Litigating Children's Rights Across Borders:

Family reunification for unaccompanied children seeking international protection

Gina Starfield, M.Sc. Student in Refugee and Forced Migration, Refugee Studies Centre, University of Oxford

Under the supervision of Cathryn Costello, Andrew W Mellon Associate Professor in International Human Rights and Refugee Law

According to Eurostat data

In 2015, **over 1.2 million** individuals formally applied for international protection in European Union (EU) Member States – a number more than double that of 2014

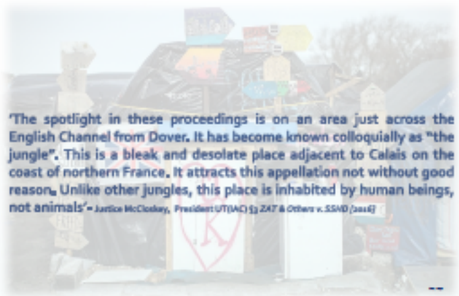
365,000 were less than 18 years old – roughly 30% of all registered applicants

96,500 were **unaccompanied minors**

Thousands more unaccompanied minors entered **without** formally claiming asylum … *likely just as many*

10% of those registered were under 14 years of age, over a third were Afghans and about a fifth were Syrians

By September 2016, **1,179 children** inhabited makeshift camps – or 'jungles' – in Calais, France
Nearly **90%** were without an accompanying adult; many had **identifiable family links to the UK**



'The spotlight in these proceedings is on an area just across the English Channel from Dover. It has become known colloquially as "the jungle". This is a bleak and desolate place adjacent to Calais on the coast of northern France. It attracts this appellation not without good reason. Unlike other jungles, this place is inhabited by human beings, not animals' – Justice McCloskey, President UT(IAC) *SJ ZAT & Others v. SSHD (2016)*

The Dublin Regulation and the Common European Asylum System (CEAS)

Where an unaccompanied minor submits an application for asylum in one Member State, under the Dublin III Regulation (Regulation (EU) 604/2013), he 'shall' have his application examined in the Member State where a 'family member', 'sibling' or 'relative' is legally present, provided this is in his 'best interest' (Article 8(1))

Established as an inter-governmental agreement by the 1990 Schengen Convention and the 1990 Dublin Convention, Dublin was incorporated into European Community legislation in 2003 (DR II), and later recast as an EU Regulation (DR III) in 2013. Dublin provides that every application lodged by a third-country national is (1) examined, (2) by a single 'Member State', (3) determined to be responsible according to 'objective' criteria set out in the Regulation. When a third-country national lodges an application for asylum in one Member State (State A), that state must determine which Member State is responsible for processing the claim according to hierarchical criteria in the Regulation. Family unity is at the top of the list (Articles 8 to 11).

If State A decides that another Member State (State B) is responsible for examining the application, it can issue State B with a 'take charge' or 'take back' request. State B must examine the request and reply within 2 months; if State B accepts responsibility, or fails to respond within the designated timeframe, the applicant must be notified and transferred to State B within 6 months.

In principle, Dublin (and particularly DR II in comparison to its predecessor) strives to be compatible with human rights principles laid out in the European Convention on Human Rights (ECHR), the 1951 Refugee Convention and the 1967 Protocol, and the EU Charter on Fundamental Freedoms (EUCFR). Under DR II, rights to 'respect for family life' must be 'a primary consideration' (Recital 14 DR II). DR III mandates that unaccompanied minors 'best interests' be 'a primary consideration' in all Dublin processes (Article 6).

According to my own calculations from the 2015 Eurostat online dataset, only .57% of outgoing take charge requests related to family criteria in 2015. By contrast, 68% of requests in 2015 concerned take back cases; while over 20% of take charge requests were based on issues of documentation and legal entry.

