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LOUVAIN MIGRATION CASE LAW COMMENTARY

Octobre 2023

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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.

EDITORIAL – BRITAIN'S MIGRANT POLICY IN THE CROSSHAIRS

François VAN DER MENSBRUGGHE[*]

Would it be presumptuous to consider that the UK's Illegal Migration Bill, that became law on 20 July 2023, was bound for the courts...? The stated aim of this piece of legislation was to prevent and deter "unlawful" migration by those using unsafe routes to gain access to the UK. Primarily, this meant stopping people from crossing the Channel in small boats or other "irregular" means. The Act placed a legal duty on the Home Secretary to "detain and swiftly remove" such people upon their irregular arrival on British shores, and send them back to their home country or to a safe third country such as Rwanda (4,000 miles away). The asylum claims of these people would be declared "inadmissible" in the UK, i.e., their applications for sanctuary would not be processed by the Home Office (the duty to remove would not apply to unaccompanied children: under the circumstances, the Home Secretary would only be required to remove them when they turn 18). In comparison to other pieces of legislation, it is agreed that the Illegal Migration Bill passed Parliament quickly. It had been announced in December 2022 as a component of Prime Minister Rishi Sunak's pledge to "Stop the Boats." It was then laid before Parliament in March 2023 and debated for five months before receiving royal assent in July 2023. Notwithstanding, Sunak's migrant policy should not be seen as a pop-up scheme, thrust upon Westminster from one day to the next. The problem had been running through the political pipeline for quite some time in a throwback to the country's desire to "take back control" of Britain's borders as promised after Brexit. Under Boris Johnson (and his Home Secretary, Priti Patel), the UK government had signed a Migration and Economic Development Partnership—MEDP—with Rwanda in April 2022, in effect leaving the processing of asylum seekers' claims in the hands of Rwandan authorities and hence "outsourcing" migrant handling (as part of the deal, the UK had pledged to pay Rwanda £140m). Ten asylum seekers from Syria, Iraq, Iran, Vietnam, Sudan, and Albania, all of whom had arrived in the UK by irregular means, crossing the Channel in small boats, brought a claim against the policy before English courts. All the while, mid-June 2022, the government sought to carry out its new migrant policy by placing a number of asylum seekers with removal directions on a plane bound for Kigali. In a dramatic eleventh-hour ruling, the European Court of Human Rights prevented any of these removals from happening, an hour and a half before the flight was due to take off. The ECtHR stated it had taken particular account of evidence that asylum seekers transferred from the UK to Rwanda would not have access to fair and efficient procedures for the determination of their status. The decision came as an embarrassing hammer blow to Boris Johnson. In response, the Prime Minister threatened to withdraw the UK from the European Convention on Human Rights and accused lawyers that represented asylum seekers of aiding human traffickers. With respect to proceedings before British courts, the High Court of Justice, in a lengthy judgment delivered on 19 December 2022, rejected a challenge that the government's migration policy was unlawful. The decision nevertheless partially rebuked the government's policy in that the judges said the government had failed to consider the circumstances of the individuals it had tried to deport under the scheme. After a four-day hearing, the Court of Appeal reversed the lower court's decision and ruled by a majority that Rwanda was not a "safe third country" inasmuch as there was a real risk that asylum seekers sent to the East-African country would be wrongly returned to their home country, where they faced persecution or other inhumane treatment, while in fact they had a good claim for asylum (the Lord Chief Justice, Lord Burnett, dissented and sided with the UK government). Permitted to intervene at the hearing, the United Nations High Commissioner for Refugees ("UNHCR") forcefully argued that Rwanda had a record of human rights abuses towards refugees within its borders, including *refoulement*. Under the conditions, the refugee agency added, the Home Office would not be able to guarantee the safety of asylum seekers who

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were deported to Rwanda. While the judges of the Court of Appeal heard the UNHCR's arguments and deemed that the plans to send asylum seekers to Rwanda were unlawful, they also struck a cautious note when stressing that their decision "implies no view whatever about the political merits of the Rwanda policy" and said that they were unanimous that the Rwandan government's guarantees and assurances had been made "in good faith." The Court of Appeal granted the Secretary of State permission to appeal to the Supreme Court against its decision. The Supreme Court itself subsequently granted the claimants permission to cross-appeal in respect of different matters that had been rejected by the lower courts.

At the heart of the matter was determining whether there was a breach of British domestic legislation (most notably the 1993 Asylum and Immigration Appeals Act), the European Convention on Human Rights (Article 3), and other international conventions to which the UK was party: see the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the Refugee Convention") (Article 33(1)), the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ("UNCAT") (Article 3(1)), along with the United Nations International Covenant on Civil and Political Rights of 1966 ("ICCPR").

Suffice it to say that a five-strong panel of the Supreme Court focused primarily on the grounds concerning *refoulement*. In a unanimous judgment delivered on 15 November 2023, the Supreme Court devoted considerable attention to the principle of *non-refoulement* as given effect by the ECHR (most notably drawing on the ECtHR's rulings in *Soering v. United Kingdom* of 1989, and *MSS v. Belgium and Greece* of 2011). With the 1998 Human Rights Act giving domestic effect to the ECHR, there was no doubt for the Supreme Court justices that it was "unlawful […] for the Secretary of State to remove asylum seekers to countries where there are substantial grounds to believe that they would be at real risk of ill-treatment by reason of refoulement" (§ 28). The justices emphasized that British courts had to make their own assessment of whether there were substantial grounds for believing that there was a real risk of *refoulement*. Whilst pointing out that courts were "to attach importance to the government's view as to the value of assurances given by another country," they were not expected to demonstrate blind deference to the government's assurances (§ 52). This could be explained by the fact that "the government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement" (§ 55). The Supreme Court drew on the case law of the ECtHR to the effect that other factors should be taken into account, including "the general human rights situation in the receiving state, the receiving state's practices, and its record in abiding by similar assurances, whether given to the United Kingdom or to other states" (§ 55). Stated differently, it is an assessment of the evidence as a whole that counts and not simply the Minister's words on the assurances given by another country. In this respect, the Supreme Court devoted considerable time weighing Rwanda's record and relying on specific instances raised by the UNHCR, considered to be of "particular significance" (§ 64). Drawing these threads together, the Supreme Court considered the High Court should not have dismissed the evidence submitted to it by the UNHCR and it approved the Court of Appeal's interference with its conclusion. The Supreme Court itself undertook a review of the general human rights situation in Rwanda concluding it raised "serious questions as to its compliance with its international obligations" (including UNCAT and the ICCPR) (§ 76). The Supreme Court further delved into the adequacy of Rwanda's asylum system. In a scathing appraisal, the Court singled out the outcome of the asylum process that showed 100% rejection rates for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the UK would doubtless emanate. Referring to an assessment made in the Court of Appeal's judgment (*Underhill L.J.*, at § 156), all of this represented "a culture of, at best, insufficient appreciation by […] officials of Rwanda's obligations under the Refugee Convention, and at worst a deliberate disregard for those obligations" (§ 88; see also § 104). In a word, the overall assessment given by the Supreme Court was damning. The ruling effectively put an end to the idea of shipping

off migrants to Rwanda or any other third country where there was a real risk genuine refugees would be sent back to the countries they had fled.

The fallout from the Supreme Court's ruling was immediate, with ideas to address its effects spreading out in all directions. Some envisaged finding another third country for asylum seekers. Just days before the UK Supreme Court's judgment, Giorgia Meloni reached an agreement with Prime Minister Edi Rama of Albania to build centers near Tirana to house those reaching Italy's shores (accommodating up to 3,000 people). Just two days before the Supreme Court's judgment, a cabinet reshuffle led to the replacement of Suella Braverman as Home Secretary by James Cleverly. Hardly had the ruling been released that Cleverly embarked on the idea of entering into a new treaty with Rwanda. Prime Minister Rishi Sunak himself pushed ahead with the strange proposal of "disapplying" the Human Rights Act to enact emergency legislation in an effort to stave off legal challenges against his immigration policy. The idea would doubtless tear the Conservative party apart, leading an unknown but significant swathe of Tory MPs to vote with Labour to block any such change. Others, including in Rishi Sunak's cabinet, insist the UK should leave the 46-member European rights Convention altogether to give it a "free-hand" on migrants. The argument is specious. The Supreme Court in its ruling of 15 November was clear on this point. The legal basis for its decision was not just the ECHR but a host of other international conventions, most notably the 1951 Refugee Convention that the UK was among the first to sign. Leaving the European rights Convention would not make the difference. The argument is further dangerous. The European Convention on Human Rights is key to the functioning of the Good Friday Agreement that underpins the peace process in Northern Ireland. In response to this contribution's opening question as to whether it would be presumptuous to consider that the UK's Illegal Migration Bill was bound for the courts, the answer is a safe *No*. It would not be presumptuous. The courts were more likely than not to position themselves in these matters. The English poet John Donne (1572–1631) famously wrote, "No man is an island." Britain—an island—is embedded in a sea of international norms that it entered into of its own volition. Britain cannot go it alone. Its migrant policy and the plight of tens of thousands of asylum seekers depends on compliance with the rules it willingly agreed to. Thankfully, the Supreme Court highlighted its concern to preserve the UK's reputation as a champion of the international rule of law.

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On the Court of Appeal ruling, read A. OMBENI, "L'externalisation de l'asile: une menace à l'édifice de la protection internationale", *Cahiers de l'EDEM*, August 2023.

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Read also A. TUCKER, "The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority", *U.K. Const. L. Blog*, 22 November 2023.

On the web on the decision: read in the newspapers: https://www.theguardian.com/uk-news/2023/nov/15/supreme-court-rejects-rishi-sunak-plan-to-deport-asylum-seekers-to-rwanda.

To cite this commentary: F. VAN DER MENSBRUGGHE, "Britain's Migrant Policy in the Crosshairs", *Louvain Migration Case Law Commentaries*, November 2023.

1. ECTHR, 13 JULY 2023, *EMIN HUSEYNOV V. AZERBAIJAN (NO. 2)*, APPL. NO. 1/2016

The Arbitrary Deprivation of Citizenship under the Scrutiny of the European Court of Human Rights

Francesca RAIMONDO

A. Facts and Ruling

1. Facts of the Case

In the case *Emin Huseynov v. Azerbaijan (No. 2)*, the European Court of Human Rights ("ECtHR") recognized a violation of the right to private and family life, enshrined in Article 8 of the European Convention of Human Rights ("ECHR" or "the Convention"), by the Azerbaijani government since the fact that the applicant lost his citizenship and became statelessness gave rise to uncertainty about his legal status, which also had serious repercussions on his private life and social identity. Emin Huseynov, an independent journalist and president of the NGO Institute for Reporters' Freedom and Safety (IRFS) committed to defending the rights of journalists, had appealed to the ECtHR, complaining of several violations of the Convention since he had been forced to renounce his Azerbaijani citizenship.

