Pushbacks against the Child's Best Interests

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The 2015/2016 migration influx caught the European Union and its Member States mostly unprepared and torn between human-rights ambitions and a growing anti-migrant political and social climate and security concerns. The lack of a functional EU-level legal framework, designed for high volumes of arrivals and based on Member States' responsibility-sharing, contributed to increasing recourse to policies and practices of dissuading migrants away from the EU territory. This reality obviously did not leave the European Court of Human Rights (ECtHR) indifferent and it decided to give a legal green light to certain forms of pushbacks by interpreting Article 4 of Protocol No. 4 as tolerating collective pushbacks under certain conditions. The ECtHR applies its newly established test equally to all individuals and in all situations. However, a more nuanced approach should be taken, guaranteeing special protection to children, in accordance with the principle of the child's best interests.

Defining Pushbacks

The special rapporteur on the human rights of migrants at the United Nations Office of the High Commissioner for Human Rights defines pushbacks as "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement."

According to the case-law of the ECtHR, as a general rule, pushing individuals back over the EU borders is contrary to the letter of the law, unless it does not violate the principle of non-refoulement and unless the individual concerned is not in need of protection, which, in return, can only be determined by examining his/her individual circumstances on a case-by-case basis or by first examining whether the individual will have access to an adequate asylum procedure in the receiving state. However, the standards set by the ECtHR in *N.D. & N.T.* and later clarified and limited in *Shahzad v. Hungary*, *M.K. v Poland* and *M.H. v Croatia* show that in case of a security threat or if the host state enables legal entry at official border crossing points, pushing back the individual who is in need of protection at the EU's green border can be acceptable under the European Convention on Human Rights (ECHR). It is also possible that – if confronted with a similar case – the Luxembourg Court will be influenced by the ECtHR's judgment and decide that pushbacks at the green border do not violate EU law either, including the Charter of Fundamental Rights.

Legal Pushbacks?

The Grand Chamber judgment in *N.D. & N.T.* has already been criticised by many authors, including here and here, the judgment in *Shadzad v Hungary* has been analysed here, the one in *M.K. v Poland* here and the one in *M.H. v Croatia* here. These four judgments set the criteria and boundaries for what can be classified as a 'legal pushback'. When put together, the four rulings lay down a two-tier test which tolerates pushbacks at the EU's green border in cases where one of the two following conditions is satisfied: first, if the individual's irregular entry represents a security threat to the host state due to the number of individuals that are entering *en masse* and/or due to their use of force. Second, if the host state enables asylum applications at its border crossing points and there are no cogent reasons for the individual not to have used the official entry procedure at the border crossing point instead of entering irregularly at the green border. On top of this, pushback must not violate the principle of non-refoulement which is – despite its many different defi-

nitions – understood here as provided by the Court of Justice of the European Union in *M, X & X*: – as the entitlement not to be returned, of individuals who have made an asylum claim and those who have not managed to do so, because they have been pushed back or who had their refugee status revoked, and who claim to have a well-founded fear of persecution, or believe that they would be in danger of torture, inhuman or degrading treatment or punishment if returned to a particular country. The satisfaction of the principle of non-refoulement was highly debatable in *N.D. & N.T.*

To summarise, according to the ECtHR's judgements, pushbacks at the green border do not violate the Convention even if individuals approach the border peacefully and in small numbers, such as the Afghan family in *M.H. v Croatia*, as long as the host state genuinely and effectively enables individuals to apply for asylum at its official border crossing points (which the ECtHR found not to be the case in *M.H. v Croatia*) and there are no cogent reasons for the individuals not to make use of official entry procedures. Consequently, the four judgements can be viewed as the Court's division between "good" and "bad" migrants, depending on whether they have arrived at the official border crossing point or at the EU's green border. These judgements can also be perceived as the ECtHR's endorsement of the states' deterrent activities when confronted with the possibility of a new migration influx at the EU's external borders, comparable to the situation at the Greek-Turkish border in February 2020. However, these judgements still leave a number of open questions, including what criteria the ECtHR would use to measure the existence of a security threat and whether the fact that the host state enables asylum applications at its official border crossing points automatically justifies pushbacks under the Convention if there is no security threat.

