

[SHORTER VERSION]

**ASSOCIATION OF EUROPEAN
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**IMMIGRATION AND ASYLUM WORKING
GROUP**

ATHENS SEMINAR

**THIRD COUNTRY REFUGEES: THE
ARTICLE 8 ECHR/ DUBLIN REGULATION
INTERFACE AND JUDICIAL REMEDIES**

28/29 SEPTEMBER 2017

The Honourable Mr Justice Bernard McCloskey

**President, United Kingdom Upper Tribunal,
Immigration and Asylum Chamber**

**Senior Judicial Review Judge and Senior Queen's Bench Judge of
the Court of Judicature of Northern Ireland**

Introduction

1. The refugee explosion in Southern and South-eastern Europe has had impacts, of varying force and dimensions, in many Member States of the EU and the Council of Europe. Unsurprisingly, this has had a resulting focus, progressively intense, on the Common European Asylum System (“CEAS”), the reach and efficacy of the related EU laws and, increasingly, the strengths and weaknesses in the asylum procedures of the EU Member States.
2. The crisis has also raised challenging questions of law about the interplay between EU asylum laws and the European Convention on Human Rights (“ECHR”); more specifically, the Dublin Regulation/Article 8 ECHR interface.

The Refugee Crisis

3. The uneven and unequal burdens and responsibilities among EU Member States is an issue which has assumed critical dimensions during the past three years. It is a product largely of geography and the human condition
4. Almost three years ago it was assumed – wrongly, as events have proved – that the crisis had more or less reached its peak.¹ While Syria has been a major contributor to the phenomenon of mass migration to the EU, other war-torn and famine struck countries in the Middle East and the African continent have also experienced significant population exodus.
5. In the movement of large numbers of migrants in a northerly and north westerly direction from countries such as Greece and Italy, the challenges spread to other

¹ “Editorial Comments”, Common Market Law Review, Vol 52 (06/12/15), page 1437.

EU Member States and the responses have varied from the closure of certain borders to the positive facilitation of onward transit – often by free transport – to other borders, in particular those of Austria and Germany.

6. Mass migration of comparable dimensions had not been experienced in the globe since the enormous population movements of the Second World War. The repercussions have been substantial, they continue to manifest themselves in various ways (legal, political *et al*) and, as a result of the United Kingdom's "Brexit" decision, they have had seismic implications for the unitary EU.

The Dublin Regulation

7. The Dublin Regulation is the measure of EU law which, in consequence of the south west European refugee crisis, has attracted most scrutiny, attention and controversy
8. The essential underpinnings of the successive Dublin regulations include the principle of mutual confidence among EU Member States, the full and inclusive application of the Refugee Convention and Protocol within the Common European Asylum System ("CEAS), the need for a system which will be practicable and efficacious, the imperative of inter-state co-operation, the overarching importance of expeditious decision making and the presumption (rebuttable) that Member States will comply with their international obligations, in particular observance and protection of fundamental human rights.
9. The Dublin Regulation is properly seen as a measure of EU law whereby one of the fundamental aims of the Union, namely the creation of an area of freedom, security and justice, is extended to a body of persons beyond that of EU citizens. Furthermore, the Dublin Regulation is linked to

the founding values of the Union: respect for human dignity.²

The Initial EU Response

10. Two reactive, remedial measures of EU law, neither without controversy, were introduced with speed, in September and October 2015. First, there was Council Decision (EU) 2015/1523 which had as its overarching aim the adoption of provisional measures designed to relieve the heavy burdens on Italy and Greece. There followed hot on its heels (one week later), Council Decision (EU) 2015/1601, to like effect.
11. The second of the two reactive measures was considerably more ambitious. It was designed to relocate 120,000 third-country nationals claiming international protection. Most recently, the CJEU has ruled that this measure is in conformity with EU law³.
12. At around the same time an international accord of sorts, of uncertain legal status, was struck between EU and non-EU states (contained in a “Statement”). This had as its focus the Western Balkans route and strove to enhance inter-state co-operation and consultation.

The Litigation Experience of the UK Upper Tribunal

13. I turn to consider the role of the national judge. In a context where respect for the rule of law is one of the core principles of the EU and is duly seasoned by the common law traditions still so prevalent in the United Kingdom legal system, the United Kingdom Upper Tribunal (Immigration and Asylum Chamber), which is the final

² Article 2 TEU.

³ Slovak Republic and Hungary v Council of the European Union (Cases C-643/15 and C-647/15)

court of appeal in the vast majority of immigration and asylum cases (circa 98%), has become seized of a significant number of cases stimulated by the European refugee crisis.

