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The French suite. The effect of Al Chodor on the detention of asylum seekers for the purpose of a Dublin transfer

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Introduction

In its decision from 27 September 2017 [Pourvoi n 17-15.160, arrêt n° 1130 [1]], the first civil chamber of the Cassation Court in France examines and applies the conclusions of the case of Al Chodor given by the Court of Justice of the European Union (CJEU) on 15 March 2017 CJUE, 15 March 2017, *Al Chodor*, C-528/15 [2], summarized here.

The CJEU held that asylum applicants who are to be transferred to the State responsible for examining their application for international protection in line with the Dublin III Regulation [3], could only be held in a detention centre beforehand if it was found that there was ?in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond.?

Even if the objective criteria was laid out in settled case-law sanctioning a consistent administrative practice on the part of the Foreigners Police Section, this would not suffice for the Court, which stated that only the law could restrict the fundamental right to liberty (point 47 of the Al Chodor decision). The absence of such a provision leads to the inapplicability of Article 28(2) of that regulation and a violation of Article 5 of the European Convention of Human Rights and Article 6 of the Charter of Fundamental Rights of the EU which both prohibit arbitrary detention. The CJEU couldn?t have been clearer.

The decision from the judges in Luxembourg is extremely important for the French judicial order. The administrative authority can only assign a particular place of residence to an asylum applicant within the procedure to determine the responsible Member State [Article L.561-2 du Code l?entrée et du séjour des étrangers et du droit d?asile CEDESA [4]] and can only place said applicant in detention with a view to his/her imminent transfer where there is a risk that he/she will not comply with his/her duty to leave the territory [Article L.551?1 CEDESA [5]].

As a result, the French *préfets ?*the competent administrative authorities ?habitually rely on Article 28 of the DRIII in order to enforce detention measures on asylum applicants subject to a Dublin transfer on grounds that they are at risk of absconding. Certain administrative authorities even go as far as taking such detention measures even before a reply from the requested Member State to take charge or take back the applicant. However, the French legislation [Loi n° 2015-925 du 29 juillet 2015 relative à la réforme du droit d'asile [6]] has not defined the risk of absconding under Article 28(2) of the DRIII.

Court of Cassation judgment from 27 September 2017:[1] a welcomed European inspiration

The case concerned a Sri Lankan national who had applied for asylum in France, and had appeared to have entered the EU through Italy. It was on these grounds that the Paris *préfet* took, on 13 February 2017, a first decision concerning his transfer to Italy, who has been considered to be responsible for his application under Dublin, and a second decision placing him in the administrative detention centre of Mesnil-Amelot on grounds that he was at risk of absconding. In fact, the Paris *préfet* believed that the applicant had not presented appropriate safeguards to prevent against the risk of him complying with the transfer measure whilst waiting for its implementation, since he did not have a passport, was known under an alias, did not provide proof of accommodation, and did not have resources. By a decision of 17 February 2017, the first president of the Paris Court of Appeal then prolonged the detention of the applicant.

A remedy was hence introduced against this decision. The Court of Cassation (first civil chamber) referred to the CJEU Al Chodor findings and nullified the appealed decision. The Court, following the CJEU logic, decided that the detention measure was unlawful, since Article 28(2) of the DRIII is not applicable given the absence in French legislation of a binding provision of general application, which fixes the objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond.

The Cassation Court went even further. The Court discarded the possibility of considering the application of Article L.511-1 § II,3^{e}) CESEDA which defines the criteria of a risk of absconding of third country nationals who are subject to an obligation to leave the French territory or are assigned to a residence. Within such criteria is the irregular entry and irregular stay on the French territory, failure to execute a previous removal order, the falsification or counterfeiting of identity or travel documents, the absence of sufficient guarantees stemming from the absence of possessing identity or travel documents in the midst of being validated or the absence of a stable place of residence. Moreover, the Cassation Court believed that it would be necessary to refer a preliminary question to the CJEU on the basis of Article 267 TFEU, in order to determine whether such a disposition constituted a binding provision of general application, defining the objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond.

The position adopted by the first civil chamber of the Court of Cassation was swiftly followed by the Paris *Tribunal de Grande Instance* which nullified the decision of the *Préfet du Val de Marne* to detain an asylum applicant subject to a Dublin transfer (Marne [JLD, n°17/03843, 30 September 2017) and the Paris Court of Appeal confirmed such a sanction ([B17/04273, 2 October 2017].

Decisions from the administrative court: a worrying spirit of resistance?

