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Responsibility drifting in the sea ? Search and rescue operations and the Dublin Regulation

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Introduction

After a rough week at sea and intense negotiations, Aquarius, a SAR vessel run by SOS Mediteranne and MSF, docked into the port of Valencia on 17 June, as Spain agreed to provide safe heaven to the 629 rescued migrants on board. In a statement issued on 11 June, the Spanish government stated that people had been ?abandoned to their fate in the Mediterranean? and that Spain would comply with its international commitments in relation to humanitarian crises. The saga began, last week, when Italy announced the closure of its ports, contesting that Malta should accept the vessel. The Maltese government, for its part, argued that the relevant search and rescue operation took place in international waters, therefore the Aquarius should dock to the nearest port, which is Lampedusa.

Unfortunately, over the last years, States are increasingly adopting restrictive ?non entrée? policies in the guise of migration control, putting into question traditional human rights guarantees and safeguards and even the long-standing naval tradition of rescue at sea and the extraterritorial operation of the non-refoulement principle.

But beyond this central issue, the case of ?Aquarius? provides us with the opportunity to discuss about another, seemingly technical but just as important issue: the allocation of responsibility for examining an asylum application under the ?Dublin? Regulation [1] in the case of rescuing people at sea.

The application of the Dublin Regulation to search and rescue operations

Among the relevant criteria that the Dublin rules set forth, the so-called "first entry", namely under Article 13 (1), is the most controversial one. To date, it appears that an implied assumption seems to prevail according to which would-be applicants for international protection who arrive in the territory of a Member State having effected a sea crossing must necessarily have crossed that Member State?s external border ?irregularly? for the purposes of Article 13(1) of the Dublin III Regulation.

But is it always the case? No one can deny where someone disembarks safely and undetected after a sea crossing and then, at a later stage, presents himself to the authorities of that Member State or another Member State to claim international protection, the assumption that he must have crossed the border of the first Member State ?irregularly? is truly valid[1]. However, when someone is rescued at high seas and is disembarked at a ?place of safety?[2] in the context of a

relevant search and rescue operation, his legal situation is rather more complex. Can we honestly consider that in this case the person has "irregularly? entered the territory of the relevant state, when the authorities of that State have actually brought him/her in its territorial waters following a SAR operation, in accordance with their respective international obligations under the law of the sea[3]? Is this not all the more valid when the actual disembarking site is determined by the Maritime Rescue Coordination Centre itself? Things become even more complex when a State, other than the coastal State, allows the boat to dock in its ports, as in the case with the 629 immigrants and refugees of Aquarius. Under the aforementioned circumstances, should it still be considered that those on board of Aquarius have ?irregularly? entered Spanish territory under EU and international law?

The issue was first pointed out by Advocate General of the European Court of Justice Sharpston at the outset of the *Mengesteab* case[4]. As the Advocate General noted in her Opinion, the intersection of international law of the sea, international refugee law (in the shape of the 1951 Geneva Convention) and EU law[5] does not provide a ready and evident answer to the question of whether those rescued during a Mediterranean crossing and disembarked in a coastal EU Member State should be regarded as having crossed the border of that Member State ?irregularly? for the purposes of Article 13(1) of the Dublin III Regulation[6].

Consequently, does the decision of a Member State to accept those rescued at sea ?regularise? their entry onto European soil and, if so, on what actual legal basis? For example, can this decision be considered equivalent to a 'visa issue' under the Schengen Borders Code? In this context, it is worth noting that the so-called Schengen Borders Code[7] allows a Member State to derogate from one or more of the conditions in Article 5(1) of that act (such as possession of a valid visa) on humanitarian grounds or because of its international obligations, by authorising the third-country national concerned to enter its territory[8].

The Court of Justice of the European Union (CJEU) responded negatively to a similar question concerning the crossing of land borders by third-country nationals travelling through the Western Balkans route in *A.S.* [2] *and Jafari* [3] *Judgment*[9]. The facts and reasoning of the Court?s decision in both cases have already been detailed and commented upon [4] in this blog but for our purposes it is worth noting that the Court found the admission of a national from a non-EU country to the territory of a Member State to not be tantamount to the issuing of a visa, even in exceptional circumstances such as mass arrivals to the EU, and that the term ?irregular crossing of a border? also covered the situation in which a Member State admits into its territory non-EU nationals on humanitarian grounds, by way of derogation from the entry conditions generally imposed on non-EU nationals.

The rationale for the Court's Judgement in *A.S. and Jafari* was rather unfortunate. What seems to be of concern for the CJEU was how to maintain the Dublin system ?alive and kicking? even in times of ?crisis? where massive arrivals take place. To put it in another way, the Court was more interested in holding the country of first entry ?in this case Croatia- responsible for the examination of the asylum claims, rather than the proper interpretation of the ?Dublin? rules. Still, the CJEU did not need to consider the applicant?s entry as ?irregular? for the Dublin rules to apply and Croatia not to be absolved of its responsibilities. In the respective cases the applicant?s entry could very well have been considered as a "visa-free entry". This is essentially the only exception expressly provided for by EU law, under which a third-country national can be exempted from a ?visa requirement?. In such a case, Article 14 and not 13 of the Dublin Regulation applies, namely that if a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection. Therefore, Croatia was still responsible for the examination of the relevant asylum claims under that Article of the Regulation.