14. These cases have concerned third country litigants, many of them Syrians, who have made their way to northern France (the majority) and Italy and Greece (a minority of cases). They have thrown up acutely challenging questions of law relating mainly to the interaction between the Dublin Regulation and Article 8 ECHR, together with the construction and application of the implementing Regulation⁴. They have also raised some equally challenging issues of practice and procedure: in particular efficacious case management, speedy judicial adjudication and (where appropriate) the formulation of practical and effective remedies.
15. The features common to many of the cases which have been considered by the UK Upper Tribunal to date are that the claimants are children or young adults with vulnerabilities who have travelled from a non-EU state through more than one EU Member State to Calais. In some, the claimants had not made any claim for international protection, with the result that the Dublin Regulation process had not begun to operate. The claimants were seeking reunification with a family member (or members) lawfully present in the United Kingdom, usually as a result of a grant of refugee status. They had recourse to judicial review proceedings in the United Kingdom in order to achieve their aim.
16. The coexistence of the Dublin Regulation and Convention rights requires a balancing exercise on the part of the court in certain contexts. Article 8 ECHR protects the right to respect for private and family life How to achieve harmony between Article 8 and the Dublin Regulation in cases where these two discrete regimes of international law

⁴ Commission Regulation (EU) 603(2013).

appear to pull in opposing directions and are, superficially at least, in conflict with each other?

17. The English Court of Appeal has devised a solution⁵. The Court's starting point was that there are two competing legal imperatives, namely (a) the vindication of the Dublin Regulation as a regime for the distribution at an inter-state level between Member States of responsibility for the determination of asylum claims and (b) the vindication of individual claims of right which might be denied by a rigorous enforcement of the Dublin Regime⁶. How to accommodate these two imperatives? The Court reasoned that the Dublin regime has a profound impact on the application of Article 8 ECHR. It cautioned that to view the Dublin Regime as establishing little more than a presumption of identification of the responsible Member State would undermine it critically. It concluded: "*An especially compelling case under Article 8 ECHR must be demonstrated in order to frustrate removal of the affected person following a Dublin decision*". This was endorsed in a later Court of Appeal decision⁷, which upheld the decision of the Upper Tribunal in all respects but one, in a case involving no Dublin Regulation process or decision.

18. In the first of these landmark cases, R (ZAT and Others) v Secretary of State for the Home Department⁸ the claimants advanced their challenge squarely under Article 8 ECHR. In ZAT and Others and the subsequent cases⁹ the target of the claimants' judicial review challenges was the Secretary of State's decision refusing to admit them immediately to the United Kingdom for the purpose of reunification with family members lawfully present here. The claimants were several unaccompanied Syrian teenagers, including one young adult suffering from acute mental disability.

⁵ See R (CK Afghanistan) v SSHD [2016] EWCA Civ 166.

⁶ *Ibid* at [31]

⁷ R (ZT Syria) v Secretary of State for the Home Department [2016] 1 WLR 4894 and [2016] EWCA Civ 810.

⁸ IJR [2016] UKUT 61 (IAC): now **ZT (Syria)**: see Note 7 above.

⁹ *Infra*.

19. The centrepiece of their legal challenge was Article 8 ECHR. The most significant feature of their cases was that none of them had engaged in any Dublin Regulation process involving the French authorities. Thus they had not sought to secure a “take charge” request by France of the United Kingdom.
20. By virtue of three Strasbourg decisions¹⁰, the claims of ZAT and Others had a solid juridical basis in a somewhat neglected area of the jurisprudence of the ECtHR. In all of these cases the Strasbourg Court emphasized the positive duties on the Member State in question.
21. The Government argued that the claimants were obliged to claim asylum in France and to engage fully with the French Dublin Regulation system. Only a “take charge” request by France could facilitate their entry to the United Kingdom. The Tribunal disagreed, deciding that the Government’s refusals to admit the claimants to the United Kingdom constituted a disproportionate interference with the right to respect for family life guaranteed to both the claimants and their family members on UK territory.
22. The touchstones which tipped the balance in favour of the claimants were the ages of the children concerned, their extreme vulnerability, the absence of any parent or parental figure in their lives, their parlous mental states, the sustained ordeals which each had suffered and the availability of an infinitely superior family life with their relatives in the United Kingdom. In short, the Article 8(2) proportionality balancing exercise was resolved in their favour.
23. The test which the Upper Tribunal formulated was that of whether the claimants had demonstrated a

