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Secondary migration in the EU in the jurisprudence of the Court of Justice of the European Union (CJEU)

von
Lars Bay Larsen[1]

Referat des Arbeitskreises 8
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Dear colleagues, dear friends – old and new friends alike,

It is an honour for me to be in Würzburg to speak to you about the delicate subject of the secondary migration in the EU in the jurisprudence of the CJEU.

In the political discussions on international protection, which have largely dominated European media in recent years, the topic of 'secondary movements' occupies a significant place. Concerns or recurrent criticisms have thus been expressed regarding the movements of applicants for international protection from one Member State to another. Apart from a few famous examples, such as the well-known 'train of migrants', which the Court of Justice referred to in the Jafari case[2], it is, nowadays, a daily phenomenon within the European Union.

Concerns, in this respect, are nevertheless far from new. They were, in particular, already central to the conclusion of the Dublin Convention in 1990. In a context of the abolition of internal border controls, that convention thus sought to avoid both the emergence of refugees 'in orbit' and the lodging of applications for international protection in several Member States by a single third-country national. In fact, it was outsourced from a draft of the Schengen Convention (signed four days later).

Such concerns can be found today in the preamble to several EU acts relating to international protection. Paradoxically, the Dublin III Regulation[3] does not contain any direct reference to secondary movements. However, Recitals 13 to the Qualification Directive[4] and the

Procedures Directive[5] state that the approximation of rules on the recognition and content of international protection and on procedures relating to international protection should help to limit the secondary movements of applicants for international protection between Member States. In this context, as this topic is specific to the Common European Asylum System (CEAS), I shall focus my presentation on the case law of the Court of Justice relating to the CEAS.

Even with respect to the CEAS, one should note that 'secondary movements' are mentioned in the preambles of acts rather than in provisions laying down specific rules. The intent to limit secondary movements is therefore not directly reflected in obligations of general nature imposed on the Member States. It is, nevertheless, one of the underlying objectives of the CEAS.

This particular situation logically has an impact on the place granted to the regulation of secondary movements in the case law of the Court of Justice. It is consequently not possible to cite one or more judgments of the Court of Justice relating solely or mainly to secondary movements.

However, the objective of limiting secondary movements is regularly cited by the Court of Justice as an element of reasoning. It is thus precisely the use of that objective by the Court of Justice that I shall address in my presentation.

With a view to present the relevant case law, I will first mention the case law relating to instruments for the 'direct management' of movements of applicants for international protection, namely the Dublin Regulations (I).

Secondly, I shall look into the way other acts of the CEAS have also been interpreted in order to minimise the secondary movements of such applicants (II).

I. Direct management of secondary movements: the Dublin system

a. The oldest, but arguably also the clearest, examples of the Court of Justice's consideration of the objective of preventing secondary movements relate to the application of the Dublin Regulations.

The first reference to the risk of secondary movements appeared, if I am not mistaken, in the ***Mirza***-judgment[6]. In that case, the Court of Justice was called upon to determine, whether it was possible, after a 'Dublin transfer', to send the applicant concerned to a safe third country, without examining his application for international protection. The relevant provision could have possibly been read as requiring the application to be examined after such a transfer. However, the Court of Justice reached the opposite conclusion. It justified its

choice by stating that, otherwise, applicants would be encouraged to move from one Member State to another during the asylum procedure in order to avoid any risk of being sent to a safe third country.

Those who would have opted for such travels would, in any event, also be in a more favourable position than those, who would have remained in the Member State responsible.

The Court of Justice considered that such an outcome would run counter to the objective of preventing secondary movements.

The Court later referred to this objective also in the ***Ministero dell'Interno and Others*** (Common leaflet – Indirect refoulement)-judgment[7]. In this case, the Court of Justice was also called upon to determine the relationships between the risk of refoulement and the 'Dublin transfer'. The Court of Justice was asked to specify if a judge hearing an appeal against a transfer decision could take into account the existence of a risk of refoulement in the Member State responsible. The Court of Justice ruled out such a possibility, referring not only to the principle of mutual trust but also to the objective of preventing secondary movements.

