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LOUVAIN MIGRATION CASE LAW COMMENTARY

Novembre 2022

Les Cahiers sont rédigés par l'EDEM, l'équipe Droits européens et migrations, constituée à l'UCLouvain au sein du CeDIE. Chaque mois, ils se proposent de présenter quelques arrêts récents d'une juridiction nationale ou internationale dans ses domaines d'études, à savoir la mise en œuvre du droit européen de l'asile et de l'immigration en droit belge. Les Cahiers contiennent des commentaires en français et en anglais.
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These Commentaries are written by the European Law and Migration team (EDEM), which is part of UCLouvain. Each month, they present recent judgments from national or International courts in the field of the implementation of European asylum and immigration law in Belgian law. The Commentaries are written in French and/or English.
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Collective Expulsions of Aliens – Poland – Hungary – Rule of Law – Refoulement.
With the judgments delivered in H.K. v. Hungary and T.Z. and Others v. Poland the European Court of Human Rights has found, once again, a violation of the prohibition of collective expulsions of aliens, established under Article 4, Protocol No. 4, of the European Convention on Human Rights. Such a breach of the Convention by Poland and Hungary does not appear to be purely episodic. Rather, as acknowledged by the Court itself, it represents a systemic practice, implemented according to recurring and precise patterns. Collective expulsions and denial of asylum procedures at the Polish and Hungarian borders, thus, have turned into a routine and a "normal" form of migration management.

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En complément au commentaire rédigé dans le Cahier précédent, il convient de faire référence à un nouvel arrêt de la Cour de cassation francophone sur la question du maintien de la jurisprudence « sans objet ». En vertu de cette ligne jurisprudentielle, le recours introduit par l'étranger, qu'il le soit devant les juridictions d'instruction ou la Cour de cassation, devient sans objet en cas de nouveau titre de détention pris par l'Administration, de rapatriement ou de remise en liberté de l'étranger durant le temps de l'examen du recours. Pêchant peut-être par excès d'optimisme, nous avions espéré, à l'aune de l'arrêt du 27 septembre 2022 rendu par la Cour de cassation néerlandophone, un abandon complet de la jurisprudence « sans objet » dans les trois hypothèses énoncées ci-dessus. Mais la Cour de cassation francophone fait de la résistance à cet égard et décide de maintenir sa jurisprudence « sans objet » à l'égard de l'étranger libéré ou rapatrié en cours de procédure.

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Les Cahiers de l'EDEM ont vu le jour dans le cadre du projet de recherche fonds européen pour les réfugiés – UCL.

3. UN Human Rights Committee, 21 July 2022, *Daniel Billy and Others v Australia* (Torres Strait Islanders Petition), Communication No. 3624/2019 – Between discomfort on how to address the future uninhabitability of certain territories and new avenues for climate justice. *Marie Courtoy* 11

Torres Strait Islanders – Climate Change – Uninhabitability – Small Island Developing States (SIDS) – Adaptation – Mitigation – Prevention – Anticipation – Relocation – Resettlement – Climate Justice – Common but Differentiated Responsibility (CBDR) – Indigenous – Loss and Damage.

When questioned by the Torres Strait Islanders, the United Nations Human Rights Committee finds that Australia's failure to adopt timely adequate adaptation measures violated their right to home, private and family life, and their right to enjoy their minority culture, but did not violate their right to life. The Committee considers that Australia still has time to take measures to preserve the authors' lives, including by relocating them, while the preservation of their home, private and family life, and the maintenance of their culture as a minority, cannot be conceived of anywhere but on their islands. The judgment sets the stage for a reflection on the protection of human rights in the face of the future uninhabitability of certain territories. Despite some limitations, most notably the large disregard for mitigation on the merits, the views offer additional arguments to peoples whose territories are being degraded, especially when they are indigenous and live on low-lying islands.

1. ECTHR, 22 SEPTEMBER 2022, *H.K. V. HUNGARY*, APPL. NO. 18531/17 & 13 OCTOBER 2022, *T.Z. AND OTHERS V. POLAND*, APPL. NO. 41764/17

You shall not pass! Poland and Hungary and the routine of collective expulsions at their borders

Francesco Luigi GATTA

Introduction

Within a few weeks in September and October 2022 the European Court of Human Rights ("ECtHR" or "the Court"), sitting as a Committee, delivered two judgments concerning systemic practices of collective expulsions by Poland and Hungary. Since the two cases present a number of similarities, from both a legal and factual point of view, it is worth examining them together.

A. Facts and Ruling

1. Facts

H.K. v. Hungary (Appl. No. 18531/27)

H.K. is an Iranian national who left his country of origin and arrived in Serbia in 2016. He then tried to enter Hungary and was put on the "waiting list" of the migrants being admitted as a daily quota to a transit zone located in the national territory. Being recorded as no. 102 on the list, he repeatedly tried to irregularly enter Hungary instead of waiting for his turn, but was summarily removed back to Serbia every time, without any decision or proceedings. In a further attempt, he eventually managed to enter the Hungarian territory, but was later apprehended by police officers, handcuffed, put on a van and escorted to the border, where he was expelled to Serbia without any information or documents.

T.Z. And Others v. Poland (Appl. No. 41764/17)

The applicants are a family of Russian nationals: mother, father and four children. Between August 2016 and March 2017, they repeatedly tried (on 22 occasions) to apply for asylum at the Polish-Belarusian border of Terespol. They clearly stated – also in writing – their intention to lodge an asylum application and pointed out the fear for their safety if returned to Belarus and, by way of chain *refoulement*, to Russia, where they suffered persecution due to their Chechen origin. Each time the applicants presented themselves at the border crossing point, they were turned away on the basis of administrative decisions stating that they did not have any documents authorizing their entry into Poland as they were "trying to emigrate for economic reasons" (§ 3). In June 2017, the family was eventually admitted into the Polish territory due to the ECtHR's interim measure, pursuant to Rule 39 of the Rules of the Court, ordering Poland not to remove the applicants to Belarus. The applicants finally applied for asylum, but the competent Polish authorities refused to grant international protection.