Interestingly, Huseynov had already appealed to the ECtHR previously with a different complaint (*Emin Huseynov v. Azerbaijan*). Indeed, the journalist had been arrested while he was at a private party, in a café in the capital, organized by the "Che Guevara fan club" to celebrate the Argentine revolutionary's 80th birthday, where the police had irrupted, shortly after the party began. Huseynov identified himself, informing the police that he was a journalist while warning the press agencies (Turan Information Agency) of the police intervention. At the police station, the journalist was threatened and beaten to such an extent that he lost consciousness and was taken to hospital where he was diagnosed with traumatic brain injury and contusions up to the point that he was taken to the intensive care unit. The criminal proceedings were only initiated following the complaint made by the journalist, given that, previously, the investigator refused to institute criminal proceedings, as there was no evidence that Huseynov had been ill-treated by the police. After having exhausted all domestic remedies, the case was brought to the attention of the Strasbourg judges who found a violation of Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), Article 5 (right to liberty and security), considering that his arrest was arbitrary and unlawful, as well as Article 11 (freedom of assembly and association), since there was no legal basis to justify the police intervention in a private party as well as its dispersal.

In the case here commented, in July 2014 the Prosecutor General's Office initiated investigations concerning alleged irregularities in the financial activities of some Azerbaijani NGOs that had led to the freezing of their accounts, as well as the arrest and pre-trial detention of some human rights defenders and civil society activists (already examined by the ECtHR in *ex multis* *Rasul Jafarov v. Azerbaijan*).

Fearing that he would be arrested, Huseynov first tried to escape without success and then took refuge at the Swiss Embassy, where he spent several months before being transferred to Switzerland on 12 June 2015 on a plane of the Minister for Foreign Affairs of the Helvetic confederation, where he was granted asylum in October of the same year.

However, according to the government, on 4 June 2015, when he was already in the Swiss Embassy, the journalist filled in and submitted an application form to the President of the Republic of

Azerbaijan, stating that he wished to renounce his Azerbaijani citizenship.[1] Interestingly, the application form clearly stated that Huseynov had no citizenship other than the Azerbaijani one, the renunciation of which would automatically make him stateless. A few days later the tax debt was paid by the Swiss authorities and, as a result, the order for the applicant's arrest as well as the decision declaring the applicant a wanted person fell, but the State Migration Service sent the journalist a letter informing him that, following his application, the President of the Republic issued an order (No. 1269 of 10 June 2015) which ended his citizenship. The journalist was not provided with a copy of this order, and it was not submitted at the Strasbourg Court.

2. Decision of the ECtHR

The Court first rejected the State's objection that domestic remedies had not been exhausted, a precondition under Article 35(1) for a case to be heard by the ECtHR. The Court highlighted the three reasons why this preliminary objection had to be rejected. Firstly, the Court noted that under Azerbaijani law, normative legal acts of the legislative and the executive can be challenged before the Constitutional Court if they violate rights and freedoms. However, orders of the President of the Republic, as in the present case, do not fall within the category of the normative legal acts. Secondly, the order could not even be challenged in administrative court proceedings since the President of the Republic is not an administrative body within the meaning of the domestic law. Lastly, the Court stressed that Huseynov had never been notified of the Azerbaijani President's order, a prerequisite for becoming aware of the decision and, therefore, taking legal action.

With regard to the merits of the case, the Court observed that neither the Convention nor its Protocols enshrine the right to nationality and the right to renounce it. Nevertheless, questions concerning nationality may potentially infringe the Convention because of the impact they may have on the applicant's private life. Indeed, the Court recalls that the concept of private life, protected in Article 8 ECHR, is very broad and encompasses multiple aspects of a person's identity, at both physical and social levels. Therefore, in order to verify whether a breach of the conventions has actually occurred, it is necessary to follow what the Strasbourg judges define as the *consequence-based approach*, which implies two steps: to verify the consequences of the contested measure for the applicant and, then, determine whether the measure was arbitrary.

In Huseynov's case, it is undisputed that the loss of citizenship resulted in statelessness, creating uncertainty about his legal status, which also had serious repercussions on his social identity. Regarding the arbitrariness of the measure, the Court decided to examine the facts of the case, overcoming the opposing positions of the applicant and the government. Indeed, while Huseynov stated that he had been forced to renounce his nationality, the respondent government argued that the journalist had voluntarily done so. The Court did not consider it necessary to resolve this point to ascertain whether the measure was arbitrary. To this end, it was sufficient to establish whether the measure was provided for by the law, whether there were adequate procedural guarantees and, finally, whether the authorities had acted diligently and swiftly. The Court observed that the Azerbaijani nationality law provides that a person who is charged as an accused in criminal proceedings may not ask to renounce his or her nationality. Moreover, the renunciation of nationality had rendered the applicant stateless, in stark contrast to the United Nations Convention on the Reduction of Statelessness of 30 August 1961, to which Azerbaijan acceded in 1996 and which is an integral part of Azerbaijani law. Although Article 7(1)(a) of the 1961 UN Convention states that loss of nationality is permitted when a person voluntarily renounces his or her nationality according to

[1] For the present work, citizenship and nationality will be used interchangeably. The author acknowledges the differences between nationality and citizenship and the different context in which they can be used. For further details see GLOBALCIT Glossary.

the rules of his or her country, this is permitted if the person possesses or acquires another nationality.

All in all, the fact that the authorities had acted in complete disregard of the United Nations Convention on the Reduction of Statelessness, despite the fact that they were fully aware that Mr. Huseynov held no nationality other than Azerbaijani, together with the fact that the measure had not been accompanied by adequate procedural safeguards, led the Court to conclude that the measure was arbitrary and, therefore, constituted a violation of Article 8 ECHR.

Regarding the other violations reported by the applicant, the ECtHR examined only those related to Articles 34 and 38 ECHR, concluding that they were not infringed because the government did not prevent Mr. Huseynov from taking the matter to the Court nor from examining his case by failing to provide the requested documents.

The peculiarities of this case allow for a brief review of the principles affirmed by the ECtHR on citizenship, as well as a reflection on the growing trend of denationalization leading to statelessness.

B. Discussion

1. *Citizenship in Strasbourg: From the Incompatibility Ratione Materiae to the Impact on Private Life and Social Identity*

The right to nationality is not enshrined in the articles or protocols of the ECHR. This appears to be in contradiction with the trend inaugurated in the aftermath of WWII, whose atrocity, mass denaturalization, and consequent statelessness drove the will to affirm a human right to nationality at the international and regional levels. Among others, exemplary in this regard are Article 15 of the 1948 Universal Declaration of Human Rights, Article 20 of the American Convention on Human Rights, or Article 24(3) of the International Covenant on Civic and Political Rights.

In 1988, the Committee of Experts for the Development of Human Rights started to consider the possibility of including a right to nationality in the Convention. Although there were common patterns among the European States on the main questions concerning nationality, there was a lack of political will in including such an article or protocol due to two reasons. First, States were not ready to forgo their sovereignty and submit themselves to the supervision of the ECtHR. Secondly, scholars argued that it is possible to identify a trend in European countries (with the notable exception of Portugal) where citizenship is defined not as a fundamental right itself to be guaranteed in the Constitution, but as a legal prerequisite for enjoying certain rights and freedoms.

However, even though the ECTHR is prevented from directly adjudicating on matters related to nationality, it has developed a jurisprudence on it. Earlier complaints related to nationality have been systematically rejected by the ECtHR for being incompatible *ratione materiae* with the provisions of the Convention. Over time, however, the Court has changed its approach and began to review issues regarding citizenship. Indeed, citizenship can come into consideration if a refusal of the right could, under certain circumstances, violate another right enshrined in the Convention. In this regard, the 1997 European Convention on Nationality has played an important role. Article 16 of the Explanatory Report to the European Convention on Nationality stated that, "even if the ECHR and its protocols do not, except for Article 3 of Protocol No. 4 (prohibition on the expulsion of nationals), contain provisions directly addressing matters relating to nationality, certain provisions may also apply to matters related to nationality questions." Article 16 then lists the main ECHR articles that could come into consideration, namely Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), Article 6 (right to a fair and public hearing), Article 8 (right to family life), Article 14 (non-discrimination), and Article 4 of Protocol No. 4 (prohibition on the collective expulsion of aliens). Undoubtedly, among others, Articles 8 and 14 have played an important role in the "developing" jurisprudence of the ECtHR on citizenship.

Over the years, the Court has established some important principles with regard to nationality. First, the Court has always maintained that, under Article 19, it can only handle complaints concerning the Articles and Protocols of the Convention, while it cannot decide on other human rights instruments (e.g., Article 15 of the 1948 Universal Declaration of Human Rights). Secondly, when "nationality" comes into consideration, it must be defined considering the national law of the State concerned. Thirdly, differences in treatment based exclusively on nationality are compatible with the ECHR only if very strong reasons are put forward. Fourthly, the ECtHR established that an arbitrary denial of citizenship may, under certain circumstances, raise an issue under Article 8 because of the impact of such a denial on the private life of the individual. Conversely, in *Riener v. Bulgaria*, the Court held that it cannot exclude "that an *arbitrary refusal of a request to renounce citizenship* might in certain very exceptional circumstances raise an issue under Article 8 of the Convention if such a refusal has an impact on the individual's private life" (§ 154). Strasbourg's judges extended the same principle to the revocation of citizenship, since an arbitrary revocation can have the same or even a greater interference with a person's private and family life. Finally, in the recent case of *Genovese v. Malta*, the Court went a step further, affirming that "the denial of citizenship may raise an issue under Article 8 because of its impact on the private life on an individual, which concept is wide enough to embrace aspects of a person's social identity" (§ 33).

In the *Huseynov* case, recalling the above-mentioned case law, and particularly *Genovese v. Malta*, the Strasbourg judges highlighted how the loss of citizenship and consequent statelessness of the journalist had a significant impact on his physical and social identity which, together with the arbitrariness of the measure, violated Article 8 of the Convention.

2. Deprivation of Citizenship: Back with a Vengeance?

Citizenship deprivation constitutes a State power under which a person may be deprived of the status of citizen. According to international law, each State is sovereign in determining who its citizens are, consequently it holds both the power to establish the modalities regulating the acquisition of nationality, but also to identify the specific cases in which citizenship may be revoked.