Judge Turkovic and the Best Interests of the Child

In her concurring opinion in *M.H. v Croatia*, Judge Turkovic suggests that a different test should be applied to children due to their vulnerability. Relying on Art. 22 of the United Nations Convention on the Rights of the Child, she claims that states are required "to ensure that a child seeking refugee status, whether unaccompanied or accompanied by his or her parents or by any other person, receives appropriate protection and humanitarian assistance", in accordance with the principle of the best interests of the child. Judge Turkovic concludes that, when balancing different interests, greater weight should have been given to the interests of the child. The police authorities should have referred the children to the authorities in charge of their asylum application and granted them all procedural guarantees.

The concurring opinion thus suggests that another layer should be added to the two-tier test set by the judgement in *N.D. & N.T.* by claiming that pushbacks of children would be illegal even if the state enabled asylum applications at its official border crossing points. This extra layer is very convincing both legally and practically, considering the overarching principle of the best interests of the child and the fact that official border crossing points might be kilometres away. A small child cannot realistically be expected to walk all the way, sometimes in dire conditions and with damaged health.

The Principle of the Child's Best Interests

The principle of the child's best interests has been recognised as an intersecting and unifying legal principle in international, Council of Europe and EU law. The most important international instrument regulating the rights of the child, which has been ratified by all EU Member States, is the UN Convention on the Rights of the Child (CRC), which provides in its Article 3(1) that "the best interests of the child shall be a primary consideration". In its interpretation of Article 3(1) the UN Committee on the Rights of Children provides that the child's best interests is a threefold concept comprising a substantive right, a fundamental, interpretative legal principle, and a rule of procedure. By identifying the child's best interests as a "fundamental, interpretative legal principle", the UN Committee emphasizes its interpretative function, meaning that any legal provision has to be interpreted in a manner that most effectively serves the child's best interests.

Consequently, States have the obligation to mainstream the child's best interests in all laws and policies that may concern minors, and courts are expected to interpret legal norms accordingly.

In her concurring opinion in *M.H. v Croatia*, Judge Turkovic also points to Article 22 CRC, which obliges states to "take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee … , whether unaccompanied or accompanied by his or her parents or by any other person, receives appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention …".

Even though the ECHR does not explicitly list the child's best interests as one of the rights and freedoms it proclaims, this concept is (implicitly) entailed in its Article 8, which guarantees the right to respect for one's private and family life. This statement is supported by a number of rulings of the ECtHR, which maintained that states have a duty to protect the best interests of the child (see here, here and here). Additionally, the concept of the child's best interests has found its place in both EU primary and secondary law. Most notably, it has been proclaimed in Article 24(2) of the Charter as "a primary consideration" in all actions relating to children, no matter whether taken by public or private authorities. On top of this, Article 3(3) TEU lists the protection of the rights of the child as one of the Union's aims. The child's best interests have been explicitly stated or indirectly relied upon in a number of EU secondary law instruments and policy documents (for the list, see here) and judgments of the Court of Justice (see here, here, here and here). The fact that the wording of Article 24(2) of the Charter of Fundamental Rights has been taken from the CRC implies that it embraces not only the concept of the child's best interests itself, but also its interpretative function, as laid down by the UN Committee.

Pushbacks of Children

To conclude, international, Council of Europe and EU law oblige EU Member States to consider and protect the child's best interests at their green borders. As a result, the principle of the child's best interests should preclude pushbacks of children at the green border even in cases where the state enables asylum applications at its official border crossing points and there are no cogent reasons why the child did not make use of official border procedures. Hopefully, the ECtHR will recognise this in the future and include the principle of the child's best interests in its two-tier test.

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