

Chapter 3

Identity Determination Dilemmas: Whose National Are You?

The European Commission and EU Member States make often reference to the unwillingness of third countries to readmit their own nationals as one of the main obstacles for increasing return rates. The scholarly debate has identified the main obstacles facing the negotiations and operability of EURAs. EURAs present a high level of dependency on the state of diplomatic relations between the states concerned. The academic literature has illustrated the importance of the role and cooperation of third country consular authorities in the workability or concrete implementation of readmission procedures, and the development of formal and informal patterns of cooperation covering ‘readmission’ which has been based on administrative arrangements, bilateral deals and exchanges of letters/memoranda of understanding as complementary to RAs.¹

In its evaluation of EURAs in 2011 the European Commission underlined the policy inconsistency resulting from certain EU Member States still their bilateral arrangements that pre-dated the EURA.² This has been a key point of discussion in the lifespan of EURAs during the last three decades.³ Suffice it to say that as instruments aimed at shaping international or inter-state relations in migration management, RAs depend on the state of diplomatic relations with the third (non-EU) country concerned. This dependency factor unlocks a series of practical challenges related to inter-state diplomacy and in handling conflicting sovereign interests at stake in expulsion procedures.

Cassarino has argued that “while incentives play a crucial role in inducing third countries to cooperate on readmission, they do not adequately account for the sustainability of bilateral cooperation in the long term”. In his view this is mainly

¹Cassarino (2010).

²European Commission (2011). The Commission stated “The reasons given for non-application of EURAs are the absence of a bilateral implementing protocol and/or that EURAs are used only if they facilitate returns. Whereas transition periods for third country nationals in certain EURAs as well as the need to adapt national administrative procedures may explain the continued use of bilateral agreements in certain cases, the absence of implementing protocols⁸ is not an excuse.”, p. 4.

³Panizon (2012), Coleman (2009).

due to the “asymmetrical impact of the effective implementation of the agreements”.⁴ Requested states do not often deliver the necessary travel documents or do not reply (on time or at all) to EU Member States’ readmission requests. Cassarino refers to the pressing challenge of re-documentation (i.e. “the delivery of travel documents or *laissez-passers* by the consular authorities of the third country needed to remove irregular migrants”) as an area where informal and bilateral (readmission deals) between EU Member States and third countries have progressively developed.⁵ The issue of re-documentation and lack of cooperation of third countries to readmit individuals identified as their own nationals, however, hides a more profound and far-reaching dilemma that is inherent to the practical implementation of the readmission logic and which has not received much detailed attention in the academic debate.

A field where asymmetries emerge in the readmission field relate to identifying who is a national of which state. The implementation of expulsion faces a deeper disagreement between the states concerned as to whether the person(s) involved are indeed nationals of the assigned or presumed country of origin. As noted in Chap. 2 above, when measuring effectiveness, the European Commission puts particular emphasis on the low rates of expulsions and why removal orders are not enforced by EU Member State authorities. The above-mentioned letter issued by European Commissioner Avramopoulos declared that one of the main reasons why removal orders are not enforced relate to a “lack of cooperation from the individuals concerned (they conceal their identity or abscond) or from their countries of origin (for instance problems in obtaining the necessary documentation from consular authorities)”.⁶

The difficulties in determining legal identity has been also highlighted in studies and Ad Hoc Queries issued by the European Migration Network (EMN). An EMN Ad Hoc Query on EU Laissez-Passer of October 2010 covered the obstacles experienced by some EU Member States in the processes of identification of the person to be readmitted, in particular when it comes to travelling documentation. The Query highlighted that often third countries are unwilling to cooperate with requesting EU states in the process of identifying the nationality of the person involved “because in many cases they have little or no interest in readmitting their own nationals”. According to countries like Germany, as the issuing of an EU *Laissez-Passer* ultimately requires the identification of a person’s nationality, modifying it would do little to address this fundamental issue. In the same vein, Sweden reported that “Even if the document quality would be improved, we would still have problems when it comes to the available information about the holder’s identity.”

In a 2012 report titled “Practical Measures to reduce irregular immigration” and funded by the European Commission, the EMN pointed out a number of situations where expulsions prove problematic. These included (i) a lack of cooperation of the

⁴Cassarino (2007), p. 192.

⁵Ibid. p. 187.