This State power is apt to reveal a peculiar conception of citizenship, one that considers it as a genuine privilege, which does not seem to reconcile well with the contemporary idea of citizenship that emerged in the aftermath of the WWII, according to which citizenship is more than a privilege, it constitutes an inviolable right that has found express recognition in declarations and charters of rights at both international and regional levels. In addition, the denationalization has historically led to serious discrimination on political, ethnic, racial and gender grounds, and has marked a profound and clear gap between the principle according to which citizenship is rooted in the principle of equality, and the reality where significant distinctions are made.

Denationalization has mainly characterized despotic and totalitarian regimes, especially in the period between the two World Wars. More specifically, the Soviet Union had used this tool against opponents of the Bolshevik regime; the same happened in Germany and Italy during the period of the racial laws. In particular, Germany firstly deprived many naturalized subjects of their citizenship, especially Jews and political opponents (German Law of 14 July 1933 concerning Cancellation of Naturalizations and Deprivation of Nationality), then in 1941 revoked the citizenship of all German Jews living abroad (11th Ordinance by virtue of the Reich Citizenship Law of 25 November 1941 concerning Denationalization of Jews resident abroad). Likewise, in Italy, Jews who had acquired it through naturalization after 1 January 1919 were deprived of citizenship (Article 23 of the Royal Decree-Law No. 1728 of 17 November 1938-XVII, Provvedimenti per la difesa della razza italiana). Referring to the mass denationalization of this period Hannah Arendt affirmed: "once they [the affected persons] had left their homeland they remained homeless, once they had left their state,

they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth."

In essence, the revocation of citizenship is generally used by the State with the aim of severing the ties, both legal and symbolic, with a given person, so that he or she loses the rights and privileges of citizenship, as well as the duties and obligations deriving from it, and may more easily be removed or expelled from the territory of the State. Denationalization represents the culmination of the exercise of State power: it constitutes a sort of civil death for the individual who is completely excluded from the political community and, consequently, from the enjoyment of all the rights and privileges associated with the previous possession of citizenship.

Precisely in the light of the conception of citizenship as a human right, which emerged in the aftermath of the atrocities of WWII, and the fact that denationalization has mainly characterized despotic and totalitarian regimes, the use of the instrument of the revocation of citizenship has gradually declined, until it almost fell into disuse. In the last two decades, however, denationalization has regained a particular centrality—both practical and, above all, symbolic—since, in many Western countries, it has been used against individuals suspected or convicted of terrorism. Among others, the United Kingdom has amended the 1981 British Nationality Act in 2002, 2006 and 2014, progressively extending the power of the State to revoke citizenship. As of now, the State Secretary has the power to deprive citizenship if such deprivation is "conducive to the public good," without any prior court decision.

In the case at stake, the renunciation of citizenship by Mr. Huseynov goes a step further, making him stateless. Under Article 1 of the 1954 Convention relating to the Status of Stateless Persons, a stateless is a person "who is not considered as a national by any state under the operations of its law." Therefore, statelessness has both a strong symbolic impact—breaking the bond of belonging that binds the individual to a State—but also a strictly practical one. Indeed, the lack of identity documents has a significant impact on livelihoods because identity documents allow a person to freely enter and leave the territory of State, but they are also central with regard to employment, education, health care and other public services. Furthermore, statelessness can trigger forced displacement given that stateless people do not enjoy the same rights and duties as citizens and then may be victims of discrimination, human rights abuse and, in some cases, even persecution. Article 8 of the United Nations Convention on the Reduction of Statelessness of 30 August 1961, to which the Azerbaijani government acceded in 1996, clearly states that a person cannot be deprived of citizenship if denationalization ultimately leads to statelessness. Only one exception is contemplated, namely when citizenship has been acquired by misrepresentation or fraud. A similar provision is enshrined in the European Convention on Nationality which states: "[A] State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: […] (b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant." Needless to say, this is not the case of the deprivation of citizenship perpetrated in the *Huseynov* case.

3. Conclusion

The *Huseynov* case is a further example of a growing trend of arbitrary denationalization being used as a tool to restrict citizens' rights and freedoms. In the present case, denationalization is determined by the renunciation of citizenship due to state coercion, which in essence amounts to the arbitrary deprivation of citizenship. Denationalization is used by States with the aim of severing the ties, both legal and symbolic, with a given person, so that he or she loses the rights and privileges of citizenship, as well as the duties and obligations deriving from it, and may ultimately also be permanently removed from the territory of the State. Scholars have observed how denationalization represents

the culmination of the exercise of State power: it constitutes a kind of civil death for the individual who is completely excluded from the community of citizens. The ECtHR responds very severely on this point, first reaffirming the impact of citizenship on private life, also declined as social identity, and then highlighting the arbitrariness of the measure, ultimately detecting the violation of Article 8 of the Convention.

C. Suggested Reading

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To cite this contribution: F. RAIMONDO, "The Arbitrary Deprivation of Citizenship under the Scrutiny of the European Court of Human Rights", *Louvain Migration Case Law Commentaries,* November 2023.

2. ECTHR, 19 OCTOBER 2023, *A.B. V. ITALY*, *A.S. V. ITALY*, *M.A. V. ITALY*, APPL. NOS. 13755/18, 20860/20, 13110/18

The hotspot approach in Lampedusa under the spotlight of the ECHR: Unlawful detention as well as inhuman and degrading treatment

Eugénie DELVAL

A. Facts and Judgments

1. Facts

The three applicants are nationals of Tunisia who irregularly reached the Italian coast of Lampedusa aboard makeshift vessels for international protection purposes. They were transferred to the "Early Reception and Aid Centre" (*Centro di Soccorso e Prima Accoglienza*), on the Italian island of Lampedusa, identified as one of the Italian hotspots. In the case of *A.B.*, the applicant reached Italy in October 2017. He was then issued with a refusal-of-entry order and was eventually forcibly removed to Tunisia. A few months later, he again reached the coast of Lampedusa abroad a makeshift vessel and was again transferred to the Lampedusa hotspot where he expressed his intention to apply for international protection. The applicant however stated that it had not been possible to fill in an official application form. In the course of his two stays, the applicant remained in the Lampedusa hotspot for 22 days and 17 days, during which it was allegedly impossible to interact with any authority. In the case of *M.A.*, the applicant reached the Italian coast in January 2018 and submitted an asylum request on the day of his arrival to the Lampedusa hotspot. His request was however rejected as manifestly ill-founded. After a fire broke out at the hotspot, the applicant was transferred to a reception facility in Turin. He was then transferred back to the Lampedusa hotspot and remained there for more than two months. In the case of *A.S.*, the applicant reached Italy in October 2018 and expressed his wish to file an asylum application 12 days after his arrival in the Lampedusa hotspot. He was consequently transferred to a reception center and filed an asylum request there. His application was however rejected as manifestly ill-founded and he was served with an expulsion order. The applicant challenged the expulsion order which was ultimately revoked on procedural grounds.

In the three cases, the applicants complained of the poor material conditions of their stay in the hotspot of Lampedusa. Relying on Article 3 of the European Convention on Human Rights ("ECHR"), they pointed out that the center was overcrowded, that they were housed in poor hygiene conditions and that they had a limited access to hot and drinking water. Furthermore, the applicants claimed a violation of Article 5 ECHR. They complained that they had been deprived of their liberty during their stay in the hotspot in the absence of any clear and accessible legal basis and that it had therefore been impossible to challenge the lawfulness of their deprivation of liberty.

2. Judgments of the European Court of Human Rights

On 19 October 2023, the European Court of Human Rights ("ECtHR") issued its judgments in the three cases.

First, the Court found that the applicants were subjected to inhuman and degrading treatment during their stay in the Lampedusa hotspot, in violation of Article 3 ECHR. The Court in particular referred to the 2016-17 report of the National Guarantor of the rights of people detained or deprived of their liberty and the 2017 report on Identification and Expulsion Centers in Italy of the Senate of the Republic. These stated that the general conditions in the hotspot were rundown and dirty and pointed out the lack of services and space, with regard in particular to beds as the applicants had to sleep on mattresses outside the center, as well as the general poor hygiene and inadequacy of the

center (*A.B.*, § 27) The Court also referred to the 2020 report of the National Guarantor of the rights of people detained or deprived of their liberty attesting in addition that in 2019 in the Lampedusa hotspot there had only been two bathrooms to be shared by 40 people, and the rooms had been either too cold or too hot (*A.B.*, § 27; *A.S.*, § 20; *M.A.*, § 18). Also, the Court found that while the center was closed as from 13 March 2018 on account of a fire which had rendered the center unsuitable for living, the applicant in *M.A.* nonetheless had to remain in the hotspot during that time (*M.A.*, § 17).

Second, the ECtHR concluded in the three cases that there had been a violation of Article 5 ECHR. The Court noted that in the case of *M.A.*, the applicant remained there for more than two months without a clear and accessible legal basis and in the absence of a reasoned measure ordering his detention (§ 23) In the case of *A.S.*, the Court noted that the applicant had remained in the hotspot for 18 days without a clear and accessible legal basis for that placement and in the absence of any order giving reasons for his detention (§ 26). Likewise, in the case of *A.B.*, the Court stated that the applicant remained in the hotspot during two periods, one of 22 days and the other of 17 days, without a clear and accessible legal basis and in the absence of a reasoned measure ordering his detention (§ 32). In view of the lack of a clear and accessible legal basis for the detention, the Court failed to see how the authorities could have informed the applicants of legal reasons for their deprivation of liberty or provided them with sufficient information to enable them to challenge the grounds for their *de facto* detention before a court (*M.A.*, § 24, *A.S.*, § 27; *A.B.*, § 33). The Court therefore reached the conclusion that the applicants were arbitrarily deprived of their liberty, in breach of the first limb of Article 5(1)(f) ECHR which reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

B. Discussion

1. The "Hotspot Approach" in the European Union

The hotspot approach was introduced by the European Commission in the European Agenda on Migration in April 2015, at the height of the "migration crisis," as a means of providing frontline Member States faced with the arrival of large numbers of migrants with emergency assistance. The hotspot approach is thus presented as a key element in the EU's support for Member States on the external borders of the EU. Hotspots are facilities established for initial reception, identification, registration and fingerprinting of asylum seekers and migrants arriving in the EU by sea, and thereby serve to channel new arrivals into procedures such as international protection or return. The hotspot approach was also introduced to contribute to the implementation of the temporary emergency relocation mechanisms that were proposed by the Commission and adopted by the Council of the EU in September 2015: people in clear need of international protection would be identified in frontline EU Member States for relocation to other EU Member States where their asylum application would be processed. Hotspots imply coordination of European aid in areas under high migratory pressure, where the European Union Agency for Asylum, the European Border and Coast Guard Agency, Europol and Eurojust work on the ground with the authorities of frontline EU Member States to help them fulfill their obligations under EU law.