If the French judicial jurisdictions seem to follow the lessons from the European level, the French administrative jurisdictions seem, for their part, to have several difficulties in integrating the CJEU?s logical conclusions. Admittedly, the Administrative Tribunal of Toulouse took on board the arguments developed by the CJEU in Al Chodor, which supported its decision to cancel a decision to detain a third country national who had applied for asylum on grounds that the objective criteria defining the risk of absconding lacked any precision in the law, thus depriving the detention of any legal basis (TA Toulouse, 22 May 2017, n°1702143). Nevertheless, when it comes to the superior administrative jurisdictions, these ones are reluctant to draw all of the appropriate consequences of the CJEU decision. It is worth citing the Administrative Court of Appeal decision given the 14 March 2017 where it is hard to imagine that the Court would not be aware of the Al Chodor case, and the possible outcomes of the decision the CJEU was expected to hand down the following day. [CAA de Douai 14 mars 2017 n°16DA01958 [7]].

The case concerned an Iraqi national who had applied for asylum in Germany before being stopped in Calais on 14 September 2016 by the French authorities. By 15 September, the Pas-de Calais *Préfet* had taken two decisions: the first with the object of requesting the German authorities to take charge of the applicant; the second, placing the applicant in detention. The decision to detain was set aside by the administrative judge following an appeal against the lawfulness of the detention (TA de Lille, decision n°1606968, 23 September 2016). Henceforward the prefect introduced an appeal against this decision in front of the Administrative Court of Appeal of Douai. Whilst the Court asked itself questions concerning EU law ? namely questions concerning the application of measures for asylum applicants subject to a Dublin transfer in general and their placement in detention in particular ? the Court of Appeal did not make a preliminary reference to the CJEU but instead preferred to ask a question on a new point of law to the Council of State [Article L.113-1 Code de justice administrative [8]].

The case demonstrates that French judges (at least the administrative ones) are rarely inclined to have a dialogue with the Court of Luxembourg. Indeed, the opinion given by the Council of State on 19 July 2017 [CE, avis, 19 juillet 2017, n°408919 [9]] translates a reading and interpretation of Article 28 which is dissimilar to the interpretation given to this very provision by the CJEU in Al Chodor. In essence, the highest administrative court considered that the legislator did not intend for the administrative authorities to place an applicant subject to a Dublin procedure in administrative detention before the actual decision to transfer had been taken. The Council of State, therefore, allowed the placement in detention of an asylum applicant subject to a Dublin transfer after the notification of the transfer decision, without giving the slightest consideration to the absence of objective criteria relating to the risk of absconding in national law, of which the consequences were clearly outlined by the CJEU four months earlier.

The Council of State continues to place asylum applicants in detention on grounds of a risk of absconding [see in particular CE, 11 avril 2017, n°409592 [10]; CE, 1er septembre 2017, n°413842 [11]]. In an order of the 8 November 2017, the President of the Court of the Council of State maintained and even accentuated such a position, in clear opposition to the jurisprudence of the CJEU [JRCE, 8 November 2017, n°415178 [12]].

The Council did not in any way call into question the fact that the French administration considered that introducing an appeal against a decision to transfer under Dublin as a transfer refusal, constituting a risk of absconding (para 7). Moreover, the Council confirmed that introducing an appeal against a decision to transfer interrupts the six month deadline laid out in Article 29(2) DRIII, up until the administrative tribunal has provided its judgment. As such this restricts the possibility for the French authorities to examine asylum applications of applicants who have not been transferred under Dublin.

Conclusion

With the backing of the highest administrative court, the French prefectures continue to place asylum applicants subject to a Dublin transfer decision in detention; in other words, they continue to deprive applicants from their fundamental right to liberty and are in violation of EU law. Furthermore, the widespread practice has been reinforced and applicants subject to a Dublin transfer can be detained at the moment of their registration at the prefecture. One may question what sort of provisions will be laid out in the draft law on asylum and immigration currently being prepared. Will they draw all of the conclusions from the Al Chodor decision in providing objective and precise criteria on the risk of absconding in order for detention to be the exception? Or will the provisions circumvent the European case law and provide for cosmetic and malleable criteria allowing prefectures to maintain a systematic detention of individuals and allow administrative judges to validate the measures? A reading of the proposed law allowing for a correct application of the European asylum regime

[13] lodged at the National Assembly on 24 October 2017 (presented by Jean-Luc Warsmann and 18 other republican deputies) does not bode well since the proposal specifically aims to render meaningless the decisions, analysed here, by the CJEU and Court of Cassation.

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

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