2. Complaints and Decisions of the Court

Applicants in both cases invoked a violation of the prohibition of collective expulsions of aliens (Article 4, Protocol No. 4, ECHR) and of the right to an effective remedy (Article 13 ECHR) in relation to their continuous pushbacks at the borders, in breach of procedural guarantees and in the absence of any remedies. In *T.Z. and Others v. Poland,* moreover, the family with children also invoked a violation of the prohibition of torture, inhuman and degrading treatment (Article 3 ECHR) due to their removal to Belarus coupled with the impossibility of lodging an asylum application. In both cases the Court unanimously declared a violation of all the invoked provisions of the Convention.

B. Discussion

1. Poland & Hungary: European "Champions" of Collective Expulsions

Both the applications brought against Poland and Hungary have been dealt with in the ECtHR by a Committee of three judges. Such a judicial formation is employed when a "case is considered to be a repetitive case, which raises an issue on which the Court has already ruled in a number of cases". Therefore, put differently: that Poland and Hungary expel aliens collectively at their borders is no longer new, it is now a fact. They simply do it, and they do it systematically.

Looking at the applications in which, so far, the Court has declared a violation of Article 4, Protocol No. 4, ECHR, Poland now takes the lead in the Council of Europe (five violations in total: *M.K. and Others*; *D.A. and Others*; *A.B. and Others*; *A.I. and Others*; and *T.Z. and Others*). Hungary (two violations) follows immediately after Italy and Russia (with three violations each).

The Polish-Hungarian duo is probably destined to consolidate its "leadership" in the field of collective expulsions, since many other additional applications are pending before the Court. And the Court is now procedurally treating these cases as repetitive ones, which are linked with violations "under well-established case-law".

In general, this Polish-Hungarian case-law is rather recent. It has been developing between 2020 and 2022, and appears as characterized by some consistent and recurring patterns. Applications have been lodged in the first half of 2017, and concern pushbacks performed during 2016-2017, that is, the period in which migratory flows were particularly intense along the so-called Balkan route. That was a period of legal-political tensions within the EU: the EU-Turkey Statement had just been implemented; the relocation mechanism had triggered many controversies, leading, in particular, to a "judicial saga" whose protagonists, Hungary and Poland, had fiercely – but unsuccessfully – challenged their solidarity obligations before the Court of Justice of the EU ("CJEU"). Both countries, moreover, were (and still are) experiencing an alarming phenomenon of Rule of law backsliding, with "reforms" and judicial decisions that have seriously compromised the domestic systems of rights and freedoms and that has been worsening ever since (see, for example, the recent Resolution of the European parliament of 15 September 2022 on "the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded").

Against this background, Poland and Hungary have implemented an openly unlawful policy of collective expulsions of migrants: asylum requests are not registered and applicants are removed to non-EU countries: in the former case towards Belarus (which is not even a member of the Council of Europe, nor a Party to the ECHR), and towards Serbia in the latter. This practice has been widely documented by numerous international observers and human rights actors. Such a list also includes, since 2020-2021, a growing number of judgments by the Court of Strasbourg.

a) Collective expulsions in Poland

More specifically, with regard to Poland, the case-law on collective expulsions mainly concerns Russian nationals of Chechen origin (often families with children), who have been systematically pushed back at the Polish-Belarusian border of Terespol. Violations of Article 4, Protocol No. 4, ECHR have been associated with those of Article 3, since the Polish border authorities not only expelled applicants without any procedural guarantees, but also refused to register asylum applications. And sometimes they did so even openly disregarding the ECtHR's interim measures ordered ex Rule 39 of the Rules of Court.

This line of case-law was inaugurated with the landmark judgment delivered in 2020 in the case *M.K. and Others v. Poland*. Here not only did the Court declare the first violation of the prohibition of collective expulsions with regard to Poland, but it also, and especially, certified "the existence of a systemic practice of misrepresenting the statements given by asylum-seekers … at the border

checkpoints between Poland and Belarus" (§ 174); further explaining that "the applicants' cases constituted an exemplification of a wider State policy of refusing entry to foreigners coming from Belarus" (§ 208); and thus concluding in the sense of "the existence of a wider State policy of not accepting for review applications for international protection and of returning individuals seeking such protection to Belarus" (§ 209).

In the subsequent judgment in *D.A. and Others v. Poland* delivered in 2021, the Court reiterated the same conclusions, unanimously finding a violation of the prohibition of collective expulsions. This time the applicants were Syrian nationals.

b) Collective expulsions in Hungary

As regards Hungary, the case-law on collective expulsions concerns the transit zones of Röszke and Tompa, located at the borders with Serbia. These are designed as "waiting areas" and filtering structures, where asylum seekers are detained and kept under control before either being admitted to the national territory (rarely) or being removed to Serbia (frequently). Hungarian transit zones have been initially addressed in a case-law concerning *refoulement* to Serbia and deprivation of liberty, being thus examined under Articles 3 and 5 ECHR. With regard to the latter profile, interestingly, both European courts (and both in the highest judicial formation of Grand Chamber) have addressed the issue: while the ECtHR in *Ilias and Ahmed v. Hungary* excluded the applicability of Article 5, thereby considering that the applicants kept in the transit zone were not in detention, the Court of Justice in *FMS and Others* ruled that the stay in the very same transit zone amounts to a deprivation of liberty.