Italy and Greece are the first two EU Member States where the hotspot approach is currently being implemented. In Greece, five hotspots were established in reception and identification centers: on Lesvos, Chios, Samos, Leros and Kos. In Italy, there are currently four active hotspots: in Lampedusa,

Messina, Pozzallo and Taranto. Considering the commented judgments, the following developments focus primarily on the situation in the Italian hotspots. In particular the inhuman and degrading treatment (2) as well as the *de facto* unlawful detention (3) to which the migrants are subjected will be analyzed.

2. The Poor Living Conditions in Italian Hotspots: The Case of Lampedusa

Very quickly, the situation in the hotspots in Italy, including in Lampedusa, was met with fierce criticism by national and international human rights bodies and NGOs. For example, Amnesty International and the UN Committee against Torture reported an excessive use of force by police during fingerprinting of migrants. Cases of collective expulsions have also been reported. In general, Lampedusa has been known for many years for the inhuman living conditions in its hotspot center which is completely overcrowded (see for example here and here). Consequently, many people have to sleep on dirty mattresses outside the premises. The hotspot is repeatedly denounced as displaying inadequate hygienic and sanitary conditions, as lacking the necessities to guarantee the basic well-being of people, and as presenting systematic deficiencies in the provision of medical care (see for instance here, here, here and here). Notably, mid-March 2018, the hotspot was temporarily closed, following a wave of criticism at their operation and conditions. The National Guarantor of the rights of people detained or deprived of their liberty (together with many others, for instance here and here) has repeatedly reported that migrants are not allowed to leave the hotspot of Lampedusa even after they have been identified and identification photographs and fingerprints have been taken (see notably here and here). Migrants, including the most vulnerable ones, are *de facto* detained without any judicial assessment and without the possibility of appealing to a judicial authority. What was initially designed as a first reception facility for a very limited period of time eventually turned into a *de facto* detention center, not adequate at all in view of people's length of stay (a few weeks or months).

Considering those dire conditions, it comes as no surprise that the ECtHR ruled that Italy had violated Article 3 ECHR for subjecting migrants to inhuman and degrading treatment during their stay in the Lampedusa hotspot, not only in the three commented judgments, but also in the similar case of *J.A. and Others v. Italy* decided a few months earlier. The latter concerned four Tunisian nationals who attempted to travel from Tunisia to Italy in October 2017 by makeshift boat. When their boat ran into trouble, they were rescued by an Italian ship, which took them to Lampedusa. They remained in the hotspot of Lampedusa for ten days and were prevented from leaving. Along with other persons, the four were then taken to the airport where they were asked to sign documents that they allegedly did not understand, but which they later learned were refusal-of-entry orders, preventing them from returning to Italy. They were then forcibly removed to Tunisia (§§ 2–11). It is without any difficulty that the ECtHR decided that the applicants were subjected to inhuman and degrading treatment during their stay in the hotspot. The Court recalled in particular the conditions of hygiene, the lack of space, the features of accommodation, the lack of services, and the lack of adequacy of the center, referring to abundant international and national sources (§§ 60–65). The Court reached the same conclusion in the three commented judgments. The judgment of the Court in the case of *A.S. v. Italy* in particular shows that the situation in late 2019 remained similar.

In September 2023, nearly 7000 migrants arrived on the island of Lampedusa in 48 hours. The hotspot however only has a capacity of around 400 persons and the staff was completely overwhelmed. The local authorities were unable to provide food, water and shelter to everyone. This situation led to despair and vivid tensions. The President of the European Commission, Ursula von der Leyen, and the Commission responsible for migration, Ylva Johansson, presented a 10-point plan to reduce irregular migration and provide immediate EU assistance to the Italian authorities. This plan includes supporting the transfer of people out of Lampedusa, including to other EU Member States using the voluntary solidarity mechanism. Considering those circumstances and the strong reluctance of

certain EU Member States in taking migrants from Lampedusa (for example France, Poland, and Belgium), the living and housing conditions in the hotspot of Lampedusa are certainly not set to improve anytime soon and inhuman and degrading conditions will persist.

3. Vague Legal Framework Surrounding Migrants' Detention in the Hotspot of Lampedusa

As mentioned, there is no overarching EU legal framework for the hotspot approach (albeit regulated by international and regional human rights law). Contrary to the situation in Greece, no specific legislation was initially adopted in Italy to monitor the functioning of the hotspots. In its Grand Chamber judgment *Khlaifia and Others v. Italy*, the ECtHR reaffirmed that despite the particularities of migrants' detention centers, there can be no dilution of the fundamental safeguards around the prohibition of arbitrariness. In that case, the Court recalled and specified the general principles applying to the detention of migrants in reception centers. The 2011 case of *Khlaifia* concerned three Tunisian nationals who were intercepted at sea by Italian coast guards and transferred to the early reception center (CSPA) on the island of Lampedusa. After a violent revolt broke out in the center, leading to a fire that destroyed parts of it, the applicants were transferred to Palermo. The Italian authorities placed them in boats moored in the harbor, together with other migrants, where they stayed for several days. They were afterward deported to Tunisia. Among others, the ECtHR found a violation of Article 5 ECHR as for the detention in the Lampedusa center and aboard the ships. First, the Court found that Article 5 was indeed applicable to the case since, having regard to the restrictions imposed on the applicants by the authorities, in the center and on the ships, the applicants were genuinely deprived of their liberty. This regardless of the classification of the measure under domestic law (§§ 65–73). Next, the Court recalled that the deprivation of liberty must be "lawful." This means that a "procedure prescribed by law" must have been followed, with respect to both substantive and procedural rules. Article 5(1) ECHR therefore requires that any arrest or detention has a legal basis in domestic law (§ 91). The Court stressed that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied: it is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application (§ 92). In that case, the ECtHR found that the applicants' detention had no legal basis in Italian law and that, consequently, the Italian legal system did not provide them with a remedy whereby they could challenge the lawfulness of their detention. Article 5 ECHR had thus been violated (§§ 97–108).

It is precisely this requirement of a clear and accessible legal basis that still raises questions in the context of the detention of migrants in the hotspot of Lampedusa. In response to the European Agenda on Migration issued by the European Commission in 2015, the Italian Ministry of Interior issued a Roadmap on 28 September 2015, in which six hotspots were planned in Lampedusa, Trapani, Pozzallo, Taranto and Augusta, for pre-identification and registration purposes. No specific legislation or amendment was adopted initially. Alternatively, the Italian Interior Ministry, in cooperation with the European Commission, adopted in February 2016 standard operating procedures that apply in hotspot and non-hotspot areas where disembarkation takes place. Those standard procedures are not legislative acts. In 2017, the Consolidated Act on Immigration (TUI) was amended by Decree Law 13/2017, implemented by Law 46/2017. Following this amendment, Article 10*ter* TUI provided that foreigners apprehended for irregular crossing of the internal or external border or arrived in Italy after rescue at sea are directed to appropriate "crisis centers" and at first reception centers. There, they will be identified, registered and informed about the asylum procedure, the relocation program and voluntary return. Here, hotspots were thus specifically provided for in a legal text. Once the identification is complete, migrants who have expressed their willingness to apply for asylum in Italy are transferred to first-level reception facilities, where they have to wait for the decision on their application for international protection. Article 10*ter*(3) TUI also provides, following this amendment,

that repeated refusal to undergo fingerprinting at hotspots or on the national territory constitutes a criterion indicating a risk of absconding which may justify detention.

These legal amendments however did not change the arbitrariness of migrants' general detention in Lampedusa. In the above-mentioned case of *J.A. and Others v. Italy*, the Court focused on the applicants' claim that they had been arbitrarily deprived of their liberty. As said, the applicants were four Tunisian nationals who departed from their country of origin in October 2017 and, after their rescue at sea, were brought to the hotspot in Lampedusa. After undergoing identification procedures, they stayed at the center for ten days. The Court assessed whether the detention of the applicants was to be considered "lawful" in order to prevent their effecting an unauthorized entry into the country, in accordance with Article 5(1)(f) ECHR. The Court noted that the hotspot is a "closed area with bars, gates, and metal fences that migrants are not allowed to leave, even once they have been identified" (§ 92). However, the Court found that the Italian regulatory framework, in particular the newly adopted Decree Law 13/2017, does not provide clear instructions concerning the detention of migrants in these facilities (§ 90). The Court explained that "at the moment of migrants' attempt to be admitted into the territory of a Contracting Party, a limitation of their freedom of movement in a hotspot may be justified—*for a strictly necessary, limited period of time—for the purpose of identification, registration and interviewing* with a view, once their status has been clarified, to their possible transfer to other facilities" (§ 93, emphasis added). Yet, in the circumstances of the present case, the impossibility for the migrants to leave the closed area of the hotspot did not fall under any of these situations, and the maximum duration of their stay in the hotspot was not defined by law or regulation (§ 94). In respect of the lack of a clear and accessible legal basis for detention, the Court thus failed to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or have provided them with sufficient information or enabled them to challenge the grounds for their *de facto* detention before a court (§ 98). Thus, the Court confirmed that there had been a violation of Article 5 ECHR.

In its judgment, the Court added that "the nature and function of hotspots under the domestic law and EU regulatory framework may have changed considerably over time […] thus possibly not excluding deprivation of liberty" (§ 95). Be that as it may, the Court noted that at the time of the facts, the Italian regulatory framework did not allow for the use of the Lampedusa hotspot as a detention center for aliens. According to the ECtHR, "the organisation of the hotspots would thus have benefited from the intervention of the Italian legislature to clarify their nature as well as the substantive and procedural rights of the individuals staying therein" (§ 96). After 2017, some amendments were brought to the Italian legal framework. The Decree Law 113/2018 converted into Law 132/2018 amended Article 6(3*bis*) of the Italian Reception Decree. The new Article 6(3*bis*) provides that asylum seekers may be detained up to 30 days in "specific premises" in hotspots or first reception centers for the purpose of establishing their identity or nationality. If the determination or verification of identity or nationality is not possible in those premises, they can be transferred to a pre-removal detention center. Although the new Article 6(3*bis*) of the Reception Decree foresees the possibility of detention for identification purposes in specific places, such places have still not been identified by law. As those dedicated premises have never been identified, detention for identification purposes occurs *de facto* in hotspots. Indeed, the commented judgment of *A.S. v. Italy* shows that this newly amended legal framework still does not constitute a clear and accessible legal basis for the detention of migrants in the hotspot of Lampedusa. Decree Law 113/2018 was indeed adopted in September 2018 and the applicant in *A.S.* remained in the hotspot from 8 to 25 October 2019 without any possibility to leave. As already said, the ECtHR found the detention to be unlawful.