However, the issue at stake in sea crossings is more complex. Therefore, the main points of the *A.S. and Jafari judgments* cannot be automatically applied.

In the present circumstances of the Aquarius case, the Spanish authorities were not confronted with an unpredictable and massive arrival of migrants, such as the Croatian authorities in 2015. Nor did they "tolerate" or "facilitate" their entry into their territory. Instead, Spain explicitly and in the most formal way (by the Prime Minister himself) authorised their entry in Spanish soil, following the refusal of the Italian and Maltese authorities to accept the vessel and those on board. In legal terms, the Spanish authorities have used the option available to the Member States under the Schengen Borders Code to authorise non-EU nationals who do not fulfil the entry conditions to travel to their territory on humanitarian grounds, thus complying with Spain?s relevant international obligations[10]. After all, no one can contest that the duty to render assistance to persons in distress at sea constitutes ?one of the most ancient and fundamental features of the law of the sea?[11].

Thus, the people on board the Aquarius can hardly be seen as entering 'irregularly' in Spain?s territory, within the meaning of the Dublin Regulation. However, that does not mean that Spain is to be to be absolved of its responsibility for the examination of any relevant asylum claims. As said before, Article 14 of the Dublin Regulation foresees that Spain shall be responsible for examining the relevant claims in cases where a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived.

Conclusion

The question of whether or not there is an "irregular crossing of the external borders" in the context of search and rescue operations at high seas has wider implications that extend beyond the scope of the Dublin Regulation. For instance, if there is no ?irregular? entry, it could be assumed that there is subsequently no ?irregular? stay (at least for a short stay of 90 days or less within a 180-day period under the Schengen rules), so that any relevant expulsion or return order lacks legal basis?

So far, the Court of Justice of the European Union has not had the opportunity to provide the necessary guidance and interpretation of Articles 13(1) of the Dublin III Regulation and 5(1)(4) of the Schengen Borders Code in the context of search and rescue operations at sea. All that is required is a case where the issue is raised directly by a national court requesting a preliminary ruling. Cases such as this of the ?Aquarius? can help national courts to address the right questions to the CJEU.

Stathis Poularakis, Legal advisor - Advocacy Officer Médecins du Monde ? Greece.

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[1] Opinion of Advocate General Sharpston delivered on 20 June 2017 in Case C?670/16 ? Mengesteab, par. 51.

[2] The term is not defined in the SOLAS or SAR Conventions, but in the International Maritime

Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78), adopted on 20 May 2004. The EU legislature adopted a definition in nearly identical terms in Article 2(12) of the Frontex Regulation. A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.

[3] Article 98(1)(b) of the United Nations Convention on the Law of the Sea (UNCLOS) states that every State must require the master of a ship flying its flag, in so far as he can do so without causing serious danger to the ship, the crew or the passengers, inter alia, to proceed with all possible speed to the rescue of persons in distress. Article 98(2) of UNCLOS provides that every coastal State must promote the establishment, operation and maintenance of an adequate search and rescue service regarding safety on and over the sea. Furthermore, the 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended, applies to all vessels, whether state-owned or commercial; see also Regulation 33(1), Ch. V, Annex to SOLAS Convention, and Paragraphs 2.1.10, 1.3.2, of the Annex to the 1979 International Convention on Maritime Search and Rescue (SAR), 1405 UNTS 109.

[4] Judgment of the Court (Grand Chamber) of 26 July 2017, in Case C-670/16 Tsegezab Mengesteab v Bundesrepublik Deutschland, ECLI:EU:C:2017:587. However, as the issue was not raised in the order for reference and therefore the Dublin States were not put on notice of the question as to possibly submit written observations addressing this point, while at the same time the actual conditions of the applicant?s entry did not arise, both the Attorney General and the Court did not elaborate more on the issue.

[5] See among others Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC and Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union? that regulation has been fully integrated and referred to in Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard.

[6] Opinion of Advocate General Sharpston, par. 51-55.

[7] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1). That regulation has since been repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (OJ 2016 L 77, p. 1), also entitled the Schengen Borders Code.

[8] Article 5(4)(c) of the Schengen Borders Code.

[9] Judgment of the Court (Grand Chamber) in Cases C-490/16 A.S. v Slovenian Republic and C-646/16 Khadija Jafari and Zainab Jafari

[10] See mutatis mutandis Opinion of Advocate General Sharpston delivered on 8 June 2017 in cases C?490/16 - A.S. ??? C?646/16 - Jafari

[11] Moreno-Lax, V., ?Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of

EU Member States? Obligations Accruing at Sea?, 23(2) International Journal of Refugee Law (2011), pp. 174 to 220, at p. 194.

Links:
[1] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF
[2] http://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%9149016-v-republika-slovenija#content
[3] http://www.asylumlawdatabase.eu/en/content/cjeu-c-64616-khadija-jafari-and-zainab-jafari
[4] http://www.asylumlawdatabase.eu/en/journal/second-time%E2%80%99s-charm%E2%80%99-%E2%80%93-cjeu%E2%80%99s-interpretation-irregular-border-crossing-criterion-dublin