As to Article 3 and the possibility of requesting asylum, the CJEU, in *Commission v. Hungary,* in ruling on the compatibility with EU Law of the border procedures applied in transit zones, has concluded in the sense of "a consistent and generalised administrative practice of … limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals … in practice were confronted with the virtual impossibility of making an application for international protection in Hungary" (§ 118). Similarly, the Commissioner for Human Rights of the Council of Europe has recently stressed that access to asylum and to any form of international protection in Hungary has become virtually impossible due to multiple measures taken by the government since 2015.

With regard to collective expulsions, the leading case is represented by *Shahzad v. Hungary,* decided in 2021, which marked the first violation of Article 4, Protocol No. 4 on the part of Hungary. The case concerned the denial of access to an asylum procedure and the forced removal of a Pakistani national by Hungarian police officers. In addition to the prohibition of collective expulsion, the ECtHR unanimously found a violation of the right to an effective remedy under Article 13 ECHR.

2. Collective expulsions under "well-established case-law"

In 2022 the Court found additional violations of the prohibition of collective expulsions. In *T.Z. and Others v. Poland* the violation is declared on the basis of "a well-established case-law". The reference is to the judgments delivered in *M.K. and Others* and *D.A. and Others*. What is relevant of those cases, in particular, is that the ECtHR had applied the test of the "own culpable conduct", previously coined by the Grand Chamber in *N.D. & N.T. v. Spain*: that is an exception, according to which, a collective expulsion by a State may be "excused" if the expelled aliens have tried to irregularly and violently enter the State's territory, without making use of available means of legal entry. In all the Polish cases, contrary to *N.D. & N.T.,* the Court specifically highlighted the applicant's irreprehensible conduct: they attempted to enter the territory in a legal manner, orderly presenting themselves at the official border checkpoint, without any clandestine or aggressive behavior, and subjecting themselves to the prescribed border checks and procedures. The exception of the own culpable conduct, thus, does not apply, and the collective expulsion is considered inexcusable.

In *H.K. v. Hungary,* similarly, the violation of Article 4, Protocol No. 4 is declared by essentially recalling the judgment in *Shahzad.* In that case, in particular, the Court focused on the issue of the *informal waiting list* in use at the transit zones at the Hungarian-Serbian borders and employed as a tool for establishing the order of entering therein. It found, in this respect, that such a list represented the only means of legal entry in Hungary, but that it could not have been considered to be effective in view of the limited access (daily quota) and lack of any formal procedure accompanied by appropriate safeguards. In *H.K. v. Hungary* the Court, once again, deals with the issue of the waiting list, highlighting a difference with *Shahzad*: while in the latter case the applicant had not been included in the list, in the former the applicant was put on the list and, after a few months, was actually admitted to the transit zone where he could later apply for asylum. Despite such a difference, however, significantly the Court does not change its approach as regards the accessibility of asylum procedures in Hungary and the collective nature of the applicant's expulsion: indeed, "the mere fact that he later managed to enter the transit zone could not make his removal from Hungary compliant with the Convention" (§ 12).

3. Concluding Remarks

Frontline Visegrad countries like Poland and Hungary provide very weak asylum and reception systems. Yet, a "surprising" manifestation of solidarity has been recently displayed towards (Ukrainian) refugees by countries that are typically and generally hostile towards (all other) refugees.

In Poland, collective expulsions have been in place for a few years now, being systematically implemented as a precise, recurring administrative state practice. The Polish state has rapidly become the first country in the Council of Europe for a number of violations of Article 4, Protocol No. 4 ECHR. And this trend will likely continue to increase.

In Hungary, the right to asylum basically exists only on paper. Transit zones represent a filtering mechanism that has proven to be incompatible with both EU law and the ECHR, as the respective courts have made clear. Additionally, violations of the prohibition of collective expulsions have been recently declared by the ECtHR, with a number of other "repetitive" cases that are pending in Strasbourg.

Collective expulsions may be regarded as especially emblematic violations of human rights and they represent the overall deterioration of the rule of law in Poland and Hungary well. Collective expulsions, indeed, characterize themselves for the lack of an individualized examination, which would enable the concerned person to highlight their specific vulnerabilities, protection needs and bring argumentation against their removal. With a collective expulsion, thus, the person is dehumanized, loses his or her individual dignity and becomes purely a number, part of an indefinite group of people that have to be removed from the State.

By systematically expelling migrants, Poland and Hungary blatantly disrespect the most basic guarantees of an effective protection of the human dignity, denying access to justice and to legal remedies. They are not alone in this: applications are equally pending before the ECtHR in cases of pushbacks allegedly performed in, among others, Croatia, Serbia and Latvia. Possible collective expulsions, moreover, have been taking place not only at the European external borders of the EU, but also within the EU itself, in the framework of bilateral agreements and return arrangements being disguised as Dublin procedures.

Collective expulsions, thus, may have different shapes and features, being often employed as standard forms of border control. What is tragically problematic is that, in too many EU countries, this is, for a while now, the normality.

C. Suggested Reading

To read the cases

ECtHR, 22 September 2022, *H.K. v. Hungary,* Appl. no. 18531/17.

ECtHR, 13 October 2022, *T.Z. and Others v. Poland,* Appl. no. 41764/17.

Case law

ECtHR, 23 July 2020, *M.K. and Others v. Poland,* Appl. nos. 40503/17, 42902/17 and 43643/17.

ECtHR, 8 July 2021, *D.A. and Others v. Poland*, Appl. no. 51246/17.

ECtHR, 30 June 2022, *A.B. and Others v. Poland,* Appl. No. 42907/17.

ECtHR, 30 June 2022, *A.I. and Others v. Poland,* Appl. No. 39028/17.

ECtHR, 8 July 2021, *Shahzad v. Hungary*, Appl. no. 12625/17.

