

Analysis



Silvia Bartolini

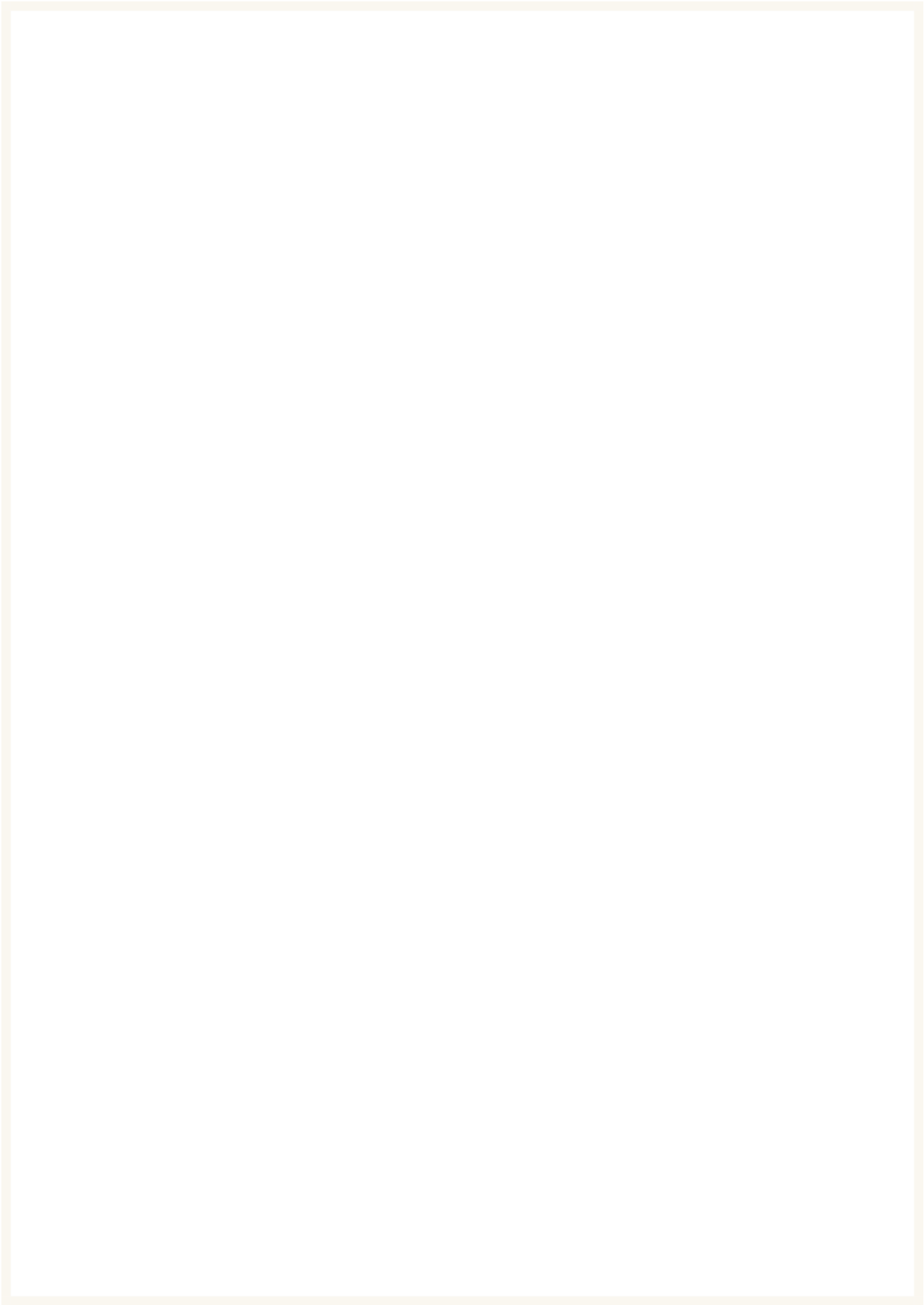
“Solidarity in Times of Crisis”

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Last Thursday, the Court of Justice delivered its highly anticipated judgment in *Commission v Poland, Hungary and Czech Republic* (Joined cases [C-715/17](#), [C-718/17](#), [C-719/17](#)) where it found that Poland, Hungary and the Czech Republic – by refusing to take in their fair share of applicants for international protection for the benefit of Greece and Italy pursuant to [Council Decision \(EU\) 2015/1523](#) (‘Decision 2015/1523’) and [Council Decision \(EU\) 2015/1601](#) (‘Decision 2015/1601’) – failed to fulfil their obligations under EU law.