⁶Council of the EU (2015).

country of origin and their unwillingness to readmit their own citizens; (ii) difficulties in establishing a person's identity and the lack of travel documents; and (iii) an unwillingness on the part of individuals to cooperate in their own removal.⁷ Similar issues were identified in another EMN study from 2013 titled "Establishing Identity for International Protection: Challenges and Practices".⁸ The EMN examined the ways in which EU Member States understand the concept of 'identity' within expulsion procedures. A majority of EU States reported that "In the absence of valid proof of identity, the authorities responsible for executing returns have to request travel documents for the applicant from his/her (declared) country of origin. Cooperation with third countries, including in the context of readmission agreements, affects success in this regard".⁹ Another finding was that the type of documents accepted by countries of origin varies widely, depending on the type of expulsion procedures.¹⁰

The 2013 EMN study illustrates how contacts with the national authorities of the 'presumed' country of origin were reported to be *indispensable* in expulsion procedures, and that there were strict demands for documenting identity in these cases, sometimes including coercive methods.¹¹ The annex of the EMN study lays down a compilation of methods used by EU national authorities in determining the identity of the persons to be expelled. While citizenship constitutes the most important element in determining legal status, the study presents other methods used by relevant national authorities in EU Member States such as language analysis, age assessment, comparison of fingerprints and photographs with national or EU databases, DNA analysis, interviews, consultations with country liaison officers based in the (presumed) countries of origin, coercive methods (including forced searches of the applicant's property), biometrics, etc.¹² According to the study,

In the domain of 'forced return', the identity question is often decisive regarding the possibility for return. To implement a 'forced return', the identity of the person concerned must either be verified (by the country of return) or documented (with valid passport or travel document) in a way accepted by the perceived country of origin.¹³

All these challenges remain despite the fact that a subsequent EMN published in 2014 stated that statistics provided by some EU Member States indicated that the

⁷EMN (2012).

⁸EMN (2013).

⁹Ibid. p. 7.

¹⁰Ibid. p. 15.

¹¹Ibid.

¹²Table 7 in the Annex of EMN (2013). See Table 5 on the kind of documents accepted.

¹³Ibid. p. 22. The Study emphasizes that "The presence of reliable identity and travel documents is often decisive, as most countries of origin request a person identified by nationality, surname, first name and date of birth. Exceptionally, determining the nationality of the rejected applicant may suffice to launch the return process. In Greece, for example, return may take place even with partial identity even though personal data about the applicant has not been absolutely verified. On the other hand, in Italy, identification does not affect the decision on forced return, as this procedure may be started only with an attribution of identity".

majority (almost 100 %) of applications lodged by Member States covered own nationals of the countries with whom EURAs have been concluded.¹⁴ Identification challenges have been also reported in monitoring reporting procedures of removal regimes such as the one in the UK. Another report published in 2015 by the UK Independent Chief Inspector of Borders and Immigration highlighted: “We were told by the Home Office that there are some countries to where removal cannot be enforced, either because of the general situation prevailing in that country or because of an unwillingness on the part of the country to document its own nationals, e.g. Iran”.¹⁵ It is therefore clear that a third-country national cannot be readmitted when her/his identity is not adequately established. Two specific examples illustrate ongoing frictions related to the identity determination challenge: First, the obstacles in the implementation of the EURA with Pakistan (Sect. 3.1), and second, the UK Supreme Court judgment in *Pham v. Secretary of State for the Home Department* (Sect. 3.2 below).

3.1 The Quasi-suspension of the EURA with Pakistan

A recent controversy in the application of the EURA with Pakistan illustrates some of the previously identified dilemmas in the operability of readmission. The unclear situation of ‘Afghan nationals from Pakistan’ constituted an issue of concern from the very start of EU talks on migration and asylum with Pakistan in the late 1990s.¹⁶ The EURA with Pakistan entered into force in 2010.¹⁷ Five years later, and in the context of the so-called European refugee crisis, the Pakistani authorities reportedly

¹⁴EMN (2014).

¹⁵Independent Chief Inspector of Borders and Immigration (2015).

