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CASE LAW COMMENTARY

Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Czech Republic and Hungary*

On failed relocation and would-be Leviathans: Towards the New Pact on Migration and Asylum

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Abstract

This final act of the European saga on relocation is important in two respects. First, it makes clear that Article 72 TFEU is not a "Trojan horse" in the liberal stronghold of EU law: it does not allow Member States to select which rules of EU law to apply in the name of their prior Hobbesian mission. Second, the grounds of public policy/public order that a Member State could invoke to oppose the relocation of an asylum seeker cannot be interpreted broadly: even though potential threats can be considered, a double standard of protection between EU and non-EU citizens who are affected by national security measures does not seem to emerge. Moreover, the relocation experiment confirms the existence of an executive deficit of the EU, which the upcoming New Pact on Migration and Asylum should not overlook.

A. FACTS AND RULING

1. *At the origin of the dispute*

With the decisions 2015/1523 and 2015/1601 of September 2015, the EU Council introduced, on the basis of Article 78(3) TFEU, a provisional derogation from the rule of the Dublin III Regulation, which assigns responsibility for the examination of asylum claims to the Member State of first entry. The two relocation decisions were aimed at redistributing 160,000 asylum seekers from Italy and Greece to other Members States in what was considered the main EU measure of inter-state solidarity in the face of the refugee crisis. However, this first experiment of relocation has proven to be controversial and unsatisfactory.

Its controversial nature emerged soon after the approval of the second Council decision. Whereas the first decision (2015/1523 of 14 September) provided for the relocation of 40,000 asylum seekers without indicating national quotas and was adopted unanimously, the second decision (2015/1601 of 22 September) added 120,000 relocation pledges based on a quota system that was binding on each Member State. This helps to explain why it was approved by majority, with the opposition of the Czech Republic, Romania, the Slovak Republic and Hungary. Moreover, the latter two States, with the support of Poland, challenged the legality of the decision with an action for annulment, but the Court of Justice ("CJEU"), in its ruling of 6 September 2017, rejected their complaints and confirmed the validity of the second decision.

Following that ruling, the Commission speeded up the infringement procedure launched in June 2017. In December 2017, when the temporary relocation scheme had already expired, the Commission brought Poland, Hungary and the Czech Republic before the CJEU to ascertain their failure to comply with the two decisions. During the two-year duration of the scheme, the three States of the Visegrád Group had indeed ignored their obligations. But it would be misleading to assume that it was the reluctance of the three Visegrád countries to determine the partial failure of the relocation scheme. At the end of the two-year scheme, in fact, only four Member States had been fully compliant, while many others had made available fewer pledges than their planned quotas. Other reasons, pertaining to the overall limited administrative capacity of the Union, contribute to explain that failure. A too ambitious regulatory scheme, based on binding national quotas and/or an extensive use of individual coercive measures, can hardly be implemented in a satisfactory way on a continental scale. As it is suggested below (B.3), this is a lesson that the upcoming New Pact on Migration and Asylum should not neglect.

2. *The ruling*

The three resistant States defended the legitimacy of their behaviour by putting forward the following argument: the decisions on relocation could be disregarded insofar as they did not allow Member States to exercise their prerogatives on «the maintenance of law and order and the safeguarding of internal security» that Article 72 TFEU protects.

In addressing this argument, the CJEU had to clarify the scope of Article 72 TFEU, which constitutes one of the most ambiguous provisions of the Treaties on the Area of Freedom, Security and Justice. Can Article 72 TFEU – read together with Article 4(2) TEU, which considers the maintenance of public policy as one of the "essential functions of the State" – be

construed as an opting-out clause, allowing Member States to disapply EU law anytime it obstructs the exercise of their "Hobbesian" responsibilities? The negative answer provided by the Court, although convergent with the one suggested by the Advocate General ("AG") Sharpston, departs from it in a significant respect and deserves further attention (§ B.1).

Linked to the former argument is the interpretation offered by the Court of the public policy/public order (hereinafter, only "public policy") clause that, pursuant to Article 7(5) of both Council decisions, a Member State can invoke to oppose the relocation of a single asylum seeker when s/he is considered dangerous. This interpretation, although incomplete, marks an important step in EU case-law, as it attempts to bridge the gap between the liberal notion of public policy, traditionally applied to the realm of the freedom of movement of European citizens/workers, and a broader, more discretionary, understanding of that notion, which emerged in three recent cases concerning third-country nationals (§ B.2).