The '***Mirza logic***' was subsequently developed in cases with no direct connection to the possible refoulement of the concerned applicant for international protection.

In this context, one should notably mention the ***Khir Amayry***-judgment[8]. In that case, the Court of Justice was asked to determine the starting point of the period within which to carry out the transfer in a situation, where the person concerned is detained.

Taken literally, the applicable provision could have been understood as meaning that, where the person concerned is detained, any transfer would be excluded after the expiry of a time limit of six weeks from the acceptance of the request to take charge or take back.

Following such a reading, the detention of an applicant for international protection would have thus automatically led to a reduction of the period within which to carry out the transfer, which would have gone from six months to six weeks from the date of this acceptance.

One of the main arguments used by the Court to reject that reading was the need to prevent secondary movements. Indeed, if the literal interpretation of the provision in question had been adopted, it would have been sufficient for the persons concerned to leave the Member State wishing to carry out the transfer for a few weeks and then to return to this Member State in order to avoid any possibility of detention. The literal interpretation of this provision was therefore rejected in order to preserve the effectiveness of the transfer mechanisms.

The objective of preventing secondary movements has subsequently been taken into account by the Court of Justice in order to clarify the very logic of the Dublin system. Indeed, in the ***H. and R.***-judgment[9] the Court of Justice specifically referred to this objective to rule

that the procedure for taking back an applicant for international protection did not require determining the Member State responsible for examining his application. This finding stems from the fact that a take back procedure normally takes place after a first process of determining the Member State responsible has come to an end.

Thus, if the take back procedure required to re-apply the rules governing the process of determining the Member State responsible, any applicant who would not be happy with the result of the first process of determining the Member State responsible would have the possibility to have a 'second chance' by changing Member State.

Such an applicant would even potentially have several 'new chances', since any change of Member State would entail relaunching the procedure as a whole. In this context, the objective of preventing secondary movements was invoked by the Court of Justice to support a simplified conception of take back procedures compared to take charge procedures, which, for their part, involve completing the process of determining the Member State responsible.

The risk of multiple secondary movements is also at the heart of three cases addressed in the ***Staatssecretaris van Justitie en Veiligheid*** (Time limit for Transfer – Multiple applications)-judgment[10]. These cases concerned the situation of applicants for international protection, who had moved around in three Member States, and who had lodged up to five applications for international protection in these Member States. These cases reflect precisely the type of situations, which the Dublin III Regulation seeks to avoid.

The Court of Justice stressed, in general terms, that the mechanisms provided for by the Dublin III Regulation apply in such situations, including those relating to the time limits to be complied with and to cases of transfer of responsibility.

However, the Court of Justice deemed important to avoid that the mere fact that an applicant for international protection leaves a Member State and then returns to it would allow him or her to 'exit' from the Dublin system. With that in mind, the Court of Justice held that, in such a situation, a transfer decision adopted during the first stay in a Member State remains enforceable during the second stay in that Member State.

b. The judgments I mentioned so far show, in my view, how the Court of Justice referred to the objective of preventing secondary movements in the context of interpreting the Dublin III Regulation. Still, it should be noted that this objective has been invoked before the Court of Justice more frequently than it has been used by the Court. In order to illustrate this point, I would like to draw your attention to certain developments, which took place in the case law of the Court of Justice relating to the Dublin system, even though they arguably entailed the risk of favouring certain secondary movements.

Firstly, the Court was called upon, in particular in ***N.S.***[11] and ***Jawo***[12], to consider the status of applicants for international protection falling, in principle, within the responsibility of a

Member State affected by systematic deficiencies in the reception conditions of applicants for international protection and in procedures for international protection. In practice, the cases leading to these judgments related to secondary movements, since the persons concerned had left the Member State responsible to go to another Member State. However, that travel was to a large extent forced, since those persons could not remain in the Member State responsible without risking serious infringements of their fundamental rights. In the absence of an allocation system provided for by the EU legislature, the Court of Justice therefore held, on the basis of the EU Charter, that transfers of responsibility should be accepted in such situations of systemic flaws. The risk of encouraging secondary movements, the reality of which is, moreover, undeniable, was not therefore deemed to be decisive in that particular situation.

