CEEMC MALTA 2012

NOTES FOR JUDGMENT

Introduction and disclaimers

- Only for moot court
- No value outside / beyond this context
- Written as direct result of mooting yesterday and today (not pre-prepared text)
- Style more like Opinion than judgment
- Won't explore every argument raised on every point!

- For convenience / shorthand, where necessary will refer to members of the SIG as 'Article 12 refugees'

Question 1

- Clear from case law that EU citizen does not always need to have exercised free movement rights in order to be able to rely on Articles 20 and 21 TFEU
- Also clear that third country national will, in certain circumstances, be able to derive residence (and employment) rights through relationship with 'static' EU citizen
- Ruiz Zambrano formula: 'Article 20 TFEU precludes [national measures] which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by that status' (Ruiz Zambrano para 42, cited McCarthy para 47 and Dereci para 64)
- Case C-434/09 McCarthy establishes that third country national cannot derive residence rights through EU national spouse where that EU spouse can live in own Member State independently of third county national or exercise free movement rights to go elsewhere in the EU (paras 50, 54 – Court therefore determined McCarthy to be a purely internal situation)
- Thus, there still seems to be a significant difference between the rights that 'moving' and 'static' EU citizens can confer on ex-spouses (c f Surinder Singh)
- Therefore, arguments based on Abdul's relationship with his ex-spouse Fadiyyah ineffective
- Turn to relationship with son Zarif and say at once that think it is better to approach this from the perspective of Zarif's rights than Abdul's rights
- 'denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole' (Dereci para 66)
- 'the mere fact that it might appear desirable to a national of a Member State, for economic reasons or to keep his family together in the territory of the Union, for the members of his

family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union is not sufficient to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted' (Dereci para 68)

- Here, clear that primary carer is (EU national) mother Fadiyyah and that Abdul merely has a right of access (which is not technically tied to staying in Mulysa – but I bear in mind that Zarif's rights to see his father may not be very easily exercised if Abdul deported); furthermore there is complete economic dependency on Abdul and he may not be able to remit sufficient funds from abroad (if deported) to support family (so, facts stronger than 'economically desirable')
- There are plausible fundamental rights reasons for thinking that family should be kept together (but, in Mulysa or elsewhere?)
- Should also emphasise that, in the view of this Grand Chamber, Ruiz Zambrano does not represent a one-off, exceptional case that should be confined to its facts
- Fortunately, it is also clear from Dereci that it is for the national court to carry out an analysis to determine whether the circumstances of the case fall within Union law (i.e., Ruiz Zambrano formula applies) and therefore Article 7 of the Charter (Abdul's and or his son's right to respect for private and family life) is triggered; or whether the situation is governed by national law and protection of family life is therefore assured by Article 8 ECHR (see Dereci paras 70-74)
- Therefore, for the national court to carry out the necessary verifications to determine whether Zarif and Fadiyyah would effectively be forced to leave territory of Union if Abdul is deported
- Answer : Article 20 TFEU is to be interpreted as precluding [national measures] which have the effect of forcing an EU citizen to leave the territory of the EU and thereby depriving him of the genuine enjoyment of the substance of the rights conferred by that status. It is for the national court to verify whether, in the circumstances of the case, that would be the effect of deporting the third country national who is that minor EU citizen's father.

Question 2

- On wording of Citizens Rights Directive, clear beyond argument that the Directive does not apply to Abdul (Article 3: Beneficiaries – Abdul's ex spouse Fadiyyah is 'static' citizen)
- Note also that Abdul does not meet the criteria for "and family" – he is an ex spouse, rather than a spouse (cf Article 2(1)(a)), nor is he a *dependent* relative in the ascending line (Article 2(1)(d))
- Should the directive (in some way) be applied by analogy?
- Principle of non-discrimination : do not treat similar situations differently unless the difference in treatment is objectively justified
- Are these similar situations?
- Depends on whether focus on movement / no movement (if so, different) or on family situation (similar) – so, what is a relevant difference in the facts?
- Have reached view that in the end does not matter: if situations similar, difference in treatment is objectively justified because moving citizens have codified rights under EU law whereas non-moving citizens in principle derive rights from national law of their Member

State; if situations different then no violation of the principle of equal treatment arises if they are treated differently

- Answer : no right arises by analogy with those contained in Articles 13 and 27 of the Citizens Rights Directive