Doctrine

U. Brandl, "A human right to seek refuge at Europe's external borders: The ECtHR adjusts its case law in M.K. vs Poland", *EU Migration Law Blog,* 11 September 2020.

J.-Y. Carlier, L. Leboeuf, "Collective Expulsion or not? Individualisation of Decision Making in Migration and Asylum Law", *EU Migration Law Blog,* 8 January 2018.

F.L. Gatta, "Systematic Push Back of "Well Behaving" Asylum Seekers at the Polish Border: M.K. and Others v. Poland" *Strasbourg Observers*, 7 October 2020.

F.L. Gatta, "The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case law of the European Court of Human Rights", in G.C. Bruno, F.M. Palombino, A. Di Stefano (eds.), *Migration Issues before International Courts and Tribunals*, Rome, 2019, pp. 119-146.

L. Majetschak, L. Riemer, "Poland's Power Play at its Borders Violates Fundamental Human Rights Law", *EJIL: Talk!*, 16 November 2021.

D. Schmalz, "Rights that are not Illusory. The ECtHR Rules on Pushbacks from Hungary", *Verfassungsblog*, 9 July 2021.

To cite this contribution: F.L. GATTA, "You shall not pass! Poland and Hungary and the routine of collective expulsions at their borders", *Cahiers de l'EDEM*, November 2022.

2. CASS., 9 NOVEMBRE 2022, R.G. N^{O} P.22.1208.F

La Cour de cassation sur sa jurisprudence « sans objet ».
Un pas en avant, un pas en arrière ou de côté

Noemi Desguin

A. Arrêt

L'affaire concerne un demandeur de protection internationale intercepté sur le territoire et faisant l'objet d'une décision de maintien afin d'identifier l'État membre responsable de sa demande de protection. Alors que la procédure tendant à obtenir sa libération est pendante devant les juridictions d'instruction, l'intéressé est libéré par l'Office des étrangers *proprio motu.* La Cour de cassation, statuant sur un pourvoi introduit avant la libération, était appelée à se pencher sur la question de savoir si le recours introduit par l'étranger conserve son objet alors que la détention avait pris fin. La Cour va répondre à cette question par un argumentaire divisé en deux volets.

Dans un premier temps, la Cour se penche sur l'hypothèse de titres de détention successifs adoptés à l'égard de l'étranger détenu. Jetant les bases pour ce qui va suivre, la Cour rappelle que le contrôle dévolu aux juridictions d'instruction en vertu de l'article 71 de la loi sur les étrangers vise le « titre actif », c'est-à-dire le titre de détention en vigueur au moment où la juridiction est appelée à statuer, qu'il se substitue ou non à un titre de détention antérieur. Ce postulat de base laisse déjà entrevoir une remise en cause de la jurisprudence « sans objet » en cas de titres de détention successifs rendant impossible pour l'étranger le contrôle de la légalité de sa détention.

Dans un deuxième temps, la Cour analyse l'hypothèse où l'étranger détenu est libéré en cours de procédure. La Cour énonce que la condition de célérité prévue à l'article 5.4 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après : « CEDH ») vise uniquement l'étranger détenu au moment où la juridiction d'instruction est tenue de statuer sur son recours. C'est ce que la Cour décrit comme le « lien nécessaire entre l'exigence d'un contrôle "à bref délai" de la légalité d'une privation de liberté et l'existence d'un titre actif de la rétention à contrôler ». Vu l'absence de ce lien inextricable en l'espèce, la Cour conclut au sans objet. Le simple fait que la Cour n'ait pas pu connaitre du pourvoi durant le délai de détention de l'intéressé n'est pas de nature à restituer au recours son objet. Fort heureusement, avant de parvenir à cette conclusion sans appel, la Cour considère que « ce que l'article 5.4 prohibe c'est l'impossibilité pour l'étranger, alors qu'il est administrativement détenu, de faire contrôler les titres en vertu desquels il est retenu ». L'impossibilité pour l'étranger d'obtenir un contrôle juridictionnel sur la détention par le biais d'une décision définitive en raison de la survenance d'un nouveau titre de privation de liberté entraine donc une violation de l'article 5.4 CEDH. La boucle est ainsi bouclée avec la première hypothèse.

B. Éclairage

Dans une certaine mesure, l'arrêt commenté s'inscrit dans le sillon tracé par la Cour dans son arrêt du 27 septembre dernier. Quoiqu'il ne s'agissait pas de la question soumise à son appréciation, la Cour de cassation semble vouloir définitivement enterrer sa jurisprudence « sans objet » dans l'hypothèse où l'étranger détenu fait l'objet d'un nouveau titre autonome remplaçant le précédent. Dans ce cas, l'impossibilité d'obtenir une décision définitive rendue par un organe juridictionnel ne saurait se justifier à l'aune des garanties qui découlent de l'article 5.4 CEDH. Ceci signifie très concrètement qu'une juridiction d'instruction ne pourrait plus déclarer comme irrecevable un recours introduit par un étranger détenu au motif qu'un nouveau titre de détention pris sur une autre base légale que le titre faisant initialement l'objet du recours ait été adopté par l'Office des étrangers. Il s'agit ici de l'hypothèse visée dans l'arrêt *Saqawat c. Belgique* rendu par la Cour européenne des

droits de l'homme dont la Cour de cassation semble à présent vouloir tirer les conséquences dans sa jurisprudence. Il s'agit donc d'une nouvelle avancée dans le combat pour rendre les recours ouverts aux étrangers détenus administrativement plus rapide et efficace.

