Dublin Transfers before the ECtHR and CJEU

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Overview

1. Two Courts and their Interfaces
2. Strasbourg Caselaw on Dublin Deportations
3. Dublin & Detention
4. Luxembourg Caselaw
5. Pertinent Dublin III Reforms
1. TWO COURTS & THEIR INTERFACES
Two Supranational Courts
& national caselaw

EDAL (European Database of Asylum Law)
http://www.asylumlawdatabase.eu/

Newsletter on European Asylum Law for Judges
http://cmr.jur.ru.nl/neais/
Sources:

• C Costello, 'The Ruling of the Court of Justice in NS/ME on the fundamental rights of asylum seekers under the Dublin Regulation: Finally, an end to blind trust across the EU?' (2012) Asiel-en Migrantenrecht 83
Sources:

C Costello

ECtHR + CJEU - Refugee Courts

- De Baere ‘The Court of Justice of the EU as a European and International Asylum Court’ (2013)

# CJEU Jurisdiction

(Source: JHH Weiler’s Compliance Matrix)

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<th>MS Compliance</th>
<th>EU Compliance</th>
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<td>Article 279 TFEU (ex Article 243 EC) Interim Measures</td>
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<td>Article 218(11)TFEU (ex Article 300 TEC)</td>
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<td><strong>Indirect Actions</strong></td>
<td>Article 267 TFEU (Article 234 EC)</td>
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<td>(Preliminary References)</td>
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Preliminary References

- Lisbon Treaty removes restrictions on preliminary references as regards visas, asylum and immigration
- All national ‘courts and tribunals’ may make preliminary references
- That’s YOU!
ECtHR Jurisdiction

• Article 34 ECHR:
  – Right of petition
  – Victim status
• Article 35 ECHR:
  – Exhaustion of domestic remedies (but only effective ones)
  – Six month rule
• Rule 39 of the Rules of Procedure (interim measures):
  – Threat of irreparable harm of a very serious nature
  – Harm imminent and irremediable
  – Prima facie arguable case
(deemed binding
Application No 46827/99 Mamatkulov v Turkey 8 March 2005)
EU – ECHR Interfaces

• ECHR informs general principles of EU law
• ECHR and EUCFR – Article 52(3) EUCFR ‘correspondence’
• EU accession to ECHR required by Lisbon Treaty
Article 6 TEU (post Lisbon)

1. The Union recognises the rights, freedoms and principles set out in the [EUCFR] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
Article 6 TEU

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'
Article 80 TFEU

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

ECtHR Jurisdiction over EU MS

(pending accession)

Application No 43844/98 *TI v UK* 7 March 2000


EU – RC Interfaces

Long shadow of the Spanish (Aznar) Protocol
Article 351 TFEU (ex 307 EC)
Article 78 TFEU (ex 63 EC) and references in Directives (legislative process + revisions)

= RC is part of EU law

Cf. Status of UNHCR Resolutions etc.

• Article 78(1) TFEU provides that ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’
Informal interventions by UNHCR in refugee law cases before CJEU to date (but consider impact…)

Right to Asylum! Article 18 EUCFR

- Article 14(1) UDHR states that ‘everyone has the right to seek and to enjoy … asylum from persecution.’


- As AG Maduro the QD aims to vindicate ‘the fundamental right to asylum.’ Para 30 C-465/07 Elgafaji v Saats secreteris van Justitie [2009].
ECHR – RC Interfaces

• ECtHR does not interpret the RC
• But it is acknowledged as forming part of the Contracting Parties’ background legal obligations

Eg References in ‘flagrant breach’ caselaw
Jurisdiction – Article 1 ECHR

- *Hirsi and Others v. Italy*
  Application no. 27765/09 (access – jurisdiction)

under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities’ (para 81).

‘Italy [could not] evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya’ (para 129)
Hirsi v Italy

Grand Chamber:

• violation of Article 3 ECHR (risk of ill-treatment in Libya and risk of chain refoulement),

• violation of Article 4 of Protocol no. 4 prohibiting collective expulsion

• violation of Article 13 ECHR
Hirsi v Italy

- Article 4, Protocol 4
- See Conka v Belgium (deception)
- Cf. the Italian authorities had neither subjected the applicants to an identification procedure nor carried out any form of examination of the individual situation of the applicants before returning them (para 185).
• Consider the implications of the findings on ‘collective expulsion’ for access to asylum in Europe.