Question 3

- This question is about access to, and use of, documents
- Necessary from outset to distinguish between the two
- Abdul has obvious (I would say, unassailable) right himself to access the material necessary to enable him to conduct his case (both before the national court and before the CJEU in the context of the preliminary reference procedure (equality of arms))
- Equally clear that the national court was satisfied that there were plausible national security reasons that militated in favour of forbidding disclosure to third parties or allowing third parties access to those documents
- Two issues arise: (a) competence of court(s) to make injunction (national court or CJEU?) and (b) is presumption against or in favour of disclosure i.e., what test should the competent court apply?
- As to (a): support in CJEU case law (Factortame) for power of national court to order interim relief to preserve the situation pending the outcome of a reference and (more generally) to take the necessary procedural steps in conjunction with making a reference
- Therefore national court entitled to make some form of interim order
- Reference itself governed by CJEU rules of procedure
- No express provision in those rules governing this situation
- Therefore take the view that national interim order can run, without violation of division of competence, unless / until CJEU exercises some inherent jurisdiction to make an order itself (nb this might also be desirable in respect of the treatment of pleadings by intervening Member States and the Commission)
- The necessary corollary may be that the national court's order will need to be varied or discharged in order to avoid conflict with the CJEU's order: effect should be given to this by the national court in fulfilment of the general duty of loyal cooperation
- As to (b): CJEU case law (Joined Cases C-514/07P and C-528/07P Sweden and API v Commission) (a direct action, not a reference) says there is a presumption against disclosure which the applicant must be given an opportunity to displace (paras 102-104)
- Conversely, in Application No 37374/05 Társasag the ECtHR held that in principle there should be disclosure (paras 36-38); however, that was a case about a body acting as a public watchdog where there was a clear interest in disclosure – not really like this case
- Take the view that the (new) CJEU rule should be that (i) it is for party opposing disclosure to make out a prima facie case why an order prohibiting disclosure should be made (e.g., on reasons of public security); (ii) if such a case is made out, burden then shifts to other party to show why he should nevertheless be allowed to disclose
- Answer : (i) access to documents must be given in order to ensure equality of arms within the preliminary reference procedure; (ii) a national court has competence, when making a reference, also to make an interim order prohibiting disclosure or third party access to existing documents and documents generated within the preliminary reference procedure

[applying the test that I have just set out]; (iii) applying the same test, the CJEU has competence, at any point, itself to examine (or re-examine) whether there should be an order prohibiting disclosure or third party access and to substitute its own order for that of the national court; (iv) the national court is required, in accordance with the principle of loyal cooperation, to vary or discharge any national order should this prove necessary to avoid conflict with the CJEU's order

Question 4

- Starting point is to ask why the exclusion in Article 12(1)(b) of Directive 2004/83 is there
- In my view, it is because someone who 'is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those' doesn't *need* to be able to access refugee protection: they are already sufficiently protected by what I will term 'alternative protection' (principally under national law, but also – potentially – under other EU provisions)
- It seems to me that the 'rights and obligations' so afforded under alternative protection would have to include certain basic rights enabling the individual to lead a normal life - for example, a right of residence that is valid for a reasonable length of time, the right to enter employment and the right to access social services if necessary (thus, in principle, the rights and obligations in question are the same as (or go beyond) those afforded by refugee status)
- Recognition must be a continuing concept (not 'once recognised, permanently excluded') because otherwise someone who would otherwise qualify for refugee protection and whose alternative protection has ceased will fall between two stools and not be able to access any protection
- That would be contrary to the whole spirit of the refugees directive (and the 1951 Geneva Convention)
- Answer : Article 12(1)(b) of Directive 2004/83 is to be interpreted as meaning that a person who was at one time excluded from consideration for refugee status by virtue of that provision, but whose rights and obligations under alternative protection have ceased to exist, is no longer excluded from the scope of Directive 2004/83

Question 5

- Can deal swiftly with question 5
- Obligation on Member State is to make sure that minimum standards required by Directive are implemented
- No 'standstill' requirement such that, once has implemented in a particular way, that cannot be altered (alternative interpretation would actively encourage Member States always to put in place minimum implementation)
- Answer : A Member State is at liberty, in general terms, to modify its implementation of Directive 2004/83 but, in so doing, it must respect any acquired rights under EU law arising from a previous implementation

