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The ZAT case and the far-reaching consequences for the Dublin Regulation

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1. Introduction

The ZAT case [1]was a judicial review before the UK Upper Tribunal [2]. The outcome of the first instance judicial review suggested that the operation of the Dublin Regulation was inadequate to provide the necessary protection the applicants needed. Therefore, Article 8 ECHR gave rise to an independent positive obligation on the UK government to admit the possibility of ?bypass[ing] the procedural mechanism at the initial stage for determining which Member State is responsible?.

Besides *ZAT,* two other recent cases have served to reiterate the free-standing nature of Article 8 as a right to ensure family reunification in the Dublin context: *MK, IK and HK* [3] and *CK(Afghanistan)* [4] (EDAL analysis here [5]). However, the *ZAT* case has been the first to allow Article 8 to be used to bypass in whole the Dublin initial procedural mechanism for allocating responsibility on entry. According to a previous EDAL commentary [6], this is indeed due to the dysfunctional nature of Dublin, so when it gives rise to fundamental rights breaches, allocation of responsibility for an asylum application takes place through Convention rights creating negative or positive obligations.

Before *ZAT,* challenges to Dublin responsibility were based on negative obligations (non-return) where there was a real risk of an Article 3 ECHR [7] violation. While in the latter cases, the possibility to derogate only in part (single criteria) from the Dublin Regulation has been established, in *ZAT* the possibility to derogate in whole from the Dublin initial procedure, while regulating entry in relation to Article 8 but using Article 3 as benchmark, was determined.

This brief focuses on the *ZAT* case as a precedent for future cases before EU courts and the need to reform the Dublin Regulation. In doing so, it first points to the analogies of the two streams of jurisprudence used in *ZAT* before the Upper Tribunal. It then focuses on the reasoning of the Court of Appeal in reversing the decision. It argues that the decision of the Upper Tribunal was consistent with the previous jurisprudence while the revision by the Court of Appeal was erroneous. This allows for the conclusion that if a similar or stronger case was brought before the ECtHR on account of Art. 3 ECHR, it could be the beginning of a series of landmark cases which would require the EU legislator to introduce wide-ranging reforms of the Dublin Regulation.

2. Two Streams One Conclusion

In *ZAT* the stream of jurisprudence regarding Article 8 ECHR has been linked by analogy to the pertinent stream of jurisprudence on non-returns and Article 3 ECHR.

Regarding the former (see for details EDAL analysis here [5]) ZAT confirmed the fundamental importance of the right to family life. When applying Dublin, States must make sure that both the substance and procedural machinations of the Regulation must adhere to Article 8, and these elements must be read in line with international law so that they do not interfere with the right to family unity to a disproportionate degree when exercising immigration control.

Regarding the latter, *ZAT* has been framed around the requirement that a Member State must honour its obligations and implement European Union law, including the guarantees under Article 3 ECHR. So where there is a real risk of violation of Article 3 ECHR, the EU presumption of equivalent protection can be questioned, and because such presumption underpins the predictability of the presumption as to which State should deal with a claim, one can also challenge the Dublin responsibility allocation creating this time a positive obligation.

The Upper Tribunal noted that the duties owed by France in term of numbers of arrivals due to the UK?s recent ?opt out [8]? of relevant EU legislation, were in many respects more onerous than those applying to the United Kingdom. The Court referred to a 2012 report proving that a small percentage of orders for transfer to other Member States was executed or not executed at all. The report has been supplemented by the detailed evidence of a practising French lawyer in accords with other evidence of French law emanating from a government agency. An ECRE AIDA report of January 2015 [9] also outlined insufficient and inappropriate reception conditions for unaccompanied asylum seeking children which were considered to impair their effective access to the asylum procedure and that put the applicants at risk of a violation of Article 3 ECHR. As such, while the submission in *ZAT* was based on Article 8 and the procedural shortcomings, the first instance court recognised that there were also circumstances relevant to Article 3 that should be used in the proportionality test relevant to Article 8 to impose a positive obligation.

Another good reason for advancing arguments relevant to Article 3 was that the rights under Article 8 are qualified, so not being absolutes such as those under Article 3, they require the proximity test for the alleged failure to protect to be a flagrant breach (ex. Art. 6 in *Soering* [10]) (Costello [11]). Only a flagrant breach of a qualified right can weigh the proportionality test between the interests of the individual and the interests of the community in a case of admission (*Gaskin* [12]) in favour of the applicant and not the community at large (Lambert [13]). So the Upper Tribunal applied the proportionality test correctly, and it found a disproportionate and flagrant breach of Article 8, making use of Article 3 in the proportionality test relevant to a flagrant breach of Article 8, even if the flagrant breach of Article 8 was almost independent.

The two separate yet very connected streams of jurisprudence, one on exit, the other on entry, suggest that the maintenance of migration control and allocation of responsibility under the Dublin rules can be outweighed by the rights under the ECHR. Because of such a dangerous possible conclusion and the potential far-reaching consequences for the ability of the United Kingdom to control its borders and for the integrity of the Dublin III system, the UK Secretary of State appealed the Upper Tribunal?s decision.

3. The Especially Compelling Case Requirement

The Court of Appeal partially reversed the judgement suggesting that the Upper Tribunal?s decision to allow the bypassing of Dublin was substantially erroneous, particularly regarding the test applied to assert the violation of Article 8.