B. DISCUSSION

1. Article 72 TFEU: a "cherry-picking" clause?

According to the Visegrád States, pursuant to Article 72 TFEU, their responsibilities for maintaining public policy and safeguarding internal security would prevail over incompatible obligations arising from EU secondary legislation. In their view, the mentioned provision would act as a «conflict of laws rule», which would assert the primacy of Member States' "Hobbesian" prerogatives by allowing them to disapply any act adopted under Title V TFEU, when the exercise of *those* prerogatives could be compromised. In the case at hand, their refusal to apply the decisions on relocation would be justified precisely by the inadequacy of the security checks provided therein: an interpretation which would threaten both European cooperation on immigration and asylum and the uniform application of EU law in this area.

In her Opinion, however, AG Sharpston opposed the would-be Leviathans' view, claiming that Article 72 TFEU «most obviously serves to remind the EU legislature of the need to make appropriate provision, in any secondary legislation enacted under Title V, for Member States to be able to discharge those responsibilities», with the consequence that, «[w] ere the EU legislature to disregard that obligation when drafting, Article 72 TFEU would provide a clear basis for a Member State to bring an action for annulment» (§ 202). Therefore, Article 72 TFEU would not be «a conflict of laws rule», which establishes the priority of a Member State competence over EU secondary legislation, but, rather, «a rule of co-existence», which requires that also *that* State competence is exercised in compliance with Union law.

According to this reading, Article 72 TFEU would be a rule on European legislation aimed at ensuring that EU law foresees specific clauses to safeguard public policy functions and Member States' competence on internal security. Thus, it would be a parameter of constitutional legitimacy of EU secondary legislation, which would leave no room for derogation or non-application of EU norms by the Member States.

The interpretation of Article 72 TFEU proposed by the CJEU appears, on this point, different. The Luxembourg judges move from the premise that Article 72 TFEU is comparable to the

derogations with which the Treaties authorise Member States to adopt appropriate measures to ensure law and order on their territory. It follows – in accordance with the well-established European jurisprudence on freedom of movement – that derogatory State measures do not fall within an absolute reserve of State sovereignty, since «The recognition of the existence of such an exception (...) might impair the binding nature of European Union law and its uniform application» (§ 143). Therefore, a Member State wishing to invoke Article 72 TFEU in order to exercise its responsibilities in derogation of Union law cannot do so «unilaterally», but must act under the control of the European institutions, that is, by showing before the Court the legality and the proportionality of the derogation (§ 146-147).

As a result, both the AG and the CJEU reject the Leviathans' view that Article 72 TFEU is an opting-out clause. Yet, they reach this conclusion on the basis of divergent interpretations of Article 72 TFEU (a divergence that has already appeared in the doctrine: see D. Thym, §§ 26-27). Following the AG, Article 72 TFEU can be seen as a rule on the exercise of EU legislative powers: that is, as a norm which is exclusively addressed to the EU legislator, has no "conflictual" character and does not legitimise any "Hobbesian" claims of the Member States. According to the CJEU, by contrast, Article 72 TFEU can be understood as norm that is addressed also to the Member States and that may authorise them to derogate from EU secondary legislation, provided that their choice is not unilateral, but is legally consistent with the overarching principles of EU law and is, thus, subject to the scrutiny of the Court itself.

Although based on the brave assumption that Article 72 TFEU is equivalent to the public policy clauses limiting freedoms of movement, the latter hermeneutical option appears more balanced, insofar as it acknowledges the relevance of Member States' security-related concerns under Title V of the TFEU and, therefore, contributes to the definition of a more *inclusive* space of cooperation on immigration and asylum. This supranational space remains open also to the Member States who cherish their "Hobbesian" prerogatives (*i.e.* to the Visegrád Group), provided that those aspiring Leviathans learn how to translate their concerns into proportionate decisions, fully compliant with the European rule of law.

2. The Public Policy Clause: Equal for All?

In its consolidated jurisprudence on the public policy clause, which dates back to the *Bouchereau* case (1977), the CJEU has inferred from the *preventive* nature of the administrative measures (e.g. of expulsion) affecting a *fundamental liberty* (e.g. the freedom of movement of a European worker/citizen) a series of important standards of legality, now condensed in Article 27(2) of the "Free Movement" directive 2004/38/EC: *i)* the proportionality of the measure, resulting from the balancing of the State interest in maintaining public policy with the interest of the concerned individual to stay in the territory of the host State; *ii)* the incompatibility with EU law of any automatic expulsion related to previous criminal convictions and the exclusive reference to the overall conduct of the concerned person; *iii)* the relevance of such conduct only when it represents «a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society», without the possibility to rely on considerations of general prevention.

Not less importantly, in a series of ruling adopted in 2015 and 2016 (see *Zh. e O.*, *T.*, and *N.*),

the CJEU started to extend the same standards outside the realm of the freedom of movement, to the benefit of third-country nationals: according to this "territorial" approach, whenever the protection of a fundamental right in the territory of the EU is at stake, the same set of guarantees against the arbitrary use of administrative powers should apply, regardless of the nationality of the person concerned.