En revanche, les juridictions d'instruction seraient encore autorisées à déclarer sans objet un recours introduit par un étranger entretemps libéré ou expulsé. C'est au terme d'une distinction quelque peu artificielle entre l'étranger détenu d'une part et l'étranger entretemps libéré ou rapatrié d'autre part que la Cour conclut de la sorte. Seul l'étranger encore détenu au moment où la juridiction statue, à l'exclusion des deux autres, bénéficierait de la garantie de célérité prévue à l'article 5.4 CEDH et serait, dès lors, en droit d'exiger une décision définitive sur la légalité de sa détention. À l'égard de l'étranger libéré, cela institue à notre estime une différence de traitement qui n'est pas légitime, notamment par rapport au droit à obtenir réparation du dommage : le constat d'une illégalité par la Cour de cassation (ou par une juridiction d'instruction) jouera nécessairement en faveur de l'établissement d'une faute dans le chef de l'État belge. On ne saurait davantage valider cette différence par rapport à l'étranger entretemps expulsé. L'exclure du bénéfice de la garantie de célérité pour la simple raison que celui-ci n'est plus présent sur le territoire ne nous semble pas répondre aux exigences de l'effectivité du recours prévu à l'article 5 CEDH tel qu'interprété par la Cour européenne des droits de l'homme. En effet, les juges de Strasbourg ont déjà estimé que si la garantie de célérité devient sans objet pour les besoins de l'article 5.4 une fois l'intéressé libéré, la garantie d'effectivité du contrôle continue de s'appliquer à partir de ce stade puisqu'un ancien détenu peut très bien avoir un intérêt légitime à ce qu'il soit statué sur la légalité de sa détention même après avoir été libéré (*Kováčik c. Slovaquie*, 2011, § 77 ; *Osmanović c. Croatie*, 2012, § 49). En particulier, statuer sur la question de la légalité peut avoir une incidence sur le « droit à réparation » garanti par l'article 5.5 de la CEDH (*S.T.S. c. Pays-Bas*, 2011, § 61). Contrairement à ce que laisse entendre la Cour de cassation dans l'arrêt commenté (point 3, al. 2), l'existence d'une procédure en réparation n'est pas de nature à pallier les défaillances de la procédure de recours contre le titre de détention, mais, les deux procédures ont vocation à exister parallèlement.

L'arrêt sous la loupe ici apporte une clarification et avancée qui mérite d'être saluée à propos de la situation où l'étranger n'est plus détenu en vertu de la décision faisant initialement l'objet du recours mais sur la base d'un autre titre autonome. La jurisprudence « sans objet » n'y trouverait plus un terrain fertile. Par contre, lorsque l'étranger est libéré en cours de procédure, les jurisprudences néerlandophone et francophone peinent à s'accorder. La Haute juridiction n'a pas encore dit son dernier mot à propos de cette jurisprudence « sans objet » et des rebondissements sont encore à prévoir. Affaire à suivre donc…

C. Pour aller plus loin

Lire l'arrêt : Cass., 9 novembre 2022, R.G. n° P.22.1208.F.

Jurisprudence

- Cour eur. D.H., 31 janvier 2012, *M.S. c. Belgique*, req. n° 50012/08 ;
- Cour eur. D.H., 11 avril 2013, *Firoz Muneer c. Belgique*, req. n° 56005/10 ;
- Cour eur. D.H., 14 novembre 2013, *M.D. c. Belgique*, req. n° 56028/10 ;
- Cour eur. D.H., 18 février 2020, *Makdoudi c. Belgique*, req. n° 12848/15.
- Cour eur. D.H., 30 juin 2020, *Saqawat c. Belgique*, req. n° 54962/18.
- Cass., 27 septembre 2022, R.G. n° P.22.1122.N.

Doctrine

- M. Beys et P. Baeyens, « Noot bij EHRM 30 juni 2020, nr. 54962/18, Muhammad Saqawat t. België – Lessen uit het arrst-Saqawat », *T. Vreemd.*, 2021/1, p. 85.
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3. UN HUMAN RIGHTS COMMITTEE, 21 JULY 2022, *DANIEL BILLY AND OTHERS V AUSTRALIA* (TORRES STRAIT ISLANDERS PETITION), COMMUNICATION NO. 3624/2019

Between discomfort on how to address the future uninhabitability of certain territories and new avenues for climate justice

Marie Courtoy

A. Facts and Ruling

Daniel Billy, Ted Billy, Nazareth Fauid, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warria are "nationals of Australia and residents of the Torres Strait region" (§ 1.1). They have submitted a communication to the UN Human Rights Committee (hereafter, "the Committee") in their own names and on behalf of some of their children. They claim violations of several articles of the ICCPR: Articles 6 (right to life), 17 (right to privacy, family and home) and 27 (right to culture, religion and language of minorities), as well as Article 24(1) with regard to the children.[1]

The authors "belong to the indigenous minority group of the Torres Strait Islands" (§ 2.1) and live specifically on low-lying islands there, which places them "among the most vulnerable populations to the impact of climate change" according to the Committee (§ 2.1). They explain that they are already suffering from the impact of climate change, but that the anticipated harm is expected to be even more severe, especially if adequate action is not taken.

Indeed, today we already see that the combination of extreme events, erosion and flooding are causing the loss of traditional territories and the destruction of houses and graveyards. Salt is infiltrating land used for agriculture. Rising temperature is causing ocean acidification and the decline of "nutritionally and culturally important marine species" (§ 2.3). The increasing unpredictability of weather events makes the transmission of traditional ecological knowledge more difficult.

As for the future, the Torres Strait Regional Authority, a government body, has noted in its Torres Strait Climate Change Strategy that "even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability" and that "large increases would result in several Torres Strait islands being completely inundated and uninhabitable".

1. Admissibility

Several admissibility hurdles have been raised by Australia. The first one concerns the exhaustion of domestic remedies, since the authors went directly to the Committee. The latter notes the authors' position that there are no available or effective domestic remedies based on their uncontested statement that the highest court in Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm (§ 2.9). The Committee also takes note of Australia's position that it is not required to provide domestic remedies since there is no breach of rights as recognized by the Covenant as properly understood (§ 6.6), and concludes that this issue cannot be dissociated from the merits of the case (§ 7.3).