In September 2015, *not a single* unaccompanied child had been transferred from France to Britain under DR III since it came into effect on 29 June 2013

Legal Mobilization Theory:
Numerous studies have indicated that open, accessible courts alone do not guarantee equitable access to justice for marginalized individuals, nor 'policy change with a nationwide impact' (Galanter, 1974; Rosenberg, 2008: 4). According to critical legal theory and socio-legal studies, the success of 'legal mobilization' depends on a range of structural and contingent factors that comprise a state's 'legal opportunity structure' (LOS). Where formal legal rules and procedures, public cultural frames, and existing law support rights-based claims, the LOS is conducive to change; and litigation may alter some aspect of the social, economic, and political status quo (Hilson, 2002; Evans Case & Givens, 2010; Andersen, 2005; Vanhala, 2011). In a hostile LOS lacking these features, prospects for change are dim. Some research suggests that, if civil society and lawyers work together, they can partially overcome structural and cultural constraints. Partnering with lawyers and pursuing litigation may also lead to substantive changes in policy and practice by framing civil society claims in legal language (McCann 2006; Sarat & Scheingold, 2006; Vanhala, 2017).

Legal Opportunity in the UK: While the UK has a strong tradition of the rule of law, it is often characterized as having a hostile LOS (Epp, 1998; Malman, 2014). An individual, company, or organization has standing to apply for judicial review ('JR') when a rule or act/omission of a public body is incompatible with British common law principles, EU law, or the ECHR. One must be granted 'permission on the papers' from the relevant court to obtain substantive JR. One may be entitled to state funded legal assistance; but legal aid cuts in 2012 and 2014 have abolished legal aid for most immigration matters and removed legal aid for immigration JR applications that do not pass the permissions stage (AIDA, 2015). Most court orders largely preserve the power of the executive and the legislature. Primary legislation can never be struck down and only declared incompatible with the law.

Methods & Methodology: I examine legal mobilization pursued by civil society activists and lawyers in the UK from September 2015 to May 2017. I focus on the partnership between Citizens UK's Safe Passage UK and lawyers at Bhatt Murphy Solicitors, Islington Law Centre, and Doughty Street and Blackstone Chambers. I analyse data collected from Hansard parliamentary debates, policy briefs, official press releases, news media, NGO reports, case filings, and EU and UK case law.

I rely predominately on 12 semi-structured interviews with NGO workers, barristers, and solicitors that I conducted between January and May 2017 with CUREC approval

This study falls somewhere in the middle of the 'great methodological divide' between positivist 'court-centered' (Rosenberg 1991) and interpretivist 'de-centered' studies (McCann 1994) of litigation and its socio-political impacts (Halliday 2004). While traditional analysis of court judgments and parliamentary debates are more 'court-centered,' interviews with lawyers and NGO workers conducted from the 'bottom-up' provide a 'de-centered' perspective. Without including the voices of unaccompanied children, this research is not conducted purely from the 'bottom-up'. One cannot determine what is in a child's 'best interest' without considering his/her individual voice.

Three Hypotheses: **Partnership between civil society activists and lawyers –**
H_1: makes courts more materially accessible
H_2: makes legal claims more culturally persuasive
H_3: makes political demands more legally persuasive

***ZAT and Others v. Secretary of State for the Home Department* [2016] UKUT**	Finding the case 'strong on their unique facts,' the UT(IAC) held family life rights of all seven claimants outweighed public interest to maintain immigration control and apply DR III uncompromisingly; court ordered the SSHD to admit ZAT boys after they formally sought asylum; in August 2016, the Court of Appeals ruled that the UT(IAC) had set 'too low a hurdle'; DR III could be disregarded only in 'especially compelling cases'.
***MK, IK and HK v. Secretary of State for the Home Department* [2016] UKUT**	UT(IAC) held that the SSHD's passive stance towards verifying family ties in a take charge transfer request issued by French authorities had unlawfully violated respect for unaccompanied children's right to family life, DR II safeguards, and the public law 'duty of enquiry' necessary for 'safeguarding and promoting the welfare of any children'.
***RSM and Another v. Secretary of State for the Home Department* [2017] UKUT**	UT(IAC) held that the SSHD had failed to exercise discretion conferred by DR II Article 17. Court ordered the SSHD to admit RSM due to a lack of sufficient expedition in registering asylum applications and initiating DR II procedures; the expected lengthy procedures for a take charge request and subsequent transfer; and the need to take into account the best interests of children.
***AO and AM v. Secretary of State for the Home Department* [2017] UTJR**	While awaiting the May 2017 Citizens UK hearing, ZAT lawyers applied for JR of 10 individual cases; the SSHD attempted to stay all proceedings pending the Citizens UK hearing. UT(IAC) held: while 'it [would] be more convenient, less expensive and more comfortable' to stay individual cases, the right of access to a court for children with 'a compelling claim to speedy judicial adjudication' was paramount.
***Citizens UK v. Secretary of State for the Home Department* [2017] EWHC**	Systemic challenge of the SSHD's implementation of DR III for the hundreds who were denied transfer after the SSHD's expedited process. ZAT lawyers are petitioning the Court to declare the expedited system procedurally unfair according to DR III safeguards, Article 8 ECHR, and common law best interest duties, and order the SSHD to provide rejected children means of legal recourse. Decision is pending.