Secondly, the case law of the Court of Justice on judicial review of transfer decisions provides another example in which the prevention of secondary movements has been unsuccessfully invoked before the Court. Under the Dublin II Regulation, the possibilities for judicial review of such decisions were very limited. Shortly after the entry into force of the Dublin III Regulation, the Court of Justice was called upon to assess whether it was the same under the Dublin III Regulation. The need to limit secondary movements was invoked to justify significant restrictions on the right of appeal. According to the supporters of this idea, an extended right of appeal against transfer decisions would facilitate secondary movements by allowing, in practice, the persons concerned to choose the Member State responsible for examining their application.

However, in the ***Ghezelbash***-judgment[13], the Court of Justice explicitly rejected that argument. It considered that allowing transfer decisions to be challenged did not favour *forum shopping*. The Court of Justice stressed, in that regard, that a court hearing an appeal against a transfer decision is called upon to verify whether the criteria for determining responsibility laid down by the EU legislature have been correctly applied, rather than entrusting responsibility for examining an asylum application to a Member State designated according to the applicant's wishes.

Moreover, while the ***Ghezelbash*** case concerned the application of the responsibility criteria, it stems from the ***Mengesteab***-judgment[14] that appeals may also aim to establish a transfer of responsibility resulting from the expiry of a time limit. In such a case, the person concerned would undeniably 'benefit' from travelling around the European Union, as it would no longer be possible, for procedural reasons, to return him or her to the Member State originally responsible. This consideration was nevertheless not considered by the Court of Justice to be decisive, especially since denying any possibility of appeal in such a scenario would risk rendering void the effectiveness of procedural time limits. Time limits, which have

been considered to be essential for ensuring compliance with the requirement of expeditiousness in international protection procedures.

Ultimately, the Court of Justice uses with caution, in the context of the Dublin system, the argument based on the risk of secondary movements. In particular, as it recently stated in the ***Bundesrepublik Deutschland*** (Child of refugees, born outside the host State)-judgment[15], the Court refuses to give precedence to the objective of preventing secondary movements over the clear wording of a provision of secondary EU law.

In this judgment, the Court thus acknowledged that requiring a written agreement of family members in order to apply a criterion designed to bring family together is likely to encourage irregular secondary movements. It nevertheless held that this consideration cannot be used to rule out an explicit choice made by the EU legislature.

More generally, it should be recalled that the Dublin III Regulation pursues various distinct objectives, which are, in part, contradictory. Therefore, admittedly, this Regulation aims to limit secondary movements. However, it also aims to guarantee the effectiveness of international protection procedures, notably taking into account the interests of applicants, and the expeditiousness of those procedures. The later objectives, namely effectiveness and speed may lead to take into account the current situation of the persons concerned, even if that situation follows secondary movements. The role of the Court of Justice is thus not to give precedence to the objective of preventing secondary movements but rather, as the Court highlighted in the ***Staatssecretaris van Justitie en Veiligheid*** (Time limit for Transfer – Multiple applications)-judgment[16], to identify the balance sought and found by the EU legislature between the various objectives underlying the Dublin system.

II. Indirect management of secondary movements in the CEAS

The Dublin system is at the 'core' of the regulation of secondary movements in the CEAS. However, it would be wrong, in my view, to think that the other acts forming the CEAS bear no relation to the issue of secondary movements.

As I have already indicated, the preambles of the Qualification Directive and of the Procedures Directive refer directly to the objective of preventing secondary movements. It is therefore unsurprising that this objective is also present in the case law of the Court of Justice on these directives. In this regard, two different aspects of this case law deserve, in my view, to be highlighted.