• DISCUSS
EUCFR? Jurisdiction?

• Moreno-Lax & Costello

‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity - the Effectiveness Model’

In The EU Charter of Fundamental Rights: A Commentary
Edited by Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward
2. STRASBOURG CASELAW ON DUBLIN DEPORTATIONS
Source:

- Factsheet on Dublin Cases:
TI v UK (2000)

• Application 43844/98 TI v UK (2000)

Mole reports ‘[d]espite assurances given to the Court in *TI* by the Government of Germany, [TI] was neither permitted to submit a fresh claim nor to access the discretionary procedures and was sent by the border guards onward to his own country where he was arrested and ill-treated.’ N Mole Asylum and the European Convention on Human Rights (Council of Europe, Strasbourg, 3rd Edition, 2007), 48.
Dublin & ECHR Standards

- Increased role of Rule 39 Interim Measure applications to prevent Dublin Transfers
- ECRE Information Note on Rule 39 Measures to prevent Dublin transfers


KRS v UK (2008)

- There is nothing in the materials before the Court which would suggest that returnees to Greece under the Dublin Regulation, including those whose asylum applications have been the subject of a final negative decision by the Greek authorities, have been, or might be, prevented from applying for an interim measure on account of the timing of their onward removal or for any other reason. 17-18.
the objective information before it on conditions of detention in Greece is of some concern, not least given Greece's obligations under [the RCD] and Article 3... However, for substantially the same reasons, the Court finds that were any claim under the Convention to arise from those conditions, it should also be pursued first with the Greek domestic authorities and thereafter in an application to this Court, 18.

Cf. Application No 53541/07 SD v Greece 11 June 2009.
MSS v Belgium & Greece (2011)

Application No 30696/09 MSS v Belgium and Greece 21 January 2011.

Return to Greece precluded:
- Article 3 – detention conditions in Greece
- Article 3 – living conditions in Greece
- Article 13 – no effective remedy
Para 263 in MSS

• EU RCD
• Greece has not had ‘due regard … vulnerability as an asylum seeker’
• Because of ‘inaction’
• Greece is responsible for applicant’s situation…. 
Para 263 in MSS

- Living on street; no means of providing for essential needs; no access to sanitary facilities
- Victim of ‘humiliating treatment showing lack of respect for dignity’
- Living conditions + ‘prolonged uncertainty’
- Article 3 violation
Question

- *MSS v Belgium & Greece*
- Article 3 ECHR and living conditions for asylum seekers, a ‘vulnerable group’
- Is the finding applicable only in the context of the CEAS?
- Or more widely? DISCUSS
Hussein v Netherlands & Italy

- Application 27725/10, Mohammed Hussein et al. v NL + ITA (2 April 2013)
- Transfer to Italy – Rule 39 granted
- Inadmissible
- MSS threshold not met
- See Para 78
Daytbegova v Austria (2013)

- Application 6198/12 Daytbegova v Austria, 4 June 2013
- Rule 39 granted to stay return to Italy
- Para 66 – Italian authorities aware of vulnerability and could assist
Halimi v Austria & Italy (2013)

- Application No 53852/11 Halimi v Austria & Italy 18 June 2013
- Similar reasoning
Abubeker v Austria (2013)

• Application no. 73874/11 Abubeker v Austria, 18 June 2013
Mohammed v Austria (2013)

- Application 2283/12 Mohammed v Austria, 6 June 2013
- Transfer to Hungary
- MSS threshold not met
Pending Grand Chamber Case

Application No 29217/12 Tarakhel v Switzerland

Rule 39 granted

Grand Chamber Hearing: 12 February 2014

General situation in Italy + specific ‘vulnerabilities’ – Afghan couple + 5 children
Article 3 Caselaw – General Risks

