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The Dublin System and the Right to an Effective Remedy ? Observations on the preliminary references in the cases of C-155/15 ? George Karim v Migrationsverket and C- 63/15 - Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie

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Introduction

The present article presents some observations on two similar cases pending before the CJEU. It offers some prospective thinking on the opportunity to expand the interpretation of the right to an effective remedy under the Dublin III Regulation (DRIII) - and to go beyond the Abdullahi ruling - as the evolution of the protection landscape after the adoption of the Dublin III Regulation increases procedural safeguards and rights for asylum seekers falling under its scope. The note also explores the intrinsic links between the right to an effective remedy and the interpretation of individual guarantees as developed by the ECHR under the Tarakhel judgment.

NB: The scope of this article is limited to the interpretation of Article 27 ? additional questions raised within the framework of the preliminary references will not be examined under the present article.

Questions put forward by the Swedish and the Dutch administrative courts to the CJEU for a preliminary ruling on Article 27 of the Regulation n°604/2013

Case C- 155/15 (Karim)- Do the new provisions on effective legal remedies in Regulation No 604/2013 (1) [1] (recital 19 [2] in the preamble thereto and Article 27(1) and (5) [2] thereof) mean that an applicant for asylum is also to be able to challenge the criteria in Chapter III of the regulation on the basis of which he or she is to be transferred to another Member State which has agreed to receive him or her, or can effective legal remedies be limited to mean only the right to an examination of whether there are systemic deficiencies in the asylum procedure and the reception conditions in the Member State to which the applicant is to be transferred (corresponding to the ruling of the Court of Justice in Case C-394/12 [3])?

Case C- 63/15 (Ghezelbash): What is the scope of Article 27 of Regulation No 604/2013, whether or not in conjunction with recital 19 in the preamble to that regulation? Does an asylum seeker ? in a situation such as that in the present case, in which the foreign national was confronted with the request for assumption of responsibility to deal with the asylum application only after that request

had been agreed to, and that foreign national submits evidence, subsequent to the agreement to that request, which could lead to the conclusion that it is the requesting Member State, and not the requested Member State, which is responsible for examining the application for asylum, and the requesting Member State subsequently does not examine those documents or forward them to the requested Member State ? have the right, pursuant to that article, to an (effective) legal remedy against the application of the criteria for determining the Member State responsible laid down in Chapter III of Regulation No 604/2013?

Commentary

The context of the preliminary references

The issue of what constitutes an ?effective remedy? has been one of the most controversial legal issues since the early stages of the Dublin system. A right to an effective remedy is derived from Article 47 of the Charter of Fundamental Rights of the EU as well as from the general principle of effective judicial protection (Case C-222/84 Johnston [1986]). National courts and the CJEU are therefore obliged to review the legality as well as the interpretation of an EU legislative provision through the lens of an effective remedy. Nevertheless this concept has been narrowly defined by the Court of Justice in a key judgment issued on 10 December 2013 C-394/12 Abdullahi [4], which delineates the scope of Dublin appeals in situations where a Member State has agreed to take charge an applicant for asylum under Article 10(1) of the Dublin II Regulation. Although severely criticised by legal experts, it is to be noted that in practice the effect of the ruling has had limited effect as the Dublin III Regulation (604/2013) applies to all new applications for international protection and transfer requests issued from 1 January 2014. As the concept of effective remedy should now be interpreted under the new provisions the Regulation 604/2013, two domestic courts, namely the Dutch and the Swedish high administrative courts, requested a preliminary ruling to the Court of Justice in order to seek clarification about the exact scope of the new Article 27(1).

Although phrased in a slightly different way, both Karim and Ghezelbash schematically look at the same point i.e. whether Article 27 goes beyond the narrow boundaries of systemic deficiencies and could *also* entail a right for asylum seekers ?to challenge the criteria in Chapter III of the regulation on the basis of which he or she is to be transferred to another Member State which has agreed to receive him or her?.

The legacy of the Abdullahi judgment

The Abdullahi judgment has been analysed at length and it will not be discussed again in detail here. Yet, it is important to highlight the key aspects of the judgment. As explained by Maria Hennessy [5], ?the Court held that once a Member State takes charge of an application on the basis of Article 10(1) of the Dublin II Regulation - as the Member State into which the applicant ?irregularly crossed by land, sea or air having come from a third country? - this decision can only be overturned if there are systemic deficiencies in the asylum procedure and reception conditions of that Member State. These systemic deficiencies must provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the EU [6].