Australia's argument that the authors' claims regarding violations of international climate change treaties are inadmissible *ratione materiae* is also rejected by the Committee, which considers that

[1] They also claim violation of Article 2, read alone or in conjunction with the aforementioned articles, but the Committee considers that its examination "would not be distinct from the examination of the violation of the authors' rights under article 6, 17, 24 (1) or 27 of the Covenant" (§ 7.4).

"the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant" (§ 7.5).

Australia also makes a usual argument in climate litigation: climate change "is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades that are unquestionably beyond [its] jurisdiction and control" (§ 6.7). In its response, the Committee distinguishes between adaptation measures, which must be taken as part of the positive obligations of States under the Covenant rights, and mitigation measures, for which it considers Australia's particular situation in this regard. The Committee notes that Australia "is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced" and "ranks high on world economic and human development indicators", and thus concludes that "the alleged actions and omissions fall under the State party's jurisdiction" (§ 7.8).

Lastly, Australia argues that the authors are not victims as "their allegations … represent possible impacts of climate change, but not existing or imminent violations of Covenant rights" (§ 6.1). The Committee begins by recalling its jurisprudence that a person can only claim to be a victim if he or she is actually affected, that is, when his or her rights have already been impaired or if the impairment is imminent. It then focuses on the fact that the authors live on small, low-lying islands and that their lives and cultures are highly dependent on natural resources, making them particularly vulnerable to climate change, and concludes that "the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility" (§ 7.10).

2. *Merits*

The Committee finds a violation of Articles 17 (right to privacy, family and home) and 27 (right to culture, religion and language of minorities), but not of Article 6 (right to life), and does not "deem it necessary to examine" Article 24 (children) since it has already found a violation of Articles 17 and 27.

With respect to Article 17, the Committee emphasizes that "the authors depend on fish, other marine resources, land crops, and trees for their subsistence and livelihoods, and depend on the health of their surrounding ecosystems for their own wellbeing", all of which "constitute components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory", and fall under the scope of protection of Article 17 (§ 8.10). Climate change adversely affects their way of life, jeopardizing their food resources, and damaging or threatening their villages, burial lands and graveyards, while "their most important cultural ceremonies are only meaningful if performed on native community lands" (§ 8.12). The authors therefore also "experience anxiety and distress" about upcoming impacts notably related to erosion (§ 8.12). The Committee notes that, although Australia has taken numerous adaptation measures including in the authors' territory, the State party has not explained the delay in seawall construction. The Committee therefore finds a violation of the Article.

The reasoning is similar for Article 27. The Committee begins by recalling that Article 27 "enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity" (§ 8.13). The Committee then takes note of "the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can only be performed on the islands" and considers that the threat faced by the authors could have been foreseen by Australia, but that the State party did not proceed with the seawall construction in time (§ 8.14). The Committee therefore finds a violation of Article 27 as Australia failed to "to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources" (§ 8.14).

On the other hand, the Committee does not find a violation of Article 6. The Committee recalls its general comment No. 36 which states that the right to life also includes the right "to enjoy a life with dignity", that it "extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life … even if such threats and situations do not result in the loss of life", and that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life" (§ 8.3). Yet the Committee considers that the authors "have not indicated that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity", and that their claim under Article 6 in fact "mainly relate to their ability to maintain their culture", namely Article 27 (§ 8.6).

Reiterating its jurisprudence in *Teitiota* (for a commentary, see here), the Committee recalls that "without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant" and that "given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized" (§ 8.7). However, it considers that "the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims" (§ 8.7).

B. Discussion

This is not a migration case as such. However, the concern about the future uninhabitability of the authors' territories underlies the whole case. One senses a certain discomfort on the part of the Committee to take on future issues, which mix mitigation and adaptation to climate change, with a rather ambiguous position with respect to possible relocations (1). On the other hand, the Committee accedes to the authors' request and recognizes climate justice grounds that open up new avenues for the inhabitants of territories that are being degraded by climate change, especially if they are indigenous and/or live on low-lying islands (2).

1. The Discomfort in Dealing with the Future Uninhabitability of Certain Territories

When asked about the human rights consequences of the future uninhabitability of certain territories due to climate change, the Committee must answer several new and delicate questions: whether people must be protected against future harm, whether possible relocations are compatible with human rights, and whether the protection of people living in degrading territories requires the combination of mitigation and adaptation measures.

- *Protecting Human Rights, a Preventive Obligation?*

Australia argues that it "would be perverse if the Covenant were to impose a duty or obligation on the State party – to ensure that climate change does not impair the authors' rights – that the State party could not hope to fulfil" (§ 6.7) and that it "would be both inappropriate and unfounded for the Committee to interpret the Covenant in such a way as to allow it to re-make the informed, good faith and difficult policy decisions of a democratically elected government that inherently involve compromises, trade-offs and the allocation of limited resources across the range of challenges to the full enjoyment of human rights" (§ 6.11). The argument that the Committee cannot "place an impossible burden on States" nor "displace reasonable policy choices made in good faith by States as they assess a range of threats and challenges … and decide how to distribute limited resources to address them" (§ 6.10) becomes even more compelling when it comes to future risks.

In their request, the authors approach from several fronts: they point to violations already suffered, present anxiety and distress due to future violations, imminent threats of violations, and violations to be expected if their territory becomes unviable. Interestingly, the authors also counter-argue that

> "the State party has already violated its duty to avert devastating and future irreversible impacts on rights protected by the Covenant, including impacts caused by *existing* greenhouse gas emissions. Protective measures must be initiated today. Climate change is a slow-onset process. Thus, a State party may violate its obligations before the worst effects occur" (§ 5.2, footnote omitted).