Question 6

- Question 6 essentially asks whether persons (such as the 100 members of the SIG) who have already been given refugee status under the original national law implementing the Directive can derive any protection for their position under EU law, or whether (having amended that national law) Mulysa may revoke their refugee status
- SIG has claimed law is retroactive, Mulysan authorities say it is prospective
- In my view it is prospective; but the issue remains: do the members of SIG enjoy any protection for the status that they lawfully acquired under the original version of the national law, or do the national authorities enjoy unfettered discretion to re-examine their status at any time?
- Need to decide whether the members of the SIG have legitimate expectations under EU law
- Yes – at the time that they acquired refugee status, the Mulysan original law was the transposition of the Directive into national law
- Not necessarily either really 'more generous' or 'incorrect' (drafting put Article 12 refugees into same category as all other refugees – if opinion in Bolbol is right, this was both potentially more generous and potentially too strict: whether 'incorrect' depends how Mulysan law actually applied)
- So, grant of refugee status gave rise to full rights under Directive
- These should have included (Article 24) at least 3 years' initial residence(respect for human dignity, right to establish something like a normal life in host country) and right to access employment (Article 26)
- Mulysa cannot use Art 14 (which is meant to be applied proportionately on the basis of individual examination) so as to revoke en bloc the refugee status of all 100 members of the SIG
- Answer: a Member State is precluded from amending its implementation of Directive 2004/83 and applying that re-implementation in a way that fails to respect acquired rights [like ECJ, not going to answer individual parts of question]

Question 7

- This question is all about subsidiary protection
- Definitions in Art 2(c) (refugee) and Art 2(e) (person eligible for subsidiary protection) and substance of directive make it clear that refugee status and subsidiary protection are different (cf also 1951 convention)
- Member States under clear and unambiguous obligation to make provision for both when implementing the Directive (Art 18)
- Implementation must be clear enough to enable individuals to know their rights
- Do not think that principle of consistent interpretation can be stretched far enough to read national legislation contra legem so as to include subsidiary protection
- Answer : where a Member State has failed to make clear provision to implement a directive, there is no implied implementation and no implied decision as to entitlement under the directive
- [questions referred do not ask about possible direct effect of Article 15 of Directive 2004/83]

Question 8

- The damages question
- Members of SIG claim that they would be entitled to a three-year residency permit on the award of refugee status (implying a breach of Article 24 of the Refugee Directive) or in any event be entitled to subsidiary protection – a claim that they are fully entitled to advance (whether that claim is, on the facts, made out is a matter for the national court)
- For present purposes, take the view that although there has been a breach in relation to refugee status (see answer to question 6) that breach is not a sufficiently grave and manifest disregard of the requirements of EU law to give rise by itself to a right to damages

Failure to comply with Article 24 of the Refugees Directive

- Article 24 states very clearly that persons qualifying as refugees must be granted a three-year residency permit
- It is equally clear that the Mulysan authorities did not provide this
- As to the question of damage suffered – given that present proceedings arise during the period of the one year residence permit, damages to be awarded maybe purely symbolic

Failure to provide subsidiary protection

- Total failure to implement subsidiary protection elements of Directive 2004/83 (see answer to question 7)
- Total absence of implementation is in itself a sufficiently grave and serious breach to trigger damages (Brasserie du Pêcheur, Dillenkofer)
- Mulysa cannot say, 'no causal link because did not apply for subsidiary protection' – impossible to apply for such protection where no mechanism in place to do so
- Mulysa claims the members of SIG wouldn't be entitled because can be excluded from subsidiary protection under Article 17 or that, if subsidiary protection were to be granted, it could be revoked (Article 19)
- For national court to examine, but (as sometime happens) strong hint from this court that they can't be so excluded (Article 17 exclusion has to be based on individual analysis and evidence before court does not suggest case made out ; Article 19 (parallel provision) likewise only available on basis of individual examination of cases, not en bloc for 100 members of SIG)
- Answer : in principle, entitled to damages
- Here, 'compensation' required is, essentially, maintenance of the refugee status (interpretation supported by need to respect fundamental rights guaranteed by Charter)
- It is for responsible authorities of Member State to arrange for appropriate compensation (i.e, annulment of decision revoking refugee status plus some pecuniary compensation calculated in accordance with national law, subject to supervision by national court, which must bear in mind need to give effective protection to rights guaranteed by EU law

This concludes the judgment of the 2012 CEEMC.

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