Since 2017, though, a different approach surfaced. In the realm of immigration, in fact, the CJEU upheld State measures adopted on grounds of public policy even if the threshold of «a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society», well-established in the area of the Free Movement Directive, was not met. This had occurred in three hypotheses, which concerned a third-country national who: *i)* was denied a visa on the ground of a suspect merely related to his profession and not to his actual conduct (*Fahimian* case); *ii)* was suspected of being the author of a serious crime and, hence, expelled after a short period of time spent in a Member State (*E.P. case*); *iii)* more problematically, had lived for a long time in a Member State, where he had family ties, and yet was automatically expelled on the ground of a previous conviction (*G.S. and V.G.*).

Although the first two cases appear compatible also with the traditional territorial paradigm, which affords the same level of protection (of a fundamental right) to anyone who has settled in the territory of the Union, all the three cases – and the latter in particular – point to the emergence of a double standard of protection from State preventive measures, depending on whether the relevant area is free movement or immigration. According to this citizenship-based approach, the level of protection would depend on whether the concerned person is an EU citizen or not. And it would be precisely the presence of Article 72 TFEU in Title V of the Treaty which «does point to a difference between public policy and security in free movement law and in immigration law» (Opinion of AG Szpunar in *Fahimian*, § 61).

Therefore, in dealing with the public policy clause embodied in Article 5(7) of the two relocation decisions, the CJEU had to face the following dilemma: in the words of AG Pitruzzella (see his Opinion in *G.S and V.G.*, §§ 49-50), «[w]e might regard grounds of public policy as concentric circles with the EU citizen at their centre; the further we move from that centre and from the fundamental status accorded to EU citizens, the wider the discretion accorded to Member States in the assessment of grounds of public policy. Alternatively, we might regard the discretion enjoyed by the Member States as being limited when it is exercised in the context of a restriction on a fundamental right».

Even though the ruling on relocation does not dissolve all doubts, it is not a surrender to a "Europeanized" nationalist vision, aimed at protecting more the freedoms of European citizens than the (same) freedoms of third-country nationals. It is true that, with regard to the «reasonable grounds» that Article 5(7) of the Council decisions envisages as a limit to relocation, the CJEU sets aside the stricter standard of Article 27 of the Free Movement Directive and concedes that the concept of public order «must be interpreted more broadly than it is in the case-law in relation to persons enjoying the right of free of movement» and «may cover inter alia *potential* threats» (§ 157).

However, the possibility of considering potential threats (in addition to actual ones) is related, in the specific case, not to the status of a third-country citizen, but to a factual circumstance: since the asylum seeker, who recently arrived in the territory of the Union, is still outside the territory of the State of relocation when the security checks are carried out, it

is unlikely that the authorities of that State have sufficient information for a rigorous assessment of the threat that the individual may pose. Such an approach would be, thus, compatible with the "territorial" criterion that has been so far predominant.

Moreover, the Court adds two limits to the discretionary assessment of the States of relocation. First, the reasonable grounds for regarding an asylum seeker as a danger to national security or public order can be invoked «only if there is consistent, objective and specific evidence» and «in the light of an overall examination of all the circumstances of the individual case concerned» (§ 159). Second, the State of relocation can invoke those reasonable grounds «only following a case-by-case investigation of the danger actually or potentially represented by the applicant for international protection concerned for those interests» and, therefore, cannot «peremptorily invoking Article 72 TFEU in that procedure for the sole purposes of general prevention» (§ 160).

As a result, the CJEU managed to keep alive the essential part of the traditional system of protection condensed in Article 27 of Directive 2004/38/EC: the need for an individualized and fact-based approach in the exercise of State "Hobbesian" competences and the exclusion of any general-preventive approach. Therefore, a lower level of protection against public order measures seems to be circumscribed only to hypotheses concerning non-fundamental rights. This is certainly the case with the freedom of first entry, where, in the current state of public international law, the discretion of the States is broader, if not absolute; but it is also the case under examination, where the relevant individual position is not the (fundamental) right to international protection, but the migrant's mere expectation – not protected as such by EU or international law – of being relocated to a Member State other than that of first entry into the Union.

3. Towards the New Pact on Migration and Asylum: what future for the relocation?

The implementation of the two Council decisions on relocation of September 2015 has been unsatisfactory: at the end of the two-year scheme, only 34,700 people have been redistributed from Italy and Greece out of the 47,905 pledges actually made available by the other Member States (see COM(2019) 481 final, p. 1, and COM(2017) 669 final, Annex 6). As the analysis of the Commission's progress reports on relocation suggests, this failure may be considered as the combination of a number of problems that go beyond the mere political resistance of the Member States of the Visegrád Group. Among the factors impacting on the implementation of the relocation decisions, three, in particular, deserve a mention.