• Application 8319/07 *Sufi & Elmi v UK* (GC, 2011)
• Application No 886/11 *KAB v Sweden* - Somilaland 5 September 2013
3. DUBLIN & DETENTION
Asylum seekers & detention on arrival

- App. No 42337/12 Musa v Malta (2013)
- Applies Saadi v UK on detention of asylum-seekers
- Maltese detention practices condemned, mainly due to unsuitable place and conditions of detention
- Para 97 – (paraphrase) – ‘some merit’ to applicants’ argument that if asylum seekers are authorised in their stay (under national/ EU law), then there is no lawful basis for their detention under Article 5(1)(f)
Asylum Seekers & Pre-removal detention

• Application No 53541/07 SD v Greece, 11 June 2009, para 62
• Application No 2237/08 RU v Greece 7 June 2011, para 95-96
• Application No 10816/10 Lopke and Touré v Hungary 20 September 2011, para 16.
Asylum seekers as ‘authorised’

- No detention under Article 5(1)(f)
- (cf. interveners in *Saadi*)
- *Only look to Article 5(1)(b) to detain:*
  - the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.
2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

OTHER PROVISIONS>>>>>
4. LUXEMBOURG CASELAW
ECJ agreed with interveners. Terse reasoning:
Member States were to have a choice as to whether to introduce suspensive effect (Article 20(1)(e) DR) and accordingly, those states which did so choose should not ‘for the sake of meeting the requirement of expedition, be placed in a less favourable situation than those Member States which did not deem it necessary to do so.’ (para 49). Otherwise, would infringe national procedural autonomy (para 52).
ECtHR – CJEU Dialogue

Strasbourg
• M.S.S. v. Belgium and Greece, January 2011, Application no. 30696/09 (access – Dublin)

Luxembourg
• Case C-411/10 NS C-493/10 ME 21 December 2011
Mirrors Strasbourg BUT
• ‘Systemic Breach’
Key question

• Has Luxembourg undermined the Strasbourg caselaw?

• CC: ‘The CJEU test seems more difficult to meet than the ECtHR, if we read ‘systemic deficiencies’ as an additional requirement to be met. However, I urge that such a reading be rejected. Luxembourg has no mandate to interpret Article 4 EUCFR in a manner that undermines Strasbourg’s interpretation of Article 3 ECHR. Moreover, the CJEU itself in NS/ME was emphatic that it was faithful to MSS. Accordingly, we should adopt an interpretation of the Luxembourg test which does not treat ‘systemic deficiency’ as an additional hurdle for applicants, but rather an element of the risk assessment.’
UK Supreme Court (pending)

Appeal from Court of Appeal ruling in EM (Eritrea) v SSHD [2012] EWCA Civ 1336
C-620/10 Kastrati

- C-620/10 Migrationsverket v Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati 3 May 2012
- the withdrawal of an application for asylum within the terms of Article 2(c) of that regulation, which occurs before the Member State responsible for examining that application has agreed to take charge of the Applicant, has the effect that that regulation can no longer be applicable.
In such a case, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to it being placed in the Applicant’s file.
C-179/11 Cimade, GISTI

- 27 September 2012
- RCD applies pending Dublin transfer
• AG Sharpston:
• a failure to implement the Reception Conditions Directive may constitute an infringement of Article 1 EUCFR (dignity) may therefore defeat the purposes of the Directive which include promoting the application of Article 1 and Article 18 of the Charter (para 55).
C-245/11  K v Bundesasylamt

- 6 November 2012
- Article 15(2) – MS becomes responsible.
- Family unity becomes mandatory cf. discretionary!
- ‘Bring together’ includes ‘keep together’
- Cf AG Opinion
• 48  Obligation to ensure ‘guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application.’

• 49  That objective of speed …
Article 3(2) – permits a MS which is not “responsible” to examine an application for asylum even though no circumstances exist which establish the applicability of the humanitarian clause in Article 15.
• That possibility is not conditional on the MS responsible under those criteria having failed to respond to a request to take back the asylum seeker concerned.