The Committee's response is in favor of the authors, but remains within conventional arguments. At the admissibility stage, when examining victim status, the Committee bases itself solely on past and present harm since it considers that "the risk of impairment of those rights, owing to alleged serious adverse impacts that have *already occurred* and *are ongoing*, is more than a theoretical possibility" (§ 7.10, emphasis added). On the merits, the Committee sits on the fence. It does not find the violation of Article 6 on the grounds that there is still time for the State party to act, even though it recognizes that "given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized" (§ 8.7). Yet it finds that Articles 17 and 27 have been violated in particular or even predominantly because the authors' way of life cannot be pursued outside their islands – thereby implying that it takes into account the potential future uninhabitability of the islands.

In an individual opinion, Committee member Carlos Gómez Martínez highlights this inconsistency: if the Committee considers itself "not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a [violation of Article 6]", he does not understand "how the Committee considers itself in a position to conclude that the adaptation measures taken by the State party are insufficient for the purposes of finding a violation of Articles 17 and 27" (Annex IV, § 5, translation by the author). He therefore concludes that the majority should have found no violation of Articles 17 and 27. However, he expresses an isolated opinion, since three of the five opinions conclude, on the contrary, that the majority should also have found a violation of Article 6. While Committee members Duncan Laki Muhumuza and Hernán Quezada argue in their individual opinions that the violation of Article 6 has been sufficiently substantiated, in their joint opinion Committee members Arif Bulkan, Marcia Kran and Vasilka Sancin criticize the use of the "real and foreseeable risk" standard that is borrowed from the dissimilar context of refugee cases.[2]

Verena Kahl therefore regrets the Committee's "reluctance to capture future harm, … [which] reveals the limits of preventive protection in contemporary human rights dogma". According to Sarah Joseph, "This demonstrates that, in the view of the UNHRC, climate change impacts are not yet so irreversible or unmanageable as to breach Article 6".

- *Relocation: Problem or Solution?*

The difference in the Committee's examination of Article 6, on the one hand, and Articles 17 and 27, on the other, is also surprising in another respect: the treatment of possible relocation. Under Article 6, the Committee rejects the authors' claim on the grounds that "the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take

[2] For a critique of the standard used in refugee law, see A. Anderson *et al.*, "Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection", *International & Comparative Law Quarterly*, vol. 68, no. 1, January 2019, pp. 111-140; B. Çali, C. Costello, S. Cunningham, "Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies", *German Law Journal*, vol. 21, no. 3, April 2020, pp. 355-384; M. Foster, J. McAdam, "Analysis of 'Imminence' in International Protection Claims: Teitiota v New Zealand and Beyond", *International and Comparative Law Quarterly*, vol. 71, no. 4, 1 August 2022, pp. 975-982.

affirmative measures to protect and, where necessary, relocate the alleged victims" (§ 8.7), thus considering relocation as a way of avoiding a violation of Article 6. On the other hand, under Articles 17 and 27, the Committee recognizes that the authors' cultural ceremonies can only be performed on the islands (§§ 8.12 and 8.14) and, even more tellingly, that "they could not practice their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life" (§ 8.14). It therefore concludes on a violation of Articles 17 and 27 due to Australia's failure to take adequate adaptation measures in time, in particular the delay in seawall construction, thereby implying that relocation is not an option.

Perhaps this is the difference: life can be protected by leaving the place of risk, but can we only ask for a right to life when it goes against everything that makes sense in our existence?[3] Under Article 6, reference is made to the *Teitiota* case. However, the situation was different: weighing the interests to stay and those to leave, the Kiribati national went to New Zealand of his own free will. It is a different matter when people still live in their territory and hope to live there in the future. Moreover, crucial to the Committee's views was the fact that Torres Strait Islanders have a special connection to their environment, described by the Committee as indigenous, and that they live on small islands from which the Committee infers that they "presumably offer scant opportunities for safe internal relocation" (§ 7.10) – as will be developed.

- *After the Focus on Mitigation, a Focus on Adaptation: Can the Two Objectives Be Reconciled?*

In any case, the previous considerations demonstrate the importance of continuing efforts in terms of climate change mitigation. Yet, the issue of mitigation is conspicuous by its absence from the Committee's consideration of the merits. Climate change adaptation was a latecomer to the international climate negotiations, lest it demonstrate pessimism about achieving mitigation goals, but is now gaining prominence as it is known that existing emissions are already creating harm. In the present views, though, the Committee approaches the authors' request almost exclusively through the lens of adaptation, largely disregarding mitigation. Protecting individuals who live in deteriorating territories, however, cannot be limited to curbing the symptoms without jointly addressing the cause. John Knox, the former UN Special Rapporteur on Human Rights and the Environment, called it a missed opportunity (see also, among many others, Christina Voigt).

He is not the only one to deplore the lack of consideration for mitigation, the individual opinions of two Committee members address it too. Committee member Duncan Laki Muhumza bases his argument for the violation of Article 6 inter alia on the fact that "the State Party has not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use" (Annex I, § 11). Committee member Gentian Zyberi devotes his entire opinion to mitigation. He reiterates the Paris Agreement's commitment to the highest possible ambition as part of the due diligence standard, which is higher for "States with significant total emissions or very high per capita emissions (whether these are past or current emissions), given the greater burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action" (Annex II, § 5) – as is the case with Australia. He also considers that the majority should have linked the violation of the authors' right to enjoy their minority culture under article 27 "more clearly to mitigation measures … – as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedy the effects [and i]f no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible" (Annex II, § 6).