¹⁰ Sen v The Netherlands and others.

disproportionate interference with their rights to respect for family life under Article 8 ECHR sufficient to avoid the full rigours of the Dublin Regulation procedures and mechanisms?¹¹[See Note 12¹²]. The Tribunal stated:

The Upper Tribunal recognized that the Dublin Regulation formed “*a major component of the overarching public interest engaged*” and constituted “*a potent factor in the proportionality balancing exercise*”.¹³ It described the Dublin Regulation as “*a material consideration of undeniable potency in the proportionality balancing exercise*”.¹⁴

24. The Tribunal made an Order requiring the United Kingdom to admit the claimants to its territory provided that the claimants first made formal applications for asylum under the Dublin Regulation in France.
25. The Court of Appeal favoured a more stringent test, one which gave even greater weight to the Dublin Regulation. It held that circumvention of the full rigours of the Dublin Regulation procedures via Article 8 ECHR would require an “*especially compelling case*” or “*very exceptional circumstances*”.¹⁵
26. Thus the Upper Tribunal of the United Kingdom has clearly recognised the paramountcy of the Dublin Regulation and, in so doing, has accorded primacy to EU law, while balancing this with Article 8 ECHR. The result is a compromise between these two separate systems of supranational law.

¹¹ At [54].

¹²

¹³ At [56].

¹⁴ At [52].

¹⁵ See Note 7 *supra*, echoing the linguistic formula in CK v Secretary of State for the Home Department [2016] EWCA Civ 166 at [31], per Laws LJ.

27. The litigious aftermath of the Upper Tribunal's decision in ZAT and Others has been interesting. A modest flurry of further comparable legal challenges materialised.
28. In yet another case, the claimant was a recognised refugee in the United Kingdom and the father of an unaccompanied 17 year old boy in Calais. One particular feature of this case was the ingredient of heavily delayed undetermined applications to the UK Government [the Entry Clearance Officer] by members of the family. All were Kuwaiti Bidoons and stateless.
29. As the jurisprudence of the Upper Tribunal in these Dublin Regulation/Article 8 ECHR cases developed, the vital importance of judicial remedies rapidly became apparent. This became a standout feature in succeeding cases, one of which was R (SA and AA) v Secretary of State for the Home Department.¹⁶
30. The Upper Tribunal allowed the challenge of SA and AA. The gravamen of its decision appears at [33]:

*“The centrepiece of the Applicants’ case is the psychiatric evidence. This evidence establishes beyond peradventure, that any further delay in family reunification for them could have the most appalling consequences for either or both of them. There is no more appalling consequence than the loss of their lives. I simply cannot countenance a judicial decision which would permit the continuance, rather than the abatement, of this stark and awful risk in circumstances where abatement can be achieved. It is this factor which ultimately tips the balance”*¹⁷

There was no appeal.

31. Under UK law where a claimant succeeds in judicial review proceedings, the question of remedy lies within the

¹⁶ IJR[2016] UKUT 507 (IAC).

¹⁷ At [33].

discretion of the court. The first question is whether any remedy should be granted at all. There is another related principle, namely that remedies should be practical and effective. The second question for the exercise of judicial discretion entails the selection of an appropriate remedy from the following menu: a quashing order, a mandatory order, a prohibitory order, a declaratory order and an award of damages. See, generally, “Family Reunification and Judicial Review Remedies in UTIAC”¹⁸.

32. In furtherance of the “practical and effective remedies” principle, the Upper Tribunal has, in the cases of all successful claimants, ordered the UK Government to admit the person/s concerned to its territory and to determine the asylum claim.
33. The more astute student of this stream of the Upper Tribunal’s jurisprudence will have noted the routine inclusion of “*liberty to apply*” in its orders. “
34. There are, of course, limits to the scope and operation of the “liberty to apply” provision. These have been considered most recently by the Upper Tribunal in AM and Others [No 2] v SSHD.¹⁹
35. One of the striking features of this particular case was the procedural context: the Upper Tribunal became actively involved when the claimants lodged an application for interim relief.²⁰
36. In the case of R (RSM) v Secretary of State for the Home Department²¹ the Upper Tribunal gave particular consideration to Article 17 of the Dublin Regulation and decided as follows:

¹⁸ JR, Vol 2017, page

¹⁹ (JR Remedies – Liberty to Apply – Scope) [2017] UKUT (IAC).

²⁰ In tandem with their application for permission to apply for judicial review.

²¹ (Unaccompanied Minors – Article 17 Dublin Regulation – remedies) [2017] UKUT 00124 (IAC).