In 2020, the Decree Law 130/2020, converted into Law 173/2020, confirmed the aforementioned amendment made to Article 6(3*bis*) of the Reception Decree and therefore leaves a deficient regulatory framework in place: hotspots as such are not qualified as "detention facilities." While Article 10*ter* TUI constitutes a specific piece of legislation on hotspots, it does not explicitly mention

detention in those centers. Should one even consider that the identification purpose justifying potential detention is provided for in Article 6(3*bis*) of the Reception Decree, the other grounds allowing for detention of asylum seekers in hotspots (for instance, after identification has duly been carried out) remain unclear and are not clearly defined by law, nor are the exact maximum duration of detention, the possibility to extend it and the decision-making process leading to detention, as well as the modes of detention. In 2023, the Italian legislator introduced Decree Law 20/2023, converted into Law 50/2023. The Decree Law 20/2023 introduced a new hypothesis for the detention of asylum seekers in hotspots, through the new Article 6*bis* of the Reception Decree. Applicants can be detained within a hotspot during the border procedure for the sole purpose of ascertaining their right to access Italian territory. Detention may take place where the applicant has not presented a valid passport or other equivalent document, or does not provide for suitable financial guarantees. Finally, the last step of tendency towards a proliferation of detention was reached late September 2023 when the Italian government passed tougher measures to deter migrant arrivals. Among others, a ministerial decree of 14 September 2023 allows asylum seekers from safe third countries to be transferred and detained in dedicated closed centers if they cannot provide a financial guarantee of EUR 4,938.00.[1]

It remains to be seen whether this newly adopted framework—and in particular Decree Law 20/2023 converted into Law 50/2023—satisfies the principle of legal certainty under Article 5 ECHR. It suffices to recall that deprivation of liberty must follow a procedure prescribed by law under which clear substantive and procedural rules are defined. Sufficient reasons and information must be provided to the migrants deprived of their liberty to enable them to challenge the grounds of their detention before a judge. It is highly doubtful that the Italian legal framework satisfies these requirements. In any case, deprivation of liberty within the hotspot of Lampedusa must, in addition to the ECHR, comply with EU law. In particular, it follows from Article 8 of the EU Reception Conditions Directive that only when it "proves *necessary* and on the basis of an *individual assessment* of each case, Member States may detain an applicant" and this only "*if other less coercive alternative measures cannot be applied effectively*". Article 8 of the Directive lays out six grounds that may justify the detention of asylum applicants: (a) in order to determine or verify his or her identity or nationality; (b) in order to determine those elements on which the application for international protection is based, which could not be obtained in the absence of detention, in particular when there is a risk that the applicant might abscond; (c) in order to decide on the applicant's right to enter the territory; (d) in the framework of the return procedure; (e) when protection of national security or public order so requires; (f) in the context of determining the Member State responsible for an asylum application under the Dublin Regulation. Hence, deprivation of liberty of asylum seekers within the hotspot of Lampedusa must remain a measure of last resort and a person shall not be detained for the sole reason that he or she is an applicant for international protection (Article 8(1) of the EU Reception Conditions Directive).

C. Conclusion

In the cases of *M.A.*, *A.S.*, and *A.B. v. Italy*, the ECtHR found that Italy had violated Articles 3 and 5 ECHR with respect to the applicants' stay in the hotspot of Lampedusa. It concluded that the applicants had been subjected to inhuman and degrading treatment prohibited under Article 3 ECHR, considering the material conditions of accommodation. Also, the Court concluded that the applicants had been deprived of their liberty without a clear and accessible legal basis and in the absence of a reasoned measure ordering their detention. The Italian authorities could therefore not inform the applicants of the legal reasons for their deprivation of liberty or provide them with sufficient

[1] Italian judges have overridden these new national rules as incompatible with EU law as well as with the Italian constitution, see www.asgi.it/asilo-e-protezione-internazionale/pozzallo-le-nuove-norme-sulla-detenzione-per-i-richiedenti-asilo-contrarie-alle-norme-ue-e-alla-costituzione-italiana/.

information to enable them to challenge the grounds for their *de facto* detention before a court, thereby violating Article 5(1)(f) of the Convention. In those three judgments, the ECtHR reiterated what it had already found in its earlier judgment in the case of *J.A. and Others v. Italy*, relating to the conditions and lawfulness of the detention of migrants in the Lampedusa hotspot.

While the present commentary focused on the situation prevailing in the hotspot of Lampedusa, the same conclusions may be drawn with respect to the other Italian hotspots as well as to the hotspots in Greece. For example, in April 2023, the ECtHR issued its judgment in the case of *A.D. v. Greece*, in which it condemned the living conditions in some of the hotspots on the Greek Aegean Islands. This background and the judgments of the ECtHR—which will most probably not be the only ones—demonstrate that a clear and precise legal framework surrounding the implementation of the EU hotspot approach is needed, particularly with respect to the detention of migrants in these facilities. Currently, and among others, the monitoring of human rights abuses and violations in the hotspots is flawed with gaps. A stronger legal and regulatory framework is necessary to ensure proper supervision and monitoring, not only from national systems but also perhaps from the EU.

D. Suggested Reading

To read the cases: ECtHR, 19 October 2023, *A.B. v. Italy*, *A.S. v. Italy*, *M.A. v. Italy*, Appl. Nos. 13755/18, 20860/20 and 13110/18.

Case Law:

- ECtHR, 15 December 2016, *Khlaifia and Others v. Italy*, Appl. No. 16483/12.
- ECtHR, 30 March 2023, *J.A. and Others v. Italy*, Appl. No. 21329/18.

Doctrine:

- LYS, M., "La Cour européenne des droits de l'homme condamne la détention irrégulière de migrants tunisiens sur l'île de Lampedusa dans des conditions contraires à l'article 3 de la C.E.D.H. et avant une expulsion collective illégale", *Newsletter EDEM,* September 2015.
- ROCCA, M., "*J.A. and Others v. Italy* – Is the European Court of Human Rights turning its focus to maritime migrants?", *EJIL:Talk!*, 17 April 2023.
- TSOURDI, L., "Refining the prohibition of collective expulsion in situation of mass arrivals: a balance well struck?", *Newsletter EDEM*, January 2017.
- VENTURI, D., "The Grand Chamber's Ruling in *Khlaifia and Others v. Italy*: One Step Forward, One Step Back?", *Strasbourg Observers*, 10 January 2017.

To cite this contribution: E. DELVAL, "The hotspot approach in Lampedusa under the spotlight of the ECHR: unlawful detention as well as inhuman and degrading treatment", *Louvain Migration Case Law Commentaries*, November 2023.

3. CASS., 12 AVRIL 2023, R.G. N^{O} 23.0466.F/1

Un jeune, deux âges ?[1]

Aline BODSON

A. Arrêt

1. Les faits et la décision attaquée

Début d'année 2021, Y. est sur le territoire belge. Il déclare y être seul, de nationalité algérienne et né le 23 octobre 2005.

Des doutes sont émis quant à sa minorité, conduisant à la réalisation d'un triple test osseux le 2 février 2021 sur demande du service des tutelles en vertu de l'article 7 de la loi-programme du 24 décembre 2022 sur la tutelle des mineurs étrangers non accompagnés (ci-après, « la loi tutelle »). Les résultats du test indiquent que Y. « […] en date du 02.02.2021 est âgé de plus ou moins 18 ans avec un écart-type de 2 ans. Il est en d'autres termes, impossible de déterminer s'il est âgé de plus ou moins 18 ans ».

À la suite de ce test, le service des tutelles indique à Y., dans un courrier daté du 8 février 2021, qu'il est considéré comme mineur et qu'il sera accompagné d'un tuteur jusqu'à ses 18 ans, à savoir « jusqu'au 23 octobre 2023 », date correspondant à sa majorité selon la date de naissance qu'il a communiquée.

Le 6 mars 2023, un mandat d'arrêt est décerné à son encontre. Il est inculpé comme auteur ou co-auteur de vol avec violences ou menaces, commis quelques jours plus tôt, en bande, durant la nuit. Le 10 mars 2023, la chambre du conseil du tribunal de première instance francophone de Bruxelles rend une ordonnance maintenant sa détention préventive pour une durée d'un mois.

L'avocat de Y. interjette appel en son nom. Selon ce dernier, Y. était mineur pénalement au moment des faits, ce qui implique l'irrecevabilité des poursuites et du mandat d'arrêt. Il fonde l'appel sur le courrier du service des tutelles du 8 février 2021.

2. L'arrêt de la Cour d'appel de Bruxelles, chambre des mises en accusation

Le 27 mars 2023, la chambre des mises en accusation de la Cour d'appel de Bruxelles rend sa décision.

En ce qui concerne la minorité de Y., elle souligne tout d'abord qu'« [i]l appartient au juge d'apprécier en fait si la minorité alléguée par un inculpé est établie, sans que la loi n'assujettisse cette question à un mode spécial de preuve. Ce pouvoir d'appréciation n'est pas énervé par la compétence d'identification reconnue par la loi du 24 décembre 2022 au service des tutelles » (p. 2).

Elle constate ensuite que Y. a fait l'objet d'un triple test le 2 février 2021 permettant d'estimer son âge à environ 18 ans, avec un écart-type de deux ans. Elle en déduit, en suivant l'interprétation la plus favorable à l'inculpé, que Y. était âgé de 16 ans le 2 février 2021 et a atteint l'âge de 18 ans le 2 février 2023. La Cour conclut ainsi que Y. était majeur lors des faits commis le 24 février 2023.

L'avocat de Y. forme en son nom un pourvoi en cassation. Dans la première branche du moyen, il invoque la violation de la foi due aux actes, arguant que le service de radiologie qui a réalisé le triple test n'a pas mentionné le jour et le mois de naissance du demandeur dans ses conclusions, et que par conséquent, le juge d'appel a fixé ces informations au jour du test de sa propre initiative.