• No obligation to consult UNHCR
• AIRE Centre Intervener!
• Article 24 EUCFR, based on CRC,
• ‘In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.’
• Article 6 Dublin Regulation (2003)

• ‘Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

• In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.’
• Taking a contextual interpretation, it appeared that had the EU legislature intended the first Member State to remain responsible, it could have used terms to make that clear, as it had done elsewhere in the Regulation (par 52).
A purposive interpretation, focusing on the aim of guaranteeing swift access to asylum procedures (para 54), in particular for 'particularly vulnerable persons', so 'as a rule, unaccompanied minors should not be transferred to another Member State.' (para 54)
• Fundamental rights 'supported' these considerations. (para 56). The 'best interests' principle was applicable, and in the circumstances rendered the UK (as the state in which the minors were present) responsible.
Opinion, AG Cruz Villalón

• 'T]he minor’s best interests must also be decisive in order to decide which Member State, of all those that have received an asylum application, is the Member State responsible. (Opinion, para 64)
'the minor’s best interests … must constitute the basis for interpreting the Regulation … and, consequently, where a number of different applications for asylum overlap, this should in principle be resolved in favour of the most recent application, assuming that this enables the minor’s best interests to be established most effectively.' (Opinion, para 67)
‘Does an enforceable personal right on the part of the asylum seeker to force a Member State to assume responsibility result from the duty of the Member States to exercise their right under the first sentence of Article 3(2) of [the] Regulation?’
• Even if transfer was precluded for the sorts of reasons recognised in *NS / ME*, the Dublin criteria remained applicable.

• The caveat was that
The Member State in which the asylum seeker is located must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. …
• If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of the Regulation (paragraph 35, *N. S. and Others*, paragraphs 98 and 108).
C-394/12 Abdullahi

- Opinion of AG CRUZ VILLALÓN
- 11 July 2013
- Not yet in English!
1. Article 19(2) - no individual right to have their applications examined by a particular Member State responsible in accordance with the Regulation. The scope of the appeals - Charter rights

2. Effects of first entry into the territory of the Union persist for three months

3. Member State with systemic deficiencies - exempted from the responsibility under the DR
5. DUBLIN REFORMS
Dublin Reform

Steve Peers

Statewatch Analysis: The revised ‘Dublin’ rules on responsibility for asylum-seekers: The Council’s failure to fix a broken system (April 2012)

http://www.statewatch.org/analyses/no-173-dublin-III.pdf
Reform

  - Criticised Commission’s 2007 positive evaluation and the basis of the 2008 proposal COM(2008) 820 final
  - ‘[A]vailable evidence strongly suggests that the system has actually proved unworkable and dysfunctional.’ (1)
  - Take back requests only a tiny fraction (4%), so most requests are dealt with in the MS where the application is made (2)
Reflection Note (cont.)

– ‘The hierarchy of criteria’ enumerated in the Regulation remains strictly theoretical.’ (3)
– Background: Free movement for refugees.
– Time for fundamental rethink given ‘wholly new institutional setting.’ (5)
Reform: European Parliament

  ‘We must bring into question whether the Dublin system is really “fit for purpose”’ (p13)

Dublin III Regulation

  • Article 7 – hierarchy
  • Article 8 – unaccompanied minor
  • Article 9 – family (with IP)
  • Article 10 – family (seeking IP)
  • Article 11 – family procedure
• Article 12 – grant RP / visa
• Article 13 – entry / stay
• Article 14 – visa waiver
• Article 15 – transit area
Over to you!

- Dublin without coercion!
- Family first!
- Key: prompt allocation of responsibility
• Article 33 - A mechanism for early warning, preparedness and crisis management
Towards responsibility sharing?

• Key Questions?
  – What forms may responsibility-sharing take?
  – Are any in place in the EU?
  – Which are ripe for further development?
  – Should responsibility-sharing be a global undertaking?
Towards responsibility sharing?

EU responsibility sharing

Thielemann et al

*What system of Burden-sharing between Member States for the Reception of asylum seekers?*

(European Parliament, 2010)
• Expert Council of German Foundations on Integration and Migration
• *European Refugee Policy: Pathways to Fairer Burden Sharing* (November 2013)
• http://www.svr-migration.de/content/wp-content/uploads/2013/12/European-Refugee-Policy_SVR-FB.pdf
Any Questions?