of having fast access to asylum procedures determining the refugee status for unaccompanied minors.

The second phase, post-strategic litigation, refers to ensuring proper implementation of the decision in practice in case of a positive outcome or improving the strategy in this area in case of a negative outcome. Impact is therefore efficiently assessed when litigators analyse these criteria before taking a case to court. A study [8] concerning the evaluation of human rights litigation impact on policy and practice revealed that there are at least two kinds of post-strategic litigation impacts to be considered: the immediate (short-term) effect and the long-term effect impact. Immediate effect means understanding the remedy provided by the decision of the court in case of a positive decision.

In the case of ZAT and others, for example, the immediate effect was, that due to the decision of the Upper Tribunal, four applicants could be safely reunited with their family members in the UK. As for the long-term impact of the judgement, the decision might open a window for strategic litigators to base their arguments on article 8 ECHR rather than solely on article 3 ECHR in future
cases concerning unaccompanied minors (as proposed here [13]). Such a determination could have considerable consequences across the EU.

Turning the attention to the long-term impact of strategic litigation on policies, there have been considerable improvements regarding unaccompanied minors since the decision came out in January 2016. Although, the changes might not be solely attributed to this test case, it is possible that the impact on policy might have occurred due to the combined efforts of civil societies and other parties involved in litigating the *case of ZAT and others*. Most notably in this matter was the amendment to the *Immigration Act in May 2016* [14], allowing more children to be relocated into the UK by safe and legal routes. Whilst the amendment does not apply to unaccompanied minors that are not registered in camps in Europe prior to the EU-Turkey deal, it is still a positive achievement for those vulnerable asylum seekers who were registered. Furthermore, after the decision of the court came out, there were also other efforts put in place by grassroots organisations to *record data* [15] on unaccompanied minors living in Calais, as well as further campaigns to pressure governments to protect children refugees. One of the *campaigns released in July 2016* [16] by the United Nations International Children's Emergency Fund (UNICEF) urges the UK government to take action to reunite unaccompanied refugee children with their families in the UK and proposes that the government should speed up existing family reunion procedures and widen its family reunification rules to allow children to be reunited with extended family in the UK.

Lastly, another positive long-term impact was seen after *Mr Edward Timpson MP* [17] who was appointed Minister of State for Vulnerable Children and Families at Department for Education in July 2016 committed to publishing a safeguarding strategy for children seeking asylum by 1 May 2017 which would set out further detail on how these children should be safeguarded and their welfare promoted.

**Conclusion**

Societal and policy change, like any other sustainable development, require a considerable length of time. The relationship between strategic litigation and change is not linear, but rather an *image of multiple on-off connections -- sometimes working together, sometimes working apart* [18]. Scholars define strategic litigators as the *continuation of politics by other means*, with the aim of achieving social change and address the gaps in the law in order to bring about legal reform beyond one individual case. In the case of unaccompanied minor refugees, such reforms consist of, inter alia, creating safe and legal routes for resettlement. It can be very well argued that without the strategic test case of *ZAT and Others* many children would not have reached the UK. Nonetheless, legal judgments alone "*may deliver little more than pieces of paper, with a latent untapped potential* [19]" when they are not accompanied by social mobilization and strategic litigation may also have negative and unwanted side effects. In the *case of ZAT and Others* the point on dual threshold of Article 8 by the Court of Appeal is unfortunate and will certainly affect other strategic litigation cases, since only very specific factual cases will succeed in the future. Moreover, the destruction of the camp in Calais, which may well have links with the judgment, has led to children being dispersed without any real possibility of knowing how many children were left in a legal limbo. There have been promises of relocation by the UK judgment but many children are still being left behind and stuck (invisibly so perhaps) in France although they have the legal entitlement to come to the UK. Moreover and demonstrating the need to continue and sustain litigation, the UK government has recently *ended its commitment* [20] to provide a safe haven for thousands of vulnerable lone child refugees in Europe after only 350 have been brought to Britain. Such a decision has been subsequently met with a legal challenge *before the High Court* [21].

The above demonstrates that litigating strategic cases is a process which has to engage with various systems to influence public policy-making or existing policies. Indeed, social change
achieved through decisions of courts is sustainable only if there is a strong civil society support movement accompanying the legal action. By engaging with civil society, in case of a legal win, the conditions for implementing the judgment will be enabled. However, even when a case is lost, the conditions to advance the cause will have improved and the public will have gained more awareness about the topic, which may ultimately promote social change.

Ana-Maria Bucataru,

LLM graduate in Human Rights Law at Queen Mary’s Univeristy.

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

Keywords:
Vulnerable person
Litigation
Strategic Litigation
Unaccompanied minor

Links:
[1] https://books.google.co.uk/books?id=hoM7SRYnHkC&amp;printsec=frontcover&amp;source=gbs_ge_summary_r&amp;cad=0#v=onepage&amp;q&amp;f=false
[2] https://books.google.co.uk/books?id=vTJhqH16FkQC&amp;printsec=frontcover&amp;dq=Conor+Gearty,+Can+Human+Rights+Survive?+(CUP+2006)&amp;hl=en&amp;sa=X&amp;ved=0ahUKEwiU_Pbcqt3RAhXlCcAKHeTdAaAQ6AEIJjAC#v=onepage&amp;q&amp;f=false
down