



Analysis

A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers

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How should the EU deal with the perceived ‘migrant/refugee crisis’? It has done a number of things, but back in September 2015, when the numbers of arrivals were peaking, it did something truly remarkable – requiring Member States to relocate 160,000 asylum-seekers from the ‘frontline’ states of Italy and Greece, which were bearing most of the burden of new arrivals.

In fact, this took the form of two separate decisions, as I [discussed in detail](#) at the time. The [first decision](#) was relatively uncontroversial, since it concerned only 40,000 people and Member States had agreed to admit them by consensus. But the [second decision](#), concerning the other 120,000 people, was adopted against the objection of several Member States and set out mandatory quotas for admission. This led to legal action by Slovakia and Hungary to challenge this decision before the ECJ (see discussion of the Slovak challenge [here](#)).

This week, the ECJ [ruled against](#) this legal challenge, following soon after the [opinion](#) of its Advocate-General, who took the same view. As we shall see, this case brings into sharp relief the conflict between effectiveness and legitimacy in EU law – and indeed between effectiveness as a legal principle and practical effect on the ground.

The Court’s judgment

The Court gathered the legal arguments into three main areas: the ‘legal base’ (ie whether the EU had the power to adopt the second relocation decision at all); the procedure followed to adopt the decision; and the substance of the decision, in particular as regards the principle of proportionality.

Legal base

The ‘legal base’ for the adoption of the decision was Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). This clause has been around since the Maastricht Treaty, being amended by the Amsterdam and Lisbon Treaties; but it had never been used before September 2015. It says that if ‘one or more Member States’ face ‘an emergency situation characterised by a sudden inflow’ of non-EU citizens, the Council (Member States’ interior ministers) may ‘adopt provisional measures’ to benefit those Member States, on a proposal from the Commission after consulting the European Parliament (EP). The default rule of qualified majority voting in the Council implicitly applies. So do the opt-outs for the UK, Ireland and Denmark.

First of all, the Court rejected the argument that the relocation decision was a 'legislative act', sticking to the strict definition of legislative acts set out in the Treaties. In short, the decision was not a legislative act because the Treaty doesn't define it as one. It followed from this that there was no obligation for the Council to consult national parliaments or to meet in public when adopting the decision.

Next, the Court ruled that it was possible for this non-legislative act to amend existing legislation, namely the [Dublin III Regulation](#) on responsibility for asylum-seekers. Taking a broad view of the power conferred by Article 78(3), 'provisional measures' could amend legislative acts for a limited period, as long as they do not amend legislation permanently. That was the case here, since the decision only applied for two years and related to a specified and limited number of people.

The Court also ruled that the decision was 'provisional' in that it only applied for two years. A shorter period might not have been enough time to address the crisis, and the previous limitation to six months had been removed when the Treaty was amended, suggesting an intention by Treaty drafters to give the EU more flexibility. While anyone who obtained refugee status would in principle keep that status after the decision ceased to apply, that did not mean the decision wasn't provisional, since obtaining long-term status is inherent in the idea of asylum policy. The amount of time it might take to adopt legislation by comparison was irrelevant.

Then the Court ruled that the influx of asylum-seekers was sufficiently large to count as 'sudden' for the purposes of Article 78(3), and the link between the influx of people and the emergency was strong enough to say that that emergency was 'characterised' by the influx.

Procedural issues

First, the Court rejected the argument that the decision breached the guidelines set by the European Council (Member States' leaders), which have a specific power to set such guidelines as regards Justice and Home Affairs (JHA) law. It pointed out that those guidelines only related to the first, uncontested, relocation decision, then went on to point out that the European Council could not constrain either the Commission's power to propose measures or the Council's power to adopt them by a qualified majority. As for the alleged breach of the EP's prerogatives, while it must be reconsulted if there is an essential change to the Commission's proposal – and the removal of Hungary from the list of beneficiaries was such an essential change – it had been informed of that essential amendment to the text before it voted.

Moreover, the Commission had consented informally to the Council's change to its text – which is a requirement for the Council to vote by qualified majority. Also, the Court took a flexible view of the rules on languages used in the Council. Only the main texts under consideration, not all amendments to them, need to be available in all EU languages.

Substantive issues

The Court rejected the arguments that the decision was not suitable to obtain its objectives. True, as [Commission reports](#) have pointed out, not many asylum-seekers have actually been relocated, but that could not be foreseen at the time – and that was implicitly partly the fault of the plaintiff Member States for not implementing the decision in practice. (The Advocate-General's opinion dismisses this "I killed my parents, give me sympathy as a poor orphan" line of argument more bluntly).

In the Court's view, the Council could not be limited to financial support alone and so had the power to set mandatory quotas against Member States' wishes. Also the Court claimed that the EU's existing [temporary protection Directive](#) (which was adopted in 2001 to deal with future crises, but never actually used) could not have worked as an alternative, since it only provided for

protection where asylum-seekers are located – so implicitly did not provide for relocations between member States.

Next, the Court rejected Hungary's argument that given the large numbers of asylum-seekers it was receiving, it should not have been allocated any more – given that Hungary had expressly argued that it did not want any relocation of asylum seekers *from* its territory, it was in effect estopped from arguing that it was overburdened that it could not *accept* any more of them. (The Opinion sets out the hilarious argument that while Hungary 'continues to form part of the Member States that support' Italy and Greece, it 'does so in a different way from the other Member States' by, er, not actually helping Italy and Greece at all.)