¹⁶Council of the EU (1999). The Action Plan for Afghanistan states in paragraph 54 that “At present, about 1, 2 million Afghan nationals live as refugees in Pakistan (the total number is, however, estimated at 2 million). In comparison with 1989, when the number of Afghan refugees exceeded 3 million, this is a strong decrease. Especially since 1992, after the fall of the Najibullah regime, the repatriation of Afghan nationals gained momentum. During the last few years, the number of Afghans returning to their country has however decreased. Nevertheless, in 1998 UNHCR repatriated 93,200 Afghan nationals from Pakistan. As always with UNHCR, these people returned voluntarily.” Moreover, paragraph 62 emphasized that “A declaration is appended to the EC-Pakistan Co-operation Agreement in which Pakistan declares its willingness to conclude readmission agreements with the Member States which so request. The agreement is due to be signed in [...] 1999. Since the declaration refers only to the readmission of “nationals” (viz. Pakistani), the declaration does not explicitly include the readmission of Afghans who have arrived in the EU via Pakistan. At present, Pakistan does not appear to be officially prepared to readmit Afghans who have been resident for a long period in an EU Member State. According to the Pakistani authorities, the Afghan refugee problem has simply internationalised with tens of thousands seeking asylum in Western Europe while Pakistan still harbors a multiple of that number. The fact that a number of Afghans hold Pakistani travel documents makes little difference, as the great majority of such documents are thought to have been obtained illegally, according to the Pakistani authorities.”

¹⁷OJ L 287/52 4 November 2010.

announced in November 2015 the unilateral suspension in the application of the EURA because it argued that some deportations were unfounded.¹⁸ A representative from the Interior Ministry of Pakistan declared that readmissions had taken place “without proper determination they were Pakistani nationals”.¹⁹ The Minister of Interior also announced that “Pakistan would not accept any deportees accused of militant [terrorism] links without clear evidence of guilt”. A joint return flight coordinated by Frontex from Greece on 4 November 2015 was not permitted to disembark 70 persons to be readmitted as Pakistani nationals.²⁰

The Commission’s Communication on “Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration” COM (2015) 510 of November 2015 emphasised: “A particular blockage was identified in Greece, resulting from disputes concerning documentation”.²¹ The Communication specified that “dedicated readmission discussions between the Commission, Greece and the Pakistani authorities” should lead to “a joint understanding on the application of the EU readmission agreement between Greece and Pakistan”. According to interviews conducted for the purposes of this book with EU policy makers in Brussels, even if the person to be readmitted has a passport issued by Pakistan, Pakistani authorities don’t seem to accept the readmission request if the passport does not have biometric identifiers and the name of the person is included in their national biometric database.²² These same interviews raised concerns about the non-reliability and “untrustworthiness” of the Pakistani biometric system at times of establishing the legal identity of the person involved.

On 23 November 2015 Commissioner Avramopoulos visited Pakistan to discuss and agree a way forward in the situation. After the meeting Avramopoulos declared that “everything is back to normal” and that “the EU would work with Pakistan to improve its verifications of citizenship before sending anyone back to Pakistan”.²³ In a meeting of the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament on 16 February 2016, the European Commission DG Home Affairs updated MEPs on the state of affairs with all EURAs. The Commission stated that a meeting had taken place on the 2 February 2016 with the Pakistani authorities in the context of the Joint Readmission Committee and that “concrete steps” were agreed to steer the implementation of the agreement. In particular, the Commission clarified that the Joint Readmission Committee had

¹⁸Refer to The Express Tribune (2015). The spokesperson on Pakistan Ministry of Interior declared that “The signing country had to first verify the nationality of that person who was being deported but there were instances where the nationality was not being verified. The minister took notice and the agreement is temporarily suspended.” See Dawn (2015a, b).

¹⁹Ibid.

²⁰Frontex (2015).

²¹European Commission (2015).

²²It appears that Pakistan is considering setting up another database exclusively for the purposes of readmission and that the country plans to start issuing only biometric passports before the end of 2016.

²³Reuters (2015).

agreed operational arrangements with Pakistan, including a number of concrete actions to deal with current obstacles.