The CJEU?s decision is aimed at securing ?the objective of the rapid processing of asylum applications? by establishing ?a clear and workable method? [para 59] for determining responsibility to examine the asylum claim. Furthermore, the Court emphasises that the Dublin system is a set of ?organisational rules governing the relations between the Member States? [para 56], guided by ?the principle of mutual confidence? [para 53].? The centrality of the principle of mutual trust in the Dublin system had already been emphasized by the Court in the case C-411/10 NS and ME

[7] where the court refers to the principle of mutual trust as ?*the raison d?être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights? [para 83].

The strong presumption of compliance with human rights standards has been reiterated in the Opinion 2/2013 [8] on the EU?s accession to the ECHR where the Court emphasised the central function of mutual trust in EU law, which means that ?save in exceptional circumstances, [a Member State] may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU law? [para 192].

This interpretation has raised many criticisms: according to Roland Bank [9] and Cathryn Costello [10] it is not convincing to assume that trust is justified just because the Dublin system is based on it. Blind trust should be handled cautiously as ?out of 32 states participating in the Dublin system, five are not bound by the other provisions of the EU asylum acquis at all, and another two are not bound by the new versions of the asylum acquis as applying after the round of amendments in 2011-13?[Roland Bank*, Idem*]. Yet, one should stress that although the Court has consistently put a strong emphasis on the centrality of the principle of mutual trust, it has never equated this concept with a system of blind trust. The NS ruling has clearly emphasised that the operation of the Dublin II Regulation, on the basis of a conclusive presumption that the asylum seeker?s fundamental rights will be observed in the responsible Member State is incompatible with the duty of Member States to apply and interpret Dublin II Regulation in a manner consistent with fundamental rights. Member States cannot work on the basis of a conclusive presumption of compliance with fundamental rights [para 100]. The presumption must therefore be rebuttable.

The very high threshold required to identify ?substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter? [case C-411/10 para 85], has dramatic implications in practice where transfers are allowed to countries with poor legal and reception standards. As asylum systems are under great pressure in many countries, numerous reports published by civil society organizations, such as the AIDA reports [11] published by ECRE, highlight a serious erosion of the protection landscape, great divergence in recognition rates and dire reception conditions in an increasing number of EU Member States due to recent arrival of large number of asylum seekers.

Professor Francesco Maiani, deplored that - by giving primacy to the sake of efficiency - the Abdullahi judgment considers the asylum seeker as a ?passive object? in a procedure that is based on objective criteria and which foresees ample margin of conciliation between the requested and the requesting States without involving any obligation to hear the applicant (article 37). F. Maiani, "The Dublin III Regulation: A New Legal Framework for a More Humane System?" In Vincent Chetail, Philippe de Bruycker, Francesco Maiani (Eds), 'Reforming the Common European Asylum System: the New European Refugee law', Martinus Nijhoff, forthcoming.

Another criticism raised by legal experts is that primary importance given by the Court to the objective of speed and the requirement not to compromise the objective of the rapid processing of asylum applications may severely curtail the principle of good administration and the right to an effective remedy, respectively enshrined under the EU principle of the right to good administration and 47 of the Charter of Fundamental Rights of the European Union and acknowledged as fundamental principles of EU law by the Court (see C- 69/10 [12] Diouf and C-16/90 [13] Nölle Hauptzollamt Bremen-Freihafen).

Is there an opportunity to go beyond the Abdullahi judgement under the DRIII?

The essential question raised by the preliminary references under the Karim and Ghezelbash cases is to discuss whether the content and architecture of the DRIII regulation would allow for a substantial evolution in the interpretation of the concept of effective remedy. We believe that this is the case.

To some extent, one could argue that Karim and Ghezelbash should provide a similar reasoning to the Abdullahi judgment as the key elements of the Dublin architecture remain the same under Dublin III as in the previous regulation (in particular the fact that the applicant does not have the right to choose his or her asylum country). Another key element to be considered is the strong reliance on the principle of mutual trust as discussed above.

Nevertheless, experts argue that this reasoning is no longer valid under the Dublin III Regulation, which has been substantially amended in order to strengthen procedural safeguards thus looking - to a certain extent - at the individual applicant as a ?subject of rights?. As underlined by Francesco Maiani and Suzan Fratkze [14], from a general point of view, the views and interests of the applicant are better protected and are more central in the overall architecture of the Dublin III Regulation. Although the hierarchy of criteria under Dublin II would already prioritise the right to family unity and the welfare of the child, the recast Dublin III Regulation puts a stronger emphasis on the obligation for Member States to give precedence to these principles both in law and in practice (Articles 6 through 8 and recitals 13-16). Increased procedural safeguards - such as the right to information and the right to a personal interview (Articles 4 and 5) - illustrate that the recast Dublin Regulation provides clear limitations to the discretionary powers of the Member State.