This judgment must be read through the lenses of the EU response to the refugee crisis that hit the EU between 2015 and 2016. In 2015, a massive and sudden influx of third country nationals – escaping from the horrors of the Syrian civil war – crossed the EU’s external borders into Greece and Italy in the hope of finding immediate refuge in the EU. As frontline Member States, Greece and Italy soon became unable to cope with the large numbers of applicants for international protection. With their asylum systems seriously disrupted, they could not guarantee the right to asylum as enshrined in Article 18 of the Charter (Weil and Auriel, ‘Political Asylum and the European Union. Proposals to overcome the Impasse’, *La Revue des Droits de l’Homme*, 2018 [p. 4]).

Greece and Italy’s inability to process asylum applications inevitably led to secondary movements towards Northern Europe, prompting Member States such as Germany, Austria, Slovenia, Sweden and France to temporarily reintroduce internal border controls and fuelled the rise and spread of anti-immigrant movements, with Hungary’s building of a fence-barrier at the border with Serbia being particularly emblematic of this tendency.

As a response to this emergency situation, the Council adopted – on the basis of Article 78(3) TFEU – Decision 2015/1523 and Decision 2015/1601, creating a temporary relocation mechanism for the benefit of Greece and Italy. Whilst Decision 2015/1523 laid down a system of voluntary quotas regarding the 40,000 applicants for international protection, Decision 2015/1601 provided a system of mandatory quotas for the relocation of an additional 120,000 applicants. Those Decisions formed part of a series of measures aiming not only at relieving the most exposed Member States from significant pressure on their asylum systems but also at improving those systems.

The temporary relocation scheme included a derogation from Regulation (EU) No 604/2013

establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third country national or a stateless person ('[Dublin III Regulation](#)') as it discharged Greece and Italy – the first countries of arrival – of their responsibility as the primary responsible states to process applications for international protection and transferred that obligation to the other Member States.

It is worth noting that during the refugee crisis a number of national courts relied on Article 3 (2) of the Dublin III Regulation in order to derogate from the Dublin system and prevent the transfer of applicants for international protection to Greece and Italy (Lenaerts 'The Court of Justice of the European Union and the Refugee Crisis', *An Ever Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, 2019). The Article itself codifies the Court of Justice's findings in *NS and Others* (Joined cases [C-411/10](#) and [C-493/10](#)) where it ruled that no Member State may be indicated as primarily responsible for handling applications for international protection where there are systemic deficiencies in its asylum and reception conditions system amounting to substantial grounds for believing that an applicant for international protection would face a real risk of being subjected to inhuman or degrading treatment contrary to Article 4 of the Charter. The Court of Justice further held in its recent ruling in *Jawo* ([C-163/17](#)) that national courts may also rely on Article 3 (2) of the Dublin III Regulation where there is a real risk that – in the event the applicant is transferred and international protection is granted – he/she would be exposed to extreme poverty which would amount to inhuman and

degrading treatment contrary to Article 4 of the Charter.

The adoption of Decision 2015/1523 and Decision 2015/1601 was unwelcome in Eastern Member States and marked a bloc-type resistance to the relocation of applicants for international protection in Eastern Member States. As an immediate expression of their discontent, Hungary and Slovakia, supported by Poland, brought an action for annulment of Decision 2015/1601, pleading the illegality of the mandatory relocation system. The Court of Justice in *Slovakia and Hungary v Council* (Joined cases [C-643/15](#) and [C-647/15](#)) dismissed the action by confirming the lawfulness of the relocation measures, placing an emphasis on the fact that those measures were founded on the principle of solidarity and a fair sharing of responsibilities, entailing that where the asylum system of a Member State is under great strain, there is an obligation for the other Member States to intervene and help.

Notwithstanding the judgment of the Court of Justice and the pressure from the Commission to implement the relocation programme, three Member States, namely Poland, Hungary and the Czech Republic refused to take in their fair share of applicants for international protection. Indeed, in December 2015, while Poland pledged to the Commission that it would accept the relocation of 100 applicants for international protection, none of those applicants were relocated and no further pledges were made. Hungary did not at any point pledge to accept any applicants. Lastly, in February and in May 2016, the Czech Republic, having initially indicated that 50 applicants for international protection could be relocated to its territory, accepted only 12 applicants who were relocated from Greece, and made no further

pledges. The Commission therefore initiated infringement proceedings against these Member States, which refused to comply with the reasoned opinion, before the Court of Justice.