First, Greece and Italy experienced difficulties in developing an adequate system for identifying eligible asylum seekers. Serious problems soon emerged in the internal coordination between the central Dublin unit and the decentralized operation units. Lack of qualified resources, insufficient information and training of the relevant personnel, absence of operational guidelines, have further compromised the internal implementation process of the relocation mechanism. These difficulties have been only slowly and partially overcome, despite the insistence of the Commission.

Second, some States of relocation displayed a non-cooperative and distrustful attitude, which emerged in various respects. Some Member States, for example, requested to duplicate the security checks already carried out by the Greek and Italian authorities ahead

of the transfer of an eligible person. Such a request was rejected by Italy, and was only partially met later, during the second year of the programme, with the involvement of Europol officials in the checks. Other States, moreover, imposed additional conditions to the relocation, which were not foreseen by the Council decisions: *inter alia*, health checks, or the preference for specific type of applicants, considered as more "acceptable" over others (e.g. families rather than single adult men), as well as restrictions concerning their country of origin. Further difficulties have emerged at the operational level, with problems of communication and delays that have often been experienced in the practical organisation of transfers.

Finally, and perhaps most importantly, the process of implementation has been hindered by the high threshold of admissibility – an average protection recognition of at least 75% based on periodically updated Eurostat data – required for asylum seekers in order to be included in the relocation mechanism. This threshold restricted the circle of the beneficiaries of the mechanism to very few nationalities - initially three (Syrian, Eritrean and Iraqi), then only two (Syrian and Eritrean) - thus reducing the potential pool of eligible applicants. Germany and other Member States had imposed such a condition in order to avoid the difficult repatriation of asylum seekers eventually rejected after their relocation. As a result, Italy was able to relocate almost only Eritrean applicants, accounting for just 4% of the total number of asylum seekers therein registered between 2015 and 2017.

Overall, this first experiment of relocation reveals the existence of a serious executive deficit of the Union, which is both general and specific to the migration realm. The general deficit has a structural character and stems from the very diverse administrative resources and capacity of each Member State. This asymmetry affects their ability to coordinate, both internally and with the administrative counterparts of other Member States, and it is also related to the lack of mutual trust. However, neither the Commission nor the European agencies currently have the resources and competences to adequately support national units, or to settle inter-administrative disagreements and distrust. They equally lack the capacity to directly implement EU law in this realm, which is so intimately linked to State sovereign prerogatives.

A more specific deficit concerns the inefficiency of the EU return policy, which turns out to be a major obstacle to inter-state solidarity and burden-sharing in the area of asylum. According to EU law, asylum seekers should be repatriated following the refusal of their request for protection. However, repatriation is costly and crucially depends on the active cooperation of the States of origin, which are often reluctant to engage in such operations. Therefore, a systematic redistribution of asylum seekers, regardless of the success-rate of their applications for international protection, would imply that the States of relocation share not only the burden of reception and examination of their claims, but also the costs associated with the return of rejected asylum seekers and/or the management of their irregular presences. This explains why Germany and other non-frontline Member States not only wanted the mentioned threshold to be included in the relocation scheme, but now insist on the need to both prevent secondary movements and establish more selective border procedures in the context of the Dublin reform.

If the upcoming New Pact on Migration and Asylum will ignore this executive deficit of the Union and will not ease it through a "lighter" and less ambitious regulatory framework, the

EU asylum policy of tomorrow is likely to be equally unsustainable in terms of administrative implementation and, ultimately, ineffective in overcoming the current imbalances.

C. SUGGESTED READING

To read the case:

Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Czech Republic and Hungary*, ECLI:EU:C:2020:257

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Court of Justice of the European Union [GC], Judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council, ECLI:EU:C:2017:631

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J. BORNEMANN, *Coming to terms with the refugee relocation mechanism*, in *European Law Blog*, 14 April 2020

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F. MAIANI, *Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?*, in *eumigrationlawblog.eu*, 3 February 2016

D. THYM, *Legal Framework for Entry and Border Controls*, in K. Hailbronner e D. Thym (eds.), *EU Immigration and Asylum Law. Commentary*, Beck/Hart/Nomos, 2016

Other materials:

Opinion of Advocate General Sharpston, delivered on 31 October 2019, in Cases C-715/17 *Commission v. Poland*, C-718/17 *Commission v. Hungary* and C-719/17 *Commission v. Czech Republic*, ECLI:EU:C:2019:917

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