Bolstering this argument is an assessment of recent Member State jurisprudence concerning transfers under Dublin III which has found the determining authorities to be in violation of the applicants? procedural rights under the Regulation, rather than solely for a breach of Article 4 of the Charter/ Article 3 ECHR. Indeed, a violation of the right to a personal interview under Dublin III (Article 5(1)) was found in two respective cases in the Czech Republic (Prague Regional Court, 1 July 2015, A. K. A., S. K. K., A. E. and K. B. v Ministry of the Interior, 49Az 56/2015-41 [15]) and France (Administrative Court of Nantes, 22 June 2015, No. 1505089 [16]). The French Administrative Court also found a violation of Article 4 requiring Member States to furnish information to the individual on the Dublin Regulation including its hierarchy and the possibility to challenge a transfer decision.

Moreover, it is advanced that the new right to an effective remedy [17] in Article 27 will better enable asylum seekers to challenge the legal and factual premises to a transfer decision. The new provision of Article 27 requires that all persons subject to the Dublin system shall have the right to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer, before Court or Tribunal. In line with the ECtHR decisions ?onka [18] and VM and [19] others v. Belgium, the recast recital 19 requires that an effective remedy against such decisions should cover both the examination of the application of the Regulation and the legal and factual situation in the Member State to which the application is transferred. A consequence of this substantial evolution of the Dublin system is that the asylum applicant should have the right not only to challenge the violations of fundamental rights but also to challenge the grounds set out in Chapter III.

Furthermore, reading Article 27 coupled with recital 19 in light of Article 47 of the Charter sets requirements as to the scope and intensity of the review that must be applied. The CJEU, in *Samba Diouf* [20](para 56) found that the right to a remedy under the Asylum Procedures Directive, read in light of Article 47 of the Charter requires that the facts as well as the points of law be the subject to a ?thorough review? by the national Court. Article 6 (1) ECHR, which by virtue of the Charter, is now applicable in asylum cases, requires a court or tribunal to have ?full

jurisdiction? which means that it must address both questions of fact and questions of law. [21] The ECtHR [22] has found a violation of Article 6 when a court or tribunal found themselves bound to findings of an administrative body and precluded from reviewing a central element in a dispute. In addition, in order to ?guarantee effective protection?, and to ensure the applicants? legal safeguards are adhered to (recital 19), the initial decision should be reviewed against procedural safeguards inherent in the Charter such as the right to a reasoned decision, the EU right to be heard and the duty to examine the decision carefully and impartially.

Such an interpretation would fully comply with the Tarakhel judgment [23] where the ECtHR has affirmed that the source of the risk of a violation of an applicant?s fundamental rights does not alter the ECHR obligations of the Member State ordering the Dublin transfer. As a consequence, the systemic deficiencies are not the only situation where Member State?s compliance may be challenged and an Article 3 violation triggered. The line of reasoning in *Tarakhel* is one which reverts fully back to Soering, [24] Sufi and Elmi, [25] and the interpretation advanced by UK Supreme Court in EM (Eritrea) [26]. The Court held that to say that a violation of an Article 3 right is first dependent on a finding of a systemic deficiency would go against the reality of Article 3 violations occurring without there being any systemic failure in the state of destination. The assessment of potential violations of fundamental rights must take into account the individual circumstances of the case and the transfer must be stopped if there are substantial grounds for believing that the person concerned faces a risk of being subjected to torture, inhuman or degrading treatment, irrespective of whether it emanates from systemic flaws or not.

Conclusion

It is hoped that in these new references the CJEU will take a holistic approach when interpreting the scope of Article 27 and will clearly align itself with the *Tarakhel* case and subsequent domestic judgments. The interpretation of the new article 27 should also fully acknowledge that the new Dublin III Regulation adds new procedural safeguards for persons seeking international protection and it envisages asylum applicants as ?active? subjects of rights. As demonstrated in this article, the Regulation is subject to evolutionary interpretation from the courts- both the ECtHR as well domestic courts. As a consequence, we believe that sticking to Abdullahi would misconstrue the evident additional rights in Dublin, the Charter, general principles of effectiveness and domestic jurisprudence tending towards a more rights sensitive approach (in some cases) for applicants.

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

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