[1] Ce commentaire est paru dans le *Journal du Droit des Jeunes* n° 425, septembre 2023, pp. 41-44.

3. L'arrêt de la Cour de cassation

Le 12 avril 2023, la Cour de cassation rejette le pourvoi.

Elle indique qu'en déduisant du triple test que Y. avait atteint la majorité légale au plus tard le 2 février 2023, les juges d'appel ne lui ont pas donné une interprétation inconciliable avec ses termes. Par conséquent, il n'y a pas eu violation de la foi qui est due au rapport du service de radiologie.

Par ailleurs, elle confirme que la compétence d'identification du service des tutelles, attribuée par la loi tutelle, « n'est pas exclusive du pouvoir des juridictions répressives d'apprécier en fait si la minorité alléguée par un inculpé ou un prévenu est établie. Ces juridictions en décident sans que la loi n'assujettisse la question à un mode spécial de preuve » (p. 3).

B. Éclairage

1. Le test osseux comme preuve

Comme mentionné dans les décisions analysées, la loi pénale belge n'assujettit pas la question de la minorité ou de la majorité à un mode spécial de preuve. Par conséquent, en vertu du principe de la liberté de la preuve, le juge pénal est libre de sélectionner les moyens de preuve sur lesquels il fonde sa conviction[2]. En l'occurrence, la Cour de cassation reconnaît que le juge peut prendre en compte les éléments sur lesquels le service des tutelles se fonde pour évaluer la minorité[3], en ce compris le résultat du triple test médical.

Par ailleurs, le principe de la liberté de la preuve implique que le juge, « [p]ourvu que son raisonnement ne soit pas manifestement dépourvu de rationalité »[4], est souverain quant à l'appréciation de la valeur des moyens de preuve[5].

– *Fiabilité du test et preuve*

Nous souhaitons toutefois rappeler, comme cela a déjà été fait dans les *Cahiers de l'EDEM*, les limites et les critiques de la fiabilité du triple test osseux en Belgique, outre toutes les autres critiques et questions que posent ces tests quant au respect des droits fondamentaux des enfants[6]. Il consiste en une triple radiographie des dents, de la clavicule et du poignet, réalisée à l'hôpital. En cas de doute sur le résultat du test, c'est l'âge le plus bas qui doit être retenu en vertu de l'article 7, § 3, de la loi tutelle.

S'agissant d'abord des radiographies du poignet, celles-ci sont comparées aux références de Greulich et Pyle, créées en 1935 aux États-Unis. Or, ce modèle est basé « sur une population d'enfants et jeunes blancs de classe moyenne afin d'évaluer l'état de développement du squelette des enfants par rapport à un âge chronologique »[7]. Par ailleurs, ces références n'ont pas été créées pour déterminer l'âge de la maturité du squelette et n'y sont pas adaptées[8]. Dès lors, toute comparaison

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[2] N. Colette-Basecqz et N. Blaise, *Manuel de droit pénal général*, 4e éd., Bruxelles, Anthemis, 2019, p. 447.
[3] Conclusions de l'avocat général D. Vandermeersch, sous Cass., 24 mars 2010, *Rev. dr. pén. crim.*, 2010/7-8, p. 961.
[4] C. Hennau, J. Verhaegen, D. Spielmann et A. Bruyndonckx, *Droit pénal général*, 3e éd., Bruxelles, Bruylant, 2003, p. 117.
[5] N. Colette-Basecqz et N. Blaise, *Manuel de droit pénal général*, *op. cit.*, p. 447.
[6] À ce sujet, voy. *Third Party Intervention by the Human Rights Centre (HCR) and the Centre for Social Study of Migration and Refugees (CESSMIR),* Ghent University, sous Cour eur. D.H., *Fatoumata Diaraye Barry v. Belgium*, affaire pendante ; Ch.-É. Clesse *et al.*, « Les victimes et l'administration », *in* Ch.-É. Clesse *et al.*, *Traite et trafic des êtres humains*, Bruxelles, Larcier, 2023, pp. 642-643 et les sources citées.
[7] Traduction libre. *Third Party Intervention by the Human Rights Centre (HCR) and the Centre for Social Study of Migration and Refugees (CESSMIR),* Ghent University, précité, p. 3.
[8] *Ibid.*, p. 3.

à ce modèle pour déterminer l'âge d'un mineur étranger non accompagné (ci-après « MENA ») en Belgique ne fournit qu'un résultat très incertain[9].

De la même manière, les radiographies de la clavicule sont critiquées par le monde scientifique en raison de leur très faible précision, due aux grandes variations observées entre les individus[10].

Concernant enfin les analyses de la dentition, celles-ci se limitent généralement à l'étude des dents de sagesse, pourtant considérées comme les dents les plus variables d'un individu à l'autre[11]. De plus, tout comme les références de Greulich et Pyle, les modèles de référence utilisés sont basés sur une population américaine ou européenne[12]. Or, très peu de recherches ont été menées quant à un éventuel impact du statut socio-économique et du groupe ethnique sur le développement des dents[13].

De manière générale, le développement biologique humain n'est pas uniforme, ce qui implique que toute déduction de l'âge sur base d'un examen des os ou des dents est par définition imprécise, en particulier après le début de la puberté[14].

Étant donné ces limites et les critiques en termes de fiabilité et de précision, l'on peut s'interroger sur le caractère rationnel du raisonnement du juge pénal qui établit la majorité de Y. en se fondant uniquement sur ce moyen de preuve, même si celui-ci prend en compte l'âge le plus bas de l'écart-type. Une approche plus complète et fondée sur différents éléments probants devrait être envisagée.

– *Établissement d'un jour et d'un mois de naissance*

Dans le mémoire en cassation, l'avocat de Y. soutient que les juges de première et deuxième instance ont violé la foi due aux conclusions du service de radiologie ayant effectué le triple test. Il estime que les juges ont fixé de leur propre initiative le jour et le mois d'anniversaire du jeune au jour du test, le 2 février, alors que les conclusions du test médical ne donnent qu'un âge approximatif.

La Cour de cassation estime qu'en considérant en vertu des tests que Y. avait 18 ans avec une marge de deux ans le jour du test, en retenant l'hypothèse la plus favorable, à savoir que Y. avait au moins 16 ans ce jour-là et en concluant qu'il avait au moins 18 ans deux ans après jour pour jour, « les juges d'appel n'ont pas donné, de l'acte auquel l'arrêt se réfère, une interprétation inconciliable avec ses termes, et n'ont dès lors pas violé la foi qui lui est due » (p. 2).

Selon la doctrine, la foi due à un acte « est le respect que l'on doit attacher à ce qui y est constaté par écrit, à ce que le ou les auteurs ont entendu y consigner »[15]. Il s'agit d'une limite à la liberté d'appréciation du juge, un des aspects du principe de la liberté de la preuve[16]. Le juge ne peut donner « un sens et une portée qui méconnaissent ce que le ou les auteurs ont voulu exprimer par écrit […] lui faire dire autre chose que ce qu'il exprime »[17]. En d'autres termes, « [u]n grief de violation de la foi due à un acte consiste à désigner une pièce à laquelle la décision attaquée se réfère expressément et à reprocher à celle-ci, soit d'attribuer à cette pièce une affirmation qu'elle ne comporte pas, soit de déclarer qu'elle ne contient pas une mention qui y figure »[18].

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[9] *Ibid*.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] D. VANDERMEERSCH, *Formation des avocats – Procédure en cassation en matière pénale – Les moyens de cassation*, mai 2013, p. 15.
[16] N. COLETTE-BASECQZ, N. BLAISE, *op. cit.*, pp. 447-448.
[17] D. VANDERMEERSCH, *Formation des avocats…*, *op. cit.*, p. 15.
[18] Jurisprudence constante de la Cour de cassation. Voy. par ex. Cass, 5 octobre 2022, R.G. nº P.21.0024.F ; Cass., 31 janvier 2018, R.G. nº P.18.0035.F/1.

In casu, le grief reproche l'attribution du jour et du mois d'anniversaire de Y. aux conclusions des experts médicaux, qu'elles ne comportent pas. Si l'interprétation des juges n'est pas *inconciliable* avec les termes des conclusions, nous pensons qu'elle ne correspond pas à ce que « les auteurs ont entendu y consigner »[19], ce qu'ils « ont voulu exprimer par écrit »[20]. Selon l'article 7, § 1er, de la loi tutelle, le test médical a pour objectif de « vérifier si […] [une] personne est âgée ou non de moins de 18 ans ». Dans leurs conclusions, les experts médecins ont indiqué qu'il n'était pas possible, au jour du test, de déterminer la minorité ou la majorité de Y. car le résultat était de 18 ans avec un écart-type de deux ans. L'objet de ces conclusions n'était pas de consigner un âge minimum au jour du test mais de répondre à la mission légale et d'indiquer, en l'occurrence, l'impossibilité de déterminer la minorité ou la majorité de Y. Dès lors, suivant l'interprétation doctrinale du principe, telle que résumée *supra*, l'on peut se demander si les juges, en attribuant aux conclusions du service de radiologie un âge minimum le jour du test, ont bien respecté la foi due à cet acte.

2. Le jeune à la fois mineur et majeur

La Cour de cassation, tout comme la chambre des mises en accusation, indique que l'appréciation de la minorité par le juge pénal n'est pas énervée par la compétence d'identification du service des tutelles, attribuée par l'article 7, § 1er, de la loi tutelle. En d'autres termes, le juge pénal peut, comme en l'espèce, se démarquer de la décision de minorité du service des tutelles et décider de la majorité du jeune.

Cette indépendance du juge pénal s'inscrit dans une jurisprudence constante de la Cour de cassation[21] et relève du « principe de l'autonomie du droit pénal, le juge pénal ou le juge de la jeunesse étant appelé à statuer sur la question de l'état de minorité selon les règles de la preuve en matière répressive »[22].

La Cour de cassation, restreinte à son contrôle de légalité, s'est logiquement conformée à sa jurisprudence. Toutefois, cette décision implique un double statut pour le jeune en Belgique : il est considéré comme mineur sur le plan administratif et majeur sur le plan pénal. Un régime de protection particulier lui est applicable en tant que MENA. Il bénéficie à ce titre de droits supplémentaires, de garanties procédurales renforcées et est accompagné d'un tuteur chargé, entre autres, de prendre soin de lui et de le représenter en raison de la vulnérabilité intrinsèque à sa minorité, tout en étant exclu du régime de protection des mineurs en droit pénal.

Cette situation paradoxale soulève des interrogations quant à sa conformité aux droits fondamentaux et aux droits de l'enfant.