The Court of Appeal argued that the EU presumption of equivalent protection is solid, so ?an especially compelling case under Article 8 would have to be demonstrated? to allow admission of the affected person outside the Dublin procedure. The Court confirmed that there can be cases where the applicant can be admitted without going through the Dublin initial procedure, but there

must be very good objective reasons to do so. A suitable test for this purpose is also required, and it is claimed that the test applied by the Upper Tribunal was erroneous.

According to the Court, the correct test is that of *R* [14]*-CK (Afghanistan)* [14] which requires ?a particularly compelling case? or gross breach to bypassed the Dublin process. The Court stressed that, save for such a case, it is considered that applicants should first seek recourse from the authorities and the courts of the Member State in which the applicant is present. Only after it is demonstrated that there is no effective way of proceeding in that jurisdiction should they turn to the authorities and the courts in the United Kingdom.

However, substantial and consistent evidence has been given that the asylum system in France does not work and that vulnerable people may be at risk of a flagrant breach of Article 8 or a simple breach of Article 3. A risk of a flagrant breach has been demonstrated by the UNHCR?s submission which reiterated that the procedure for assigning the Member State responsible is lengthy and protracted and that applications from minors are not prioritised and that a small percentage of transfers are executed. The UNHCR reported that such delays lead unaccompanied minors to disappear, and the risk of eventually being trafficked or being subjected to further abuses. This amounts to a flagrant breach of Article 8.

If this wasn?t enough, the flagrant breach of Article 8 has been already demonstrated before the Upper Tribunal making use of Article 3 in the proportionality test. [15] Strangely enough, while the UNHCR recalled this aspect in its submission, the Court of Appeal first confirmed that facts relevant to Article 3 were indeed relevant to the proportionality test, but in the end the Court took its decision applying a different test.

5. The Proportionality Test

The Court of Appeal shifted to the ?Heightened?Wednesbury? judicial review test, applied also to *R* [14]*-CK (Afghanistan)* [14]. The latter is based on the reasonable prospect of success for the human rights claims presented before a judge. However, contrary to the more common proportionality test used usually for Article 8, the Wednesbury test does not consider the relative weight or the fair balance struck by the decision.

As it has been recently argued in ISLRev [16], these elements are unique to the proportionality review. As a result, the proportionality review should be preferred because it affords better protection to human rights. Otherwise, insufficiently distinguishing between these standards of review can lead to an erosion of the protection afforded to human rights under the ECHR.

Therefore, while the Upper Tribunal applied the correct test regarding Article 8 with a proportionality balancing exercise, the Court of Appeal correctly spelt out the flagrant breach test but in the end failed to give relative weight or strike a fair balance in the decision due to the questionable choice to shift from the proportionality to the Wednesbury test.

This can be due to the fact that, as Lord Bingham once explained [17] at the Court of Appeal: *?the greater the policy content of a decision ? the more hesitant the court must necessarily be in holding a decision to be irrational ... where decisions of a policy?laden, esoteric or security? based nature are in issue even greater caution than normal must be shown in applying the test?.* This being the case, the ?anxious scrutiny? of the Wednesbury ground is definitely better suited to these kinds of political decisions.

6. The Far-Reaching Consequences of the *ZAT* case

The Dublin Regulation has been recently reformed and it allows derogation from certain criteria of

responsibility allocation to protect applicants against violations of human rights. However, a recent UNHCR study (unpublished) demonstrated that Member States are still reluctant to use such instruments for proactive solidarity. This tendency is in line with the new Commission proposal of Dublin IV [18] that included a complicated corrective (reactive) mechanism unfit to address the fast-changing circumstances of forced migration.

Instead, a more proactive Dublin is required. Any proposal should respect fundamental rights with special fast-track procedures for manifestly clear cases of responsibility (similar to the manifestly founded applications) for a quicker transfer of responsibility. Moreover, there should be the possibility to derogate on entry in whole or in part from the Dublin procedure when the reception and procedural standards in the Member States under particular pressure are inadequate or put people at risk of violation of fundamental rights.

If this shift of gears doesn?t take place by policy change, it will be enforced by litigation. In the *ZAT* case, it has been recognised for the first time the existence of a ?duty to admit? described as the ?entry human rights principle?. Similar arguments have been recently made in the external dimension in an opinion [19] before the CJEU (para. 82, 137, 139, 152, 174) using the non-return cases as analogy again. It is a new approach which limits the States? margin of appreciation in regulating admission proportionally to the procedural and/or material conditions prevailing in a State. The conditions prevailing in a State and the Conventional rights rather than the blind presumption of equivalent protection, underpins the predictability of the presumption as to which State should deal with a claim through the imposition of positive or negative obligations.

In consideration of the absolute nature of Article 3 and the current fragile situation in some Member States, there may be, in the near future, a strong ?duty to admit? cases before the ECtHR on account of Article 3, which might not be easily dismissed. As proclaimed in the Dublin III Regulation?s preamble and the relevant jurisprudence, the Dublin Regulation requires nothing less than full respect for human rights in its operation and the need to strike a balance between responsibility criteria in a spirit of solidarity. Doing otherwise could potentially mean a step-by-step dismantling of the Dublin Regulation.

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

Keywords:
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Links:
[1] https://www.jur.lu.se/WEB.nsf/(MenuItemByDocId)/ID5180274E559537E2C1257D630025EFC7/$FILE/JU
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[2] http://www.asylumlawdatabase.eu/en/case-law/united-kingdom-queen-application-zat-iaj-kam-aam-mat-maj-and-lam-v-secretary-state-home#content
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