On the admissibility of the case, the Court of Justice made clear that – although the period of application of Decision 2015/1523 and Decision 2015/1601 had expired (on 17 and 26 September 2017 respectively) – a declaration of the failure to fulfil obligations is still of substantive interest, inter alia, ‘as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the European Union or private parties’. The Court of Justice further emphasised the fact that the Commission indeed had an interest in bringing the proceedings as firstly, the fixed period in the reasoned opinions ended at a date on which the alleged failures were still ongoing and secondly, these three cases raise important questions concerning EU law, namely whether and, if so, under what conditions a Member State can *use* Article 72 TFEU to disapply decisions adopted pursuant to Article 78(3) TFEU and which are aimed at relocating a significant number of applicants for international protection in line with the principle of solidarity and the fair sharing of responsibility between Member States, which, in accordance with Article 80 TFEU, governs the EU’s asylum policy.

As to the substance, the Court of Justice firstly looked at the main argument brought forward by Poland and Hungary, namely whether the non-application of both Decision 2015/1523 and Decision 2015/1601 could be justified under Article 72 TFEU.

The Court of Justice began by recalling that the legality of Decision 2015/1523 and Decision 2015/1601 had been confirmed in its earlier ruling in *Slovakia and Hungary v Council*. It then pointed out that derogations on the basis of Article 72 TFEU must be interpreted strictly. In other words, this Article should not be read as conferring leeway to Member States to depart from the provisions of EU law based on no more than a reliance on the responsibilities related to the maintenance of law and order and the safeguarding of internal security, but instead, requires that they prove that it is *really* necessary to *use* that derogation order to exercise their responsibilities on those matters. The Court of Justice further recalled that under Decision 2015/1523 and Decision 2015/1601, due regard should be taken of national security and public order throughout the relocation procedure, until the applicant is transferred, and that, in that context, the applicant’s fundamental rights, including the relevant rules concerning data protection, must be fully guaranteed. In this regard, it observed that the national competent authorities should enjoy a wide margin of discretion when determining whether or not there are reasonable grounds to consider an applicant for international protection as a danger to national security or public order where the concept of ‘danger to...national security and public order’ (Article 5(4) and (7) of Decision 2015/1523 and Decision 2015/1601) encompasses both actual and potential threats to national security or public order. However, the Court of Justice made it clear that in order to rely on those grounds, the national competent authorities have to rely, further to a case-by-case investigation, on consistent, objective and specific evidence that provides grounds for suspecting that an applicant for international protection represents an actual or

potential danger to national security or public order. Therefore, the Member States could not rely on Article 72 TFEU for the purposes of general prevention and without establishing any direct link with a particular case. The Court of Justice concluded that Poland and Hungary could not rely on Article 72 TFEU to justify their refusal to implement all the relocation obligations imposed on them by Article 5(2) and (4) to (11) of Decision 2015/1523 and/or by Article 5(2) and (4) to (11) of Decision 2015/1601.

Ruling subsequently on the Czech Republic's argument that the malfunctioning of the relocation system should justify the non-application of Decision 2015/1523 and Decision 2015/1601, the Court of Justice placed emphasis on the fact that allowing a Member State to rely on its unilateral assessment of alleged lack of effectiveness or even the purported malfunctioning of the relocation mechanism, would undermine the objective of solidarity inherent to both Decisions as well as their binding nature. Finally, the Court of Justice pointed out that the Czech Republic was required to comply with the relocation obligations imposed under those Decisions irrespective of the provision of other types of aid to Greece and Italy.

The Court of Justice therefore upheld the actions for failure to fulfil obligations brought by the Commission and declared that Poland, Hungary and the Czech Republic had failed to fulfil their obligations under EU law.

Commission v Poland, Hungary and Czech Republic is clearly a pivotal ruling. The Court of

Justice firmly reminds us all that there would be no EU without solidarity among its members and that solidarity necessarily implies burden-sharing.

Member States should not refuse to help and work together especially in times of crisis. However, they are still wrangling with each other over which of them should take in applicants for international protection who manage to cross the EU's external borders. Whilst Poland, Slovakia, Hungary and the Czech Republic are firmly against any mechanism of relocation of applicants for international protection based on solidarity, the Member States on the EU's southern border are pushing for a permanent system of relocation. This lack of a common approach has also paralysed the reform of the Dublin III Regulation.

The path towards EU migration policies based on solidarity and burden-sharing seems to continue to be a long and treacherous one. Hopefully, the EU will soon find a way to promote solidarity and improve internal cohesion.

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