[3] On the same questioning arising from my field research, see M. Courtoy, "'To Leave Is to Die': States' Use of Mobility in Anticipation of Land Uninhabitability", *German Law Journal*, vol. 23, no. 7, September 2022, pp. 992-1011.

On a positive note, it should be pointed out that while mitigation was sidelined on the merits, it passed the admissibility test in a very interesting and rather innovative way – as will be developed. Furthermore, Monica Feria-Tinta, who acted as counsel in the case, considers that the Committee's statement "that 'the State party is also under an obligation to take steps to prevent similar violations in the future' … falls within the scope of guarantees of non-repetition and it can only be achieved by adequate mitigation measures".

2. The Breakthrough of Climate Justice, Providing New Tools for Victims

Despite some limitations, the views are encouraging. This is the first international climate decision where the applicants have won on the merits (as noted by Verena Kahl and Maria Antonia Tigre). It also opens up several avenues for holding (wealthier and more responsible) States accountable, protecting the most vulnerable, and strengthening loss and damage claims. It is therefore in line with domestic decisions that show a growing concern for climate issues.

- *Common but Differentiated Responsibility*

As noted above, the issue of mitigation is not discussed on the merits. However, the reasoning behind its admissibility is worth considering:

> "With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory, and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee also notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction …" (§ 7.8)

The Committee not only goes beyond the drop in the ocean argument by establishing that each State has its share of responsibility, but also declares that Australia has a heightened responsibility due to its greater capacity and contribution to climate change. This reflects the principle of "common but differentiated responsibility" in its two dimensions. Indeed, while the principle is accepted as part of environmental law, its exact scope is still debated, with Southern States seeing the differentiation as being based on contribution to climate change, and Northern States on capacity[4]. The reference to one or the other dimension of the principle is not new in climate litigation[5], but invoking both dimensions in an international decision is undoubtedly innovative and contributes to strengthening a principle often decried for its poor impact.

- *Indigenous and Inhabitants of Low-lying Islands*

The fact that the inhabitants are indigenous and live on low-lying islands constantly comes up in the views. On the very first page, the Committee declares that "The indigenous people of the Torres Strait Islands, especially the authors who reside in low-lying islands, are among the most vulnerable populations to the impact of climate change" (§ 2.1). In assessing eligibility, the Committee dwells at length on the special status of Torres Strait Islanders. It observes that "the authors – as members of

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[4] S. Atapattu, C.G. Gonzalez, "The North–South Divide in International Environmental Law: Framing the Issues", in C.G. Gonzalez *et al.* (eds.), *International Environmental Law and the Global South*, Cambridge, Cambridge University Press, 2015, pp. 1-20; J. Dehm, "Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective", *Windsor Yearbook of Access to Justice*, vol. 33, no. 3, 2016, pp. 129-161.

[5] See notably the *Sacchi* decision, where the UN Committee on the Rights of the Child discusses Germany's contribution to climate change (§ 10.9) and makes explicit reference to the principle of common but differentiated responsibility (§ 10.10). However, the request did not pass the admissibility stage for non-exhaustion of domestic remedies. See also, at the domestic level, the *Urgenda* decision where the Hoge Raad discusses the emission reduction targets of developed countries.

peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts" and deems it uncontested that "the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them". It thus returns to the previously made conclusion that "the authors are among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts" (§ 7.10).

On the merits, not surprisingly, the fact that they are indigenous is not mentioned in the review of Article 6. The authors' argument, that "the health of their islands is closely tied to their own lives", is even used to say that their Article 6 claim is mostly related to their Article 27 claim, *i.e*. their ability to maintain their culture (§ 8.6). On the other hand, the finding of violation of Articles 17 and 27 is based primarily on the threat posed by climate change to the traditional indigenous way of life of the authors, which is threatened by the loss of traditional lands and resources, but also the prospect of having to abandon their homes. Highly exposed, on a limited territory, while their life is so strongly tied to their environment, this makes them striking victims of climate change, even more so given their insignificant contribution to the problem. This recognition of the need for increased attention to indigenous peoples and in particular the inhabitants of low-lying islands gives them an additional voice to be heard (as welcomed by Sarah Joseph, Verena Kahl and Maria Antonia Tigre).

- *Loss & Damage*

Lastly, it is worth taking a look at the remedies requested by the Committee. Beyond implementing adequate and timely remedies in consultation with the authors and taking steps to prevent similar violations in the future, the Committee also requests Australia to "provide adequate compensation, to the authors for the harm that they have suffered" (§ 11).

The question of compensation for loss and damage is a burning issue, which was at the heart of COP 27. Northern States indeed refuse to compensate – thus avoiding acknowledging their responsibility – but only agree to assist Southern States in financing mitigation and adaptation measures. At COP 27, they eventually agreed to "establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage" and "to establish a fund for responding to loss and damage" (Decision CMA.4, §§ 2-3). It remains to be seen if, how and when they will be concretely implemented. The Committee's present views further emphasize the need to compensate for the harm already done and still being done, giving an additional argument to the victims of climate change.

C. Suggested Reading

To read the case: UN Human Rights Committee, 21 July 2022, *Daniel Billy and Others v. Australia* (Torres Strait Islanders Petition), Communication No. 3624/2019.

Case law

UN Human Rights Committee, 24 October 2019, *Ioane Teitiota v. New Zealand*, Views on Communication No. 2728/2016.

United Nations Committee on the Rights of the Child, 22 September 2021, *Chiara Sacchi et al. v. Argentina*, Views on Communication No. 104/2019.

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M. A. Tigre, "United Nations Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction", *Climate Law Blog*, 27 September 2022.

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To cite this contribution: M. COURTOY, "Between discomfort on how to address the future uninhabitability of certain territories and new avenues for climate justice", *Cahiers de l'EDEM*, November 2022.