GOAL: MAKE DUBLIN OPERATIVE IN LINE WITH HUMAN RIGHTS

'Lawyers can't do it on their own because they simply haven't got the evidence gathering capabilities; they need the NGOs to do that work; and the NGOs can't do it on their own because they don't know what they're looking for… you also need to work well with lawyers who have individual clients… they can muck things up, if they aren't all working in a strategic fashion together…That is really the holy grail, when you get all of those groups working together—and it doesn't happen very often…it's a kind of lucky coincidence. (Kilroy, 2016. pers. comm.).

'The combination of strategic litigation and community organizing advocacy [is] the engine that has driven basically every concession over the last 12 months…without any law it's very hard to get enough fight in your politics; without any politics, it's very difficult to get the kind of public support for the implementation of the law that can either make your robust judgement visible or make the law secure' (Gabriel, 2016. pers. comm.).

H_1: partnership makes courts more materially accessible

Safe Passage's monetary support and evidence gathering was crucial to children's accessing UK courts. Before formal legal action commenced, Safe Passage worked to identify eligible minors in Calais, review their grounds for asylum, and verify family connections. On advice from the lawyers, they compiled a list of the 12 most compelling cases for transfer based on family ties under Dublin. Strong evidence was critical for lawyers to argue that claimants would have been transferred under DR II, had they been assisted in submitting formal asylum claims.

H_2: partnership makes legal claims more culturally persuasive

A single case can have significant power. Both the UT(IAC) ruling and the more restrictive appellate decision 'opened the floodgates' to similar cases. By the time of the Citizens UK substantive hearing, ZAT lawyers could point to ZAT, MK, HK & IK, RSM, and AO and AM (the individual UT(IAC) cases) as authority. Public and parliamentary support garnered by Safe Passage (and others) compelled the government to uphold judgments and accede to ZAT's initial demands by initiating an ad-hoc, expedited process to transfer unaccompanied children in Calais to the UK.

H_3: partnership makes political demands more legally persuasive

Before Safe Passage and ZAT lawyers went public with their work, 'the Calais story' was one of 'illegal' migrants' 'threatening' immigration control and border security. ZAT radically changed the public discourse. *'There was something scandalous about the fact that, amongst these "swarms", were children who had a full legal right to come to Britain'* (Gabriel, 2017. pers. comm.). The political force of this 'legal right' pushed the SSHD to initiate an expedited transfer process. But as AO, AM, and Citizens UK v. SSHD indicate, legal action remains necessary.

When Safe Passage organizers first went to Calais in September 2015, not a single unaccompanied child had been transferred from France to Britain under the Dublin III Regulation

Today, 850 children have crossed the Channel legally and safely, reuniting with their family members in the UK

850 family lives have been transformed due to the tenacity and unrelenting commitment of lawyers, civil society activists, and politicians who have championed their rights

Roughly 400 unaccompanied children with family links remain in France with uncertain futures, having been denied transfer by the UK's expedited process

It remains unclear whether or not they will have the opportunity to access their due safe and legal pathway to the UK

E-mail: [redacted]