Furthermore, the Court rejected the argument that the EU rules violated the Geneva (Refugee) Convention by potentially forcing asylum seekers to leave the country where they were located, pointing out that this did not subject them to *refoulement* to an unsafe country but only changed which Member State their application for asylum would be considered by.

Finally, the Court rejected Poland's arguments as an intervener. In particular, the argument that Member States which are 'virtually ethnically homogeneous, like Poland' should not receive migrants was rejected, both because it infringed the principle of solidarity and because considering 'the ethnic origin of applicants for international protection' would be 'clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union', which guarantees non-discrimination on grounds of (among other things) ethnic origin.

Comments

The Court's judgment is suffused by the principle of solidarity between Member States on asylum and immigration matters, as set out in Article 80 TFEU (the Advocate-General's opinion, even more so). To that end, it gives the EU broad powers, and wide discretion to use them, to address the perceived crisis.

Most of the Court's arguments are convincing. It would indeed be hard to address a large influx of people without amending EU legislation temporarily, given the wide scope of that legislation and the broader context of establishing a 'common European asylum system'. But the Court is right to ensure that this power is not unlimited, by insisting that any emergency measure can only be temporary and limited in scope. This means that any future measure more ambitious than the 2015 decision might be challenged for going beyond the limits set out by the Court.

Note that the Court was not asked if Article 78(3) decisions can amend the *Treaties* temporarily, since the contested decision did not do so. The answer must surely be no, given the hierarchy of norms in EU law. So the general rules on EU asylum law set out in Article 78(1) TFEU – including the obligation to respect *non-refoulement*, the Geneva Convention, and other relevant (human rights) treaties – continue to apply when emergency measures are adopted. (This is implicitly confirmed by the Court's willingness to consider the validity of the decision in light of the Geneva Convention). Article 78(3) cannot therefore be a route to address perceived crises by means of (for instance) detentions, interceptions or expulsions which would violate that Convention or the *non-refoulement* rule, or which would otherwise breach human rights law – including the EU Charter of Rights, which has the 'same legal value' as the Treaties.

Nor was the Court asked about the separate [proposal to amend](#) the Dublin III Regulation to set up a permanent system for addressing emergencies. This has a different legal base than Article 78(3), so perhaps an outvoted Member State could re-run the arguments that failed in this week's judgments. However, the Advocate-General's opinion supports the legality of this proposal too.

The Court's rulings on the decision-making issues are also convincing, and are an implicit rebuke to those non-lawyers who argue that the European Council is the fount of all EU power. Then

again, given Member States' unwillingness to apply these decisions in practice, this saga confirms the argument that it is politically unrealistic for the EU to undertake very controversial 'high politics' policies – no matter how *legally* secure they are – without all participating Member States' consent.

Odd as it may seem, there's also a possible Brexit relevance to this judgment, since the EU's negotiation position takes the form of guidelines adopted by the European Council and then negotiation directives adopted by the Council, and the Council ultimately concludes the withdrawal agreement by qualified majority. In the event that a Member State is outvoted when concluding the withdrawal agreement and so challenges the agreement arguing that the reference to the European Council requires acting by consensus, this judgment suggests by analogy that it's the *Council's* power to act by a qualified majority vote which is legally decisive.

On the substance of the legal challenge, it's notable that the Court misinterpreted the temporary protection Directive, which *does* provide for potential transfers of beneficiaries between Member States. The real distinction between the two – as the Advocate-General's opinion points out – is that the Directive makes such transfers conditional on the voluntary consent of Member States, whereas the contested relocation decision sets out mandatory quotas. In any event, there's nothing in the decision to give priority to the 'emergency' route over the 'temporary protection' route: it's the Council's discretion which path (if any) to choose in the event of a perceived crisis.

It's also striking that the Court rejected Hungary's argument about the Geneva Convention, confirming judicially the view long implicit in EU legislation (but contested by some refugee advocates) that sending an asylum-seeker to another country which is sufficiently 'safe' to consider their application is not a breach of the Convention. (Cynics might suggest that Hungary advanced this argument in the hope that the ECJ would in fact reject it in these terms). Of course, this begs the question as to when a country is sufficiently 'safe' – an issue frequently litigated in the ECJ as regards other Member States but not (yet) as regards non-Member States.

That brings us to the Court's response to the Polish intervention. The Court didn't have to respond to that intervention, since it ruled that it was inadmissible. But it clearly wanted to, and did so in the strongest terms, ruling that Poland's argument would breach the principle of non-discrimination on grounds of ethnic origin. The Court's approach comes across as a kind of 'reverse dog whistle' – saying "Get lost, you're racist" as subtly as it could *to a Member State*. And it follows from the Court's ruling on this point that any kind of Trump-like 'Muslim ban' would violate EU law too, since the Charter equally bans religious discrimination.

But such arguments won't convince those with a frenzied obsession about 'white genocide', just as ruling that the quotas are legal won't convince Member States (and not just the plaintiff Member States in this case) to apply the relocation decision, which is about to expire anyway. As noted above, this saga shows the tension between legitimacy and effectiveness in EU law sharply: the Court defends the decision's *legal* legitimacy in light of the principle of effectiveness, but that decision's *political* legitimacy has been ebbing away since it was first adopted. That latter form of legitimacy was not bolstered by adopting the decision against the opposition of several Member States – and indeed the Court's ruling has now given them another stick with which to beat the EU in particular and 'scary Muslim migrants' more generally. Meanwhile the EU has taken a different course towards the perceived crisis, working with Turkey and now Libya to reduce the numbers who reach the EU to start with – although nothing will satisfy those who believe that 'none is too many'

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