Le droit au respect de la vie privée est un droit fondamental inscrit à l'article 8 de la Convention européenne des droits de l'homme, à l'article 22 de la Constitution belge et, concernant spécifiquement les enfants, aux articles 16 et 40, § 2, vii, de la Convention internationale relative aux droits de l'enfant. Le guide sur l'article 8 CEDH indique que le respect de la vie privée garantit à chaque individu le droit à son identité et a « une sphère dans laquelle il peut poursuivre librement le développement et l'épanouissement de sa personnalité » (§ 252). Dans ce cadre, la Cour européenne des droits de l'homme considère, dans son arrêt *Darboe et Camara c. Italie*, que « l'âge d'une personne est un moyen d'identification personnelle et que la procédure censée permettre d'évaluer l'âge d'un individu qui affirme être mineur joue un rôle essentiel, notamment quant à ses garanties procédurales, dans la protection de tous les droits qui découlent du statut de mineur » (§ 124).

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[19] D. VANDERMEERSCH, *Formation des avocats…*, *op. cit.*, p. 15.

[20] *Ibid.*

[21] Cass., 4 mars 2010, R.G. nº P.10.0325.F. ; Cass., 24 mars 2010, R.G. nº P.10.0407.F ; Cass., 16 février 2022, R.G. nº P.21.1153.F.

[22] Conclusions de l'avocat général D. Vandermeersch, précitées, p. 961.

Il semble légitime de se demander si le double statut de Y. pour les autorités et tribunaux belges – à la fois mineur et majeur – respecte ce droit à la vie privée. Il est primordial que chaque individu ait un seul et unique âge aux yeux des pouvoirs publics, pour des raisons, entre autres, de sécurité, d'identité et de prévisibilité. L'indépendance du juge pénal est indéniablement essentielle mais ne peut justifier l'ambiguïté de ce double statut. Une règle de primauté devrait être instaurée afin de résoudre tout futur désaccord. Dans le doute, cette règle devrait – surtout en matière pénale – privilégier la protection du jeune et par conséquent favoriser le constat de minorité.

Outre l'importance de l'établissement de la minorité quant aux garanties procédurales et aux droits qui en découlent, il est incohérent d'admettre qu'un jeune puisse être inclus dans un régime de protection des mineurs tout en étant exclu d'un autre régime de protection des mineurs. Ces régimes de protection s'expliquent par une vulnérabilité, un « manque de maturité physique et intellectuelle »[23] intrinsèque à la minorité. Un jeune ne peut être considéré en même temps comme immature et devant être protégé, et mature et ne devant pas être protégé. À ce propos, la Cour européenne des droits de l'homme indique, toujours dans son arrêt *Darboe et Camara c. Italie*, que « [l]'établissement de la minorité d'une personne est […] la première étape de la reconnaissance de ses droits et de la mise en place de l'ensemble des modalités de prise en charge nécessaires. Si un mineur est identifié à tort comme un adulte, des mesures portant gravement atteinte à ses droits peuvent en effet être prises à son égard » (§ 125). Afin d'éviter de telles atteintes, nous pensons que lorsqu'un jeune est identifié comme mineur, toutes les instances et autorités appelées à se prononcer ultérieurement sur cette question devraient se conformer à cette première décision. Il en va du bon respect des droits de l'enfant et du principe de la présomption de minorité.

3. Conclusion

À titre de conclusion, nous souhaitons insister sur l'importance du respect des droits de l'enfant et de la bonne application des protections et garanties y afférentes. Tout enfant se trouvant sur le territoire belge, qu'il soit de nationalité belge ou étrangère, doit pouvoir bénéficier de ces droits et ces protections particulières en raison de leur vulnérabilité. Or, comme l'indique la Cour européenne des droits de l'homme, la procédure de détermination de l'âge est un moment crucial pour le respect de ces droits et protections puisque son résultat détermine leur application. Par conséquent, il est primordial que cette procédure soit fiable, objective et accompagnée de garanties procédurales.

C. Pour aller plus loin

Lire l'arrêt : Cass., 12 avril 2023, R.G. n° P.23.0466.F/1.

Jurisprudence :

- Cour eur. D.H., 21 juillet 2022, *Darboe et Camara c. Italie* ;
- Cass., 4 mars 2010, R.G. n° P.10.0325.F ;
- Cass., 24 mars 2010, R.G. n° P.10.0407.F ;
- Cass., 31 janvier 2018, R.G. n° P.18.0035.F ;
- Cass., 16 février 2022, R.G. n° P.21.1153.F ;
- Cass., 5 octobre 2022, R.G. n° P.21.0024.F.

Doctrine :

- CLESSE, Ch.-É., *et al.*, « Les victimes et l'administration » *in* Ch.-É. CLESSE *et al.*, *Traite et trafic des êtres humains*, Bruxelles, Larcier, 2023 ;

[23] Assemblée générale de l'ONU, *Déclaration des droits de l'enfant*, adoptée à New York le 20 novembre 1959, Doc. ONU A/RES/14/1386, préambule et Convention relative aux droits de l'enfant, adoptée à New York le 29 novembre 1989, approuvée par la loi belge du 25 novembre 1991, *M.B.*, 17 janvier 1992, préambule.

- COLETTE-BASECQZ, N. et BLAISE, N., *Manuel de droit pénal général*, 4e éd., Bruxelles, Anthemis, 2019 ;
- HCR et CESSMIR, *Third Party Intervention* sous Cour eur. D.H., *Fatoumata Diaraye Barry v. Belgium*, affaire pendante ;
- Greffe de la Cour européenne des droits de l'homme, *Guide sur l'article 8 de la Convention – Droit au respect de la vie privée et familiale*, version du 31 août 2022 ;
- GREULICH, W. et PYLE, S., *Radiographic atlas of skeletal development of the hand and wrist*, Stanford, Stanford University Press, 1959;
- HENNAU, C., VERHAEGEN, J., SPIELMANN, D. et BRUYNDONCKX, A., *Droit pénal général*, 3e éd., Bruxelles, Bruylant, 2003.
- VANDERMEERSCH, D., Conclusions sous Cass., 24 mars 2010, *Rev. dr. pén. crim.*, 2010/7-8.
- VANDERMEERSCH, D., *Formation des avocats – Procédure en cassation en matière pénale – Les moyens de cassation*, mai 2013.

Pour citer cette note : A. BODSON, « Un jeune, deux âges ? », *Cahiers de l'EDEM*, novembre 2023.

4. RÉCIT DE VIE – ÊTRE CHEZ SOI EN PLUSIEURS LIEUX

L'EDEM est une équipe plurielle, les diversités s'y côtoient. Pour refléter la pluralité linguistique, nous avons souhaité rendre possible l'enregistrement d'un podcast dans la langue maternelle des chercheuses et des chercheurs, le texte du récit demeurant ci-dessous en français.

Mes deux parents ont quitté leur village, en Calabre, quand ils avaient 18 ans afin de poursuivre leurs études en Toscane. Je ne suis pas née en Calabre, n'y ai jamais vécu. Toutefois, quand quelqu'un me demande d'où je viens, immanquablement je réponds : « Je suis de Rome, mais ma famille vient de Calabre, la région la plus au sud de la péninsule italienne ». Avec cette réponse, j'espère rendre justice à mes racines et à ceux des miens qui sont restés au village.

De nombreuses familles d'Italiens ont des histoires de migration qui s'étendent sur plusieurs générations et ne cessent de prendre de nouvelles formes. Par exemple, mon arrière-grand-père Gaetano, né en 1895 dans notre village de Calabre, a émigré en Argentine. Leurs conditions de vie au village étaient précaires et lors de la crise économique de 1929, qui frappa l'Italie comme le reste du monde, Gaetano n'a plus été en mesure de faire face aux besoins de sa famille, de sa femme et de ses quatre enfants, et il prit la décision d'émigrer. Il partit seul, laissant derrière lui femme et enfants. Ces derniers ont, grâce à ses envois d'argent, pu aller à l'école. Ma grand-mère, Concetta est uniquement allée à l'école primaire, ses frères ont tous poursuivi des études supérieures.

Fier de ses origines, comme je le suis, Gino a écrit des poèmes dans le dialecte local. Ils sont précieux pour notre histoire familiale et pour le village. Une place y porte son nom. Dans le poème *L'histoire de mon père*, Gino raconte à la première personne la migration de son père Gaetano. Il décrit les emplois qu'il a acceptés en Argentine et dont il n'aurait jamais voulu en Italie, le mal du pays et relate les obstacles posés au retour. Ses mots sont sombres : « *Tant et tant de mes semblables ont décidé de prendre le chemin de l'oubli, qui est et sera toujours le chemin de la migration.* »

Après 20 ans en Argentine, Gaetano est rentré en Italie avec le projet de convaincre sa famille de venir vivre avec lui en Amérique du Sud. Aucun d'entre eux n'a souhaité le suivre. Ses enfants avaient fondé une famille ou allaient en fonder en Italie ; il passera ses dernières années au village, entouré des siens. Le chemin de la migration ne l'avait pas destiné à l'oubli, même si ses sentiments ont dû être tels, à un moment.

À l'instar de Gaetano et de beaucoup d'autres, mes parents ont quitté ce même village dans les années 70. Leur longue histoire commune d'émancipation a été possible grâce à cette migration du sud vers le nord de l'Italie. Mon père a réalisé des études de droit grâce à une bourse. Celles-ci duraient à l'époque quatre ans, ce qui était un circuit court comparé, par exemple, à des études médecine qui duraient six ans. Brillant et travailleur, peu après ses études, il est devenu magistrat.

J'ai un jour dit à mes parents qu'ils étaient des « migrants internes », utilisant la terminologie propre aux études sur la migration. Ils ont souri, je devinais qu'ils ne parvenaient pas à se décrire comme tels. Ces mouvements de population Sud-Nord auxquels mes parents ont participé ont modelé le pays et le modèlent toujours. À leur époque, le labeur et le mérite permettaient à eux seuls d'orienter une trajectoire. Aujourd'hui, en Calabre, comme dans de nombreuses autres régions du Sud, tenter sa chance ailleurs demeure une stratégie pour sortir de la pauvreté et améliorer ses conditions de vie.