Firstly, the issue of secondary movements has been raised in relation to questions relating to the precise degree of harmonisation resulting from EU law on international protection. This brings us back to the logic expressed in Recitals 13 to the Qualification Directive and the Procedures Directive. It is no longer about directly regulating secondary movements by

‘managing’ their consequences, as is the case in the Dublin system. The idea is, in fact, to make secondary movements less attractive by approximating laws. In theory, if legislations on international protection were fully common, the differences in attractiveness between Member States would be considerably reduced. At the very least, they would result rather from economic or political factors than from legal ones.

In this context, it is easy to understand why the Court of Justice may have referred to the objective of preventing secondary movements in order to justify resorting to a harmonised solution in the field of international protection. The first example of this kind can be found in the ***Alheto***-judgment[17]. There, the Court of Justice referred to this objective in order to justify interpreting the notion of ‘full and ex nunc examination’ in a uniform manner throughout the Union. The significance of that statement should not, however, be exaggerated as, in any case, provisions of EU law which do not refer to national law must be interpreted uniformly. Reliance on the objective of preventing secondary movements therefore has, in the **Alheto-**judgment, at most, a confirmatory function.

The ***Bundesrepublik Deutschland*** (Concept of ‘serious and individual threat’)-judgment[18] provides a related - but undoubtedly more interesting - example. This case related to the adoption by the German courts of a quantitative approach of the notion of ‘serious and individual threat’ in the context of the subsidiary protection granted to victims of armed conflicts. In order to reject this approach, the Court of Justice put forward a number of reasons. Those reasons included the risk of encouraging secondary movements due to the use, by a Member State, of a particularly restrictive interpretation of that notion. The margin of discretion granted to the Member States was thereby reduced, in order to ensure an increased harmonisation designed, notably, to limit secondary movements.

However, this method is not systematically followed by the Court of Justice. The Court thus does not systematically promote a level of harmonisation as far reaching as possible in the area of international protection. On the contrary, the Court of Justice clearly asserted, notably in the ***Ghezelbash***-judgment[19], that the rules concerning applications for international protection have been subject to minimum harmonisation. More concretely, the Court repeatedly recalled that Member States can adopt more favourable rules than those provided for by EU law, for instance in the judgments ***Commissaire général aux réfugiés et aux apatrides*** (Family unity)[20] and ***Bundesrepublik Deutschland*** (Maintaining family unity)[21].

It is true that the Court of Justice has recognised certain limits to that possibility, in particular in the ***B and D***[22] and ***M’Bodj***[23]-judgments. However, those limits have not been set with a view to reducing differences between Member States, but in order to preserve the boundaries of international protection.

Thus, in the ***B and D***-judgment, the Court of Justice held that a Member State cannot decide to grant asylum to a person who must be deprived of that status pursuant to the exclusion clauses laid down in the Qualification Directive and corresponding to the Geneva Convention. That solution was justified by the fact that those clauses are intended to avoid asylum being granted to persons, who are 'unworthy' of it, a requirement from which the Member States cannot depart without 'degrading' international protection.

In the ***M'Bodj***-judgment, the Court of Justice considered that subsidiary protection cannot be granted on the ground of general shortcomings of the health system, relying on the fact that such deficiencies did not relate to a need for international protection. In these two cases, it was therefore not with a view to prevent secondary movements that further harmonisation was encouraged.

Secondly, beyond the question of the degree of harmonisation, the identification of the situations in which an application may be declared inadmissible has ties with the prevention of secondary movements. Indeed, once a Member State has had to accept to be the Member State responsible under the Dublin system, it may still take into account the prior journey of the applicant concerned when examining the admissibility of his application.

In the ***Minister for Justice and Equality*** (Application for international protection in Ireland)-judgment[24], the Court of Justice explicitly referred to the objective of preventing secondary movements in order to determine the scope of the rules relating to the admissibility of applications for international protection. This case, which is to my knowledge unique, nevertheless concerned a very particular situation, namely the Irish situation. This Member State is bound by the First Procedures Directive[25], but not by the Second Procedures Directive.

Accordingly, the provisions applicable to Ireland provide that an application made by a person, who has been granted asylum in another Member State, is inadmissible, but not the application made by a person, who has been granted subsidiary protection in another Member State.