- (i) Article 17 is an integral part of the Dublin Regime. The suggestion that the discretion which it confers is exercisable only where the family reunification criteria in Article 8 are not satisfied is misconceived.
 - (ii) Article 17 has a role in circumstances where one of the overarching values of the Dublin Regulations, namely expedition, is not being fulfilled in the procedures and systems of the host Member State.
37. The Upper Tribunal also had to consider the correct approach to the issue of the operation of the Dublin system in the host Member State. The UK Supreme Court had previously advocated a cautious approach. in R (EM Eritrea) v SSHD.²²
38. A new challenge confronted the Upper Tribunal in a recent group of judicial review challenges all arising out of negative admission decisions of the UK Government in the context of the *soi-disant* “expedited process” which was carried out in the aftermath of the demolition of the notorious “jungle” encampment in Calais. By its decision in R (AM) v SSHD²³. The Upper Tribunal held as follows:
- (i) The Dublin Regulation occupies the field to which it applies and operates as a measure of supreme EU law therein.
 - (ii) It is not open to a Member State to unilaterally and selectively disapply certain provisions of the Dublin Regulation and its sister implementing Commission Regulation as this is contrary to EU law.
 - (iii) The dilution and disapplication of the procedural fairness and kindred protections enshrined in the Dublin Regulations, the implementing Regulation,

²² [2014] AC 1321 at [64], per Lord Kerr, who cautioned that an intent examination of the avowed failings of another Member State’s system would lead to disarray.

²³ (Dublin – Unaccompanied Children – Procedural Safeguards) [2017] UKUT 00262 (IAC).

Article 8 ECHR and the common law were not justified on the grounds of expedition and humanitarian challenge.

The claimants succeeded and the primary remedy granted was an order requiring the Secretary of State to forthwith make all necessary and immediate arrangements for their transfer from France to the UK, using best endeavours at all times and not later than a specified date.

39. *En passant*, while most of the Upper Tribunal's decisions in these Dublin Regulation cases have involved unaccompanied vulnerable children/young adults situated in France, there is a slowly growing number of cases from Italy and Greece.²⁴
40. Finally, the Upper Tribunal has had to consider, construe and apply one of the less visible measures of EU law in this field, namely the Commission Regulation implementing the Dublin Regulation.²⁵ The context was one in which the UK Government had rejected a "take charge" request by France.
41. **A footnote:** the Upper Tribunal has not yet had the opportunity to consider the question whether the decision of the Grand Chamber in Aranyose²⁶ can be applied to the field of asylum and immigration.

Conclusions

42. The ways in which the United Kingdom Upper Tribunal (Immigration and Asylum Chambers) has developed the law at the interface of the Dublin Regulation and Article 8

²⁴ RSM (*supra*) is an Italian case. Most recently AR – v – SSHD [JR/6014/2017] and FHG – v – SSHD [JR/6462/2017] are Greek and Italian cases respectively.

²⁵ Commission Regulation (EU) Number 118/2014. See also the Eurodac Measure – Regulation (EU) number 603/2013.

²⁶ Aranyosi and Caldaru, joined cases C-404/15 and C-659/15, an EAW case in which decisions to extradite the applicant from Germany to Hungary were challenged on the basis of Article 3 ECHR and Articles 1 and 4 of the EU Charter.

ECHR, in the context of the EU refugee crisis, may be thus summarized:

- (i) While the primacy of the Dublin Regulation as a measure of supreme EU law has been recognized, Article 8 ECHR is capable of taking precedence, exceptionally, in an acutely compelling case.
- (ii) Juridically, the Dublin Regulation belongs to the Article 8(2) ECHR proportionality balancing exercise, in which it must be weighed as a factor of considerable potency.
- (iii) In cases where it is decided that Article 8 ECHR will take precedence, the judicial remedy of ordering the EU Member State to admit the claimant to its territory is available.
- (i) Non-satisfaction of the family reunification criteria in Article 8 of Dublin is not a pre-condition of having recourse to Article 17.
- (ii) EU Member States are precluded from unilaterally and selectively disapplying certain provisions of the Dublin Regulation and its sister implementing Commission Regulation.
- (iii) Successive “take charge” requests under Dublin are not precluded and all must be processed in accordance with EU law, and any relevant harmonious national law.
- (iv) A decision in response to a “take charge” request generates duties of reasonable enquiry, investigation and evidence gathering via both the Commission Regulation and Article 8 ECHR (and, in the United Kingdom, the common law).

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