Le premier poste de magistrat de mon père a été à Monza, petite ville agréable située près de Milan, où je suis née. Quand j'étais enfant, j'ai connu le rythme des familles méridionales, qui font des voyages de 8, 10 ou 12 heures, en voiture, deux fois par an, à Noël et en été, pour retrouver la grande famille. L'été, je restais trois mois avec mes grands-parents et je les quittais pour rentrer à l'école au mois de septembre. J'ai grandi en sachant que l'on peut avoir le cœur à plusieurs endroits et plusieurs

« chez soi », comme beaucoup d'enfants de migrants, internes ou internationaux. Mon enfance et mon univers ont été influencés par ces liens à chérir et à préserver avec ceux qui sont restés au pays mais qui demeurent proches. Nous les appelions presque tous les jours, même quand les appels interurbains coûtaient très cher. Quand j'ai commencé l'école primaire, mes parents ont été s'installer à Rome. Nous réduisions nos trajets vers la Calabre de 12 à 6 heures de route et surtout nous allions vivre à Rome.

Ce fut merveilleux de partir à la conquête de cette ville avec mes parents. Chaque dimanche, nous allions explorer un nouveau quartier ou un monument. J'eus l'impression de voir ma *plaine de jeux* et mon regard s'agrandir. C'est un sentiment assez classique lors du passage d'une ville de province du nord vers la chaotique mais chaleureuse capitale qu'est Rome.

À l'adolescence, j'ai commencé à comprendre la complexité des stratifications de la ville, à prendre conscience de ses disparités qui sont subtiles et insidieuses. La littérature comme le cinéma ont décrit cet état des choses. Je pense au livre de l'écrivain Nicola La Gioia, *La ville des vivants.* L'assassinat de Luca Varani, 23 ans, dans un appartement de Rome en mars 2016 avait fait la une des journaux, il ne semblait y avoir aucune explication à ce meurtre perpétré par deux jeunes gens de bonne famille. En reconstruisant minutieusement les faits et les jours qui les ont précédés, Nicola Lagioia écrit une autre histoire de Rome, aussi malfaisante que splendide. Mon terrain de jeux m'a soudain paru très étroit. J'avais besoin de repousser les limites et les frontières de mon monde obsolète et trop connu.

Quand mon père a mieux gagné sa vie, nous avons voyagé en famille, en Italie et à l'étranger. Ces voyages ont encouragé ma curiosité et ont renforcé le goût d'aller voir ailleurs. En même temps, le fait d'avoir passé du temps au village, proche de la famille au sens large, été aussi porteur de valeurs positives. L'accueil des membres de la famille, proches et moins proches, de mes amis et de ceux de mon frère est une valeur essentielle pour les miens.

Mon frère a étudié la philosophie et a ensuite étudié le droit. Je ne voulais pas m'imposer un tel détour. Mon père a influencé le choix de nos études. Il incarne le droit de manière positive même s'il s'en défend. J'ai donc étudié à Sapienza, mais je cherchais toujours à quitter Rome. En 3e année, j'ai pu aller étudier à Louvain-la-Neuve. Un de mes cousins, Rosario, enfant de Gino, sortait avec Manuela qui travaillait à la Commission européenne et allait devenir sa femme. Elle m'a rendue sensible à la mobilité européenne, encourageant mes démarches pour étudier ou travailler à l'étranger, par exemple en relisant mes lettres de candidature. Nous étions trois Italiens de Sapienza à partir à Louvain-la-Neuve et j'ai pensé *je ne serai pas l'Italienne qui reste avec des Italiens*. Je souhaitais aller à la rencontre des autres. Aujourd'hui, ces Italiens sont devenus des amis chers, mais cette déclaration d'intention montre bien mon état d'esprit en arrivant.

Les personnes rencontrées à cette époque sont encore dans ma vie, y compris mon amoureux. Lui comme mes parents est un *migrant interne*, il avait fait le choix de quitter temporairement l'université d'Anvers pour étudier à Louvain-la-Neuve, grâce à un autre programme de mobilité, l'Erasmus Belgica. Je pense, en te parlant, que c'était hier, mais c'était il y a dix ans.

Au cours de ce séjour, j'ai suivi les cours de Jean-Yves Carlier qui ont donné sens à mon choix d'étude et ont orienté mes choix professionnels. À cette époque, l'EDEM organisait un cycle de conférences sur le thème de *La mise en œuvre du droit européen de l'asile en droit belge*. À ce cycle a succédé, quelques années plus tard, celui intitulé *Migrations : regards croisés*. J'ai été immédiatement enthousiaste pour ce type d'enseignement qui intégrait des références à d'autres disciplines et permettait de s'ouvrir différemment au droit. Les migrations n'étaient pas uniquement analysées sous un angle juridique, approche qui définit et distingue de plus en plus l'EDEM. Sylvie Sarolea avait clôturé une de ses interventions avec une citation du livre *Sur la route des clandestins* (2008) du journaliste et écrivain italien Fabrizio Gatti, elle m'a donné envie de le lire.

La question des migrants morts en Méditerranée m'a toujours interpellée. Notre professeur d'histoire et philosophie au collège était bénévole à la communauté de Sant'Egidio, il avait invité un réfugié érythréen à un de nos cours qui avait raconté son parcours, les tortures subies en Libye et ses diverses traversées. L'art et les médias n'ont ensuite cessé de me sensibiliser. En 2011 est sorti le film *Terraferma* d'Emanuele Crialese. Il narre comment Filippo, sa mère et son grand-père qui n'arrivent plus à vivre de l'activité traditionnelle de la pêche, dans une petite île au large de la Sicile, sauvent des eaux un groupe de clandestins africains malgré l'interdiction des autorités locales. Les pêcheurs s'interrogent, faut-il les dénoncer aux autorités et assurer la quiétude des touristes ou respecter les valeurs morales de solidarité héritées du travail de la mer ?

La question des migrants en Méditerranée a été et est toujours très politisée. Pendant plus de 20 ans, l'attention a peu à peu été portée, par les institutions et par les médias, sur la criminalisation des actes de sauvetage et de solidarité. Ils jouaient avec la peur, argument porteur pour les élections. En 2023, les maires des villages de Calabre où les corps avaient échoué ont tenu à organiser des funérailles publiques pour des migrants morts en Méditerranée. Le président de la République y a assisté. Le geste avait une portée symbolique importante. Avec les années, j'ai pu quitter l'effroi et trouver un angle pour étudier et mieux analyser pourquoi des gens meurent en Méditerranée et pourquoi on ne fait rien.

Après mon master en droit, j'ai réalisé un master complémentaire aux Pays-Bas en *Public Policy and Human Development* et ai suivi une école d'été organisée par Amnesty International. Des activistes, des intervenants sur l'île de Lampedusa, comme des garde-côtes, le maire… sont venus nous parler de leur travail. J'y ai découvert l'existence des couloirs humanitaires et ai réalisé mon mémoire de master sur ce sujet. Le principe est simple : un visa humanitaire est délivré aux personnes qui ont besoin de protection par l'État de destination (l'Italie, la France, la Belgique et puis d'autres pays au fil du temps) et la prise en charge au quotidien est assurée par la société civile. Au départ de ce projet ne se trouvait pas la question du nombre trop élevé de morts en Méditerranée, mais la question de la sécurité, des voyages légaux, des visas. Cette étude *bottom-up* m'a permis de travailler ensuite avec une ONG. Nous rédigions des plaidoyers politiques et mettions en œuvre de nombreux projets, mais le droit me manquait. En 2018, j'ai postulé à un stage aux Nations unies et ai indiqué dans ma candidature ma participation aux séminaires de l'EDEM. J'ai alors découvert qu'un poste était vacant pour réaliser un doctorat au sein de l'équipe. J'ai postulé et ai été sélectionnée.

Ce doctorat me permet d'étudier le droit européen et international des migrations, la manière dont l'Union européenne coopère avec les États tiers et la question de l'équité, au sens large, dans les migrations internationales. Les citoyens du continent africain sont exclus de la mobilité internationale, ils ne disposent pas, contrairement aux autres citoyens, d'accès sûrs et légaux à l'Union européenne. Je ne cesse de nourrir et de développer ce questionnement. Tout en me plaçant dans la perspective du droit européen, je vise à garder un œil critique sur le rôle de l'Union européenne dans la coopération UE-Afrique en matière de migration. Mes recherches m'ont amenée à mettre en évidence l'importance du droit, sous toutes ses formes, comme moyen et comme objet dans la coopération internationale entre l'Union et les États africains. Les actes de *soft law* ou l'utilisation des mécanismes parajuridiques, comme la coopération technique au développement, influencent sensiblement le droit des migrations des pays africains.

J'avais une représentation très hiérarchisée du monde universitaire, je l'ai déconstruite au sein de l'EDEM. Durant la deuxième année de ma thèse, j'ai pu réaliser un séjour de recherche au Sénégal. Ces séjours ont le plus souvent pour destination des universités « prestigieuses » en Amérique du Nord. Sylvie Sarolea comprenait ma démarche et l'a soutenue. Après la fin de mon parcours doctoral, je souhaite continuer à travailler sur les migrations et dans une équipe qui a la même qualité au niveau scientifique et humain que l'EDEM, même si je sais que ce sera difficile à trouver.

Je vis à Bruxelles et suis devenue une citoyenne européenne *résidente de longue durée*. Cette ville vibrante a le statut singulier de capitale de l'Union européenne. Je demeure où je souhaitais être et le recul me permet de réaliser que c'est sans doute dans mon ADN d'être éloignée de ceux que j'aime. De nombreux jeunes Italiens ont, comme moi, décidé de partir vivre à l'étranger. La facilité d'émigrer au sein de l'Union européenne grâce à la libre circulation des personnes et, sans doute, la qualité de nos diplômes, facilitent cette migration qui ne ressemble pas tout à fait à celle de nos parents ou arrière-grands-parents.

J'ai fêté mes 30 ans pendant le confinement. Mon amoureux m'a fait un très beau cadeau : il a demandé à tous mes proches et mes amis d'écrire un *boarding pass* imaginaire, chacun indiquait où il voudrait m'emmener en voyage, cela pouvait être un pays réel ou utopique, un souvenir ou un vœu. Je me souviens de cette nuit qui n'en finissait pas où je découvrais les 100 contrées où ils voulaient m'emmener. Ce cadeau me permettait de retrouver les miens et de dépasser les frontières même quand elles se fermaient. Il m'a aussi permis de confirmer que les communautés d'amitié et de sentiment dépassent les quartiers, les villes et les pays, elles ne connaissent pas les frontières.

Pour citer cette note : « Être chez soi en plusieurs lieux », Récit de vie recueilli par Béatrice Chapaux dans le cadre d'un projet Migrations et récits de vie financé par le Fonds de développement culturel d'UCLouvain Culture, novembre 2023.