Although the Court of Justice ultimately decided to exclude this form of 'splitting' of international protection, that solution is intended to apply only in Ireland. Moreover, faced with other situations of extension of cases of inadmissibility, the Court of Justice has always opted for text-based approach, as in the ***Ahmed***-order[26].

Conclusion

Following this analysis of the case law of the Court of Justice relating to the CEAS, it appears that this case law leaves quite some room for the objective of preventing secondary movements. That finding must not, however, lead to overestimating the significance of that objective. First, the risk of secondary movements is one argument amongst others, which is much

less cited than, for example, the requirement to respect fundamental rights. Second, the objective of preventing secondary movements does not systematically prevail over the other objectives underlying the CEAS. The Court of Justice is therefore required to take into account conflicting objectives. A solution is therefore very rarely justified only by reference to the need to limit secondary movements.

That being said, the Court of Justice's general approach is normally not to define itself the appropriate balance but to comply with the balance found by the EU legislature. As a result, the current balance resulting from the case law of the Court of Justice is necessarily intended to be reviewed in the context of the reform of the CEAS. It is well known that regulation of secondary movements is one of the main concerns that justified that reform. The conclusions to be drawn from this by the Court of Justice will therefore need to be followed carefully.

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I thank you for your attention and patience.

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[1] Vice-president of the Court of Justice of the European Union. All opinions expressed herein are personal to the author.
[2] Judgment of 26 July 2017, Jafari, C-646/16, EU:C:2017:586.
[3] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the envisages and engineering for determining the Member State responsibility for Examination an application for international protection in one of the Member States by a third country national or a staff member (OJ 2013 L 180, p. 31).
[4] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the classification of third country nationals or persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the increased protection (OJ 2011 L 337, p. 9).
[5] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and implementing international protection (OJ 2013 L 180, p. 60).
[6] Judgment of 17 March 2016, Mirza, C-695/15 PPU, EU:C:2016:188.
[7] Judgment of 30 November 2023, Ministero dell'Interno and Others (Common leaflet – Indirect refoulement), C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, EU:C:2023:934.
[8] Judgment of 13 September 2017, Khir Amayry, C-60/16, EU:C:2017:675.
[9] Judgment of 2 April 2019, H. and R., C-582/17 and C-583/17, EU:C:2019:280.
[10] Judgment of 12 January 2023, Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications), C-323/21 to C-325/21, EU:C:2023:4.
[11] Judgment of 21 December 2011, N.S. and Others, C-411/10 and C-493/10, EU:C:2011:865.
[12] Judgment of 19 March 2019, Jawo, C-163/17, EU:C:2019:218.
[13] Judgment of 7 June 2016, Ghezelbash, C-63/15, EU:C:2016:409.
[14] Judgment of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587.
[15] Judgment of 1 August 2022, Bundesrepublik Deutschland (Child of refugees, born outside the host State), C-720/20, EU:C:2022:603.
[16] Judgment of 12 January 2023, Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications), C-323/21 to C-325/21, EU:C:2023:4.
[17] Judgment of 25 July 2018, Alheto, C-585/16, EU:C:2018:584.
[18] Judgment of 10 June 2021, Bundesrepublik Deutschland (Concept of 'serious and individual threat'), C-901/19, EU:C:2021:472.
[19] C-63/15
[20] Judgment of 23 November 2023, Commissaire général aux réfugiés et aux apatrides (Family unity), C-374/22, EU:C:2023:902.

[21] Judgment of 9 November 2021, Bundesrepublik Deutschland (Maintaining family unity), C-91/20, EU:C:2021:898.

[22] Judgment of 9 November 2010, B and D, C-57/09 and C-101/09, EU:C:2010:661.

[23] Judgment of 18 December 2014, M'Bodj, C-542/13, EU:C:2014:2452.

[24] Judgment of 10 December 2020, Minister for Justice and Equality (Application for international protection in Ireland), C-616/19, EU:C:2020:1010.

[25] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and covering refugee status (OJ 2005 L 326, p. 13).

[26] Order of 5 April 2017, Ahmed, C-36/17, EU:C:2017:273.