The operational arrangements agreed with Pakistan remain confidential. The Commission's intervention before the EP LIBE Committee highlighted that they include a plan to organise a joint identification mission, which appears to be still in the planning stage. This would bring Pakistani authorities to Greece and jointly participate in the identification procedures, particularly in those cases where the identity is disputed, as well as in fostering the use of biometric technologies in the processing of readmission. The operational arrangements also foresee the obligation by Pakistani authorities to reply on specific deadlines for readmission requests by EU Member States. There continue to be obstacles when 'readmitting' people from Greece to Pakistan. According to interviews, Pakistani authorities continue not to reply within the stipulated deadlines. As of May 2016, Greece has reported a backlog of 592 readmission requests unanswered by the Pakistani authorities. This picture corresponds with the situation described by a study published by the European Migration Network (EMN) in 2014, which stated:

...the EURA with Pakistan is assessed as problematic due to delays in response and various other practical obstacles, such as the loss of documents. The average response time also reflects the disparity in the effectiveness between EURAs concluded with different third countries. For example, while the average response time for Georgia is 6-7 days, in the exceptional case of the EURA with Pakistan, it can take over a year to obtain a response from the authorities.²⁴

It is not clear at the time of writing how the obstacles in the EURA with Pakistan will be overcome. A Frontex Evaluation Report, issued 2 December 2015 on a Joint Return Operation from Greece to Pakistan,²⁵ identified ongoing identification issues when stating that

Only 19 returnees (13 from Greece, 4 from Austria and 2 from Bulgaria) were successfully handed over in Islamabad. Despite the fact that also the other 30 returnees (26 from Greece, 2 from Austria and 2 from Bulgaria) were holding valid passports and/or travel documents, they were not authorized to disembark the aircraft as, according to new rules imposed by the Pakistani authorities, their identity had not been "verified" prior to the flight by their Ministry of the Interior through supplementary biometric checks. Those 30 Pakistani citizens were brought back to Athens on board the same charter flight.

²⁴EMN (2014) p. 22.

²⁵Frontex (2015). The Report states that "As a result of a visit to the Embassy of Pakistan in Athens of a delegation headed by the European Commission aimed at increasing the commitment of the Pakistani authorities towards the identification of their nationals expelled from Greece awaiting to be returned in local detention centres, at the end of October the Greek authorities succeed in obtaining travel documents for around 70 Pakistani citizens. Frontex invited Greece to organize as soon as possible a joint return operation by air to Pakistan which was planned on the 4.11.2015. Due to the temporarily unavailability of the Greek authorities to hire planes, Frontex requested the cooperation of other MS and obtained the availability of Denmark to charter a suitable aircraft." Information on all Joint Return Operations can be found here: <http://frontex.europa.eu/operations/archive-of-operations/?year=2015&type=Return&host> Accessed on 31 May 2016.

3.2 Pham v. Secretary of State for the Home Department Case

The 2015 *Pham* Case provides another example of inter-state challenges inherent to the ‘readmission logic’. The UK Supreme Court issued on the 25 March 2015 the judgment on the case.²⁶ The case related to the lawfulness of the UK Home Department’s decision to deprive the appellant of his British citizenship as it would render him stateless. The main point of contestation was the extent to which the UK authorities should take account before depriving the appellant of British nationality of the fact that according to Vietnamese authorities he was not a national of Vietnam “under the operation of its law” in light of Article 1.1 of the 1954 Convention relating to the Status of Stateless Persons.²⁷

The appellant was born in Vietnam in 1983 and hence acquired Vietnamese nationality. The family went to the UK in 1989, claimed asylum and were granted indefinite leave to remain in the country. Six years later they acquired British citizenship. Between end of 2010 and summer 2011 the appellant was in Yemen where “according to UK security services but denied by him, he is said to have received terrorist training from Al Qaeda. It is the assessment of the security services that at liberty he would pose an active threat to the safety and security of this country”. On the basis of his suspected involvement in terrorist activities he was deprived of British nationality. Ever since Vietnamese authorities have declined to recognise him as a national of Vietnam.

Mr. Pham appealed this decision before the Special Immigration Appeals Commission (SIAC), on various grounds, including the one that the decision would render him stateless as well as the compatibility of the decision in light of EU citizenship law. The Court of Appeals held that Mr. Pham was a Vietnamese national on the relevant date under Vietnamese nationality laws. The Court concluded:

If the Government of the foreign state chooses to act contrary to its own law, it may render the individual de facto stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as de jure stateless. If this outcome is regarded as unsatisfactory, the remedy is to expand the definition of stateless persons in the 1954 Convention or in the 1981 Act, as some have urged. The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it.²⁸

The case reached the UK Supreme Court which ultimately (and unanimously) dismissed the appeal and confirmed the Court of Appeal’s rejection of Mr. Pham’s

²⁶UK Supreme Court, *Pham v. Secretary of State for the Home Department* [2015] UKSC 19, On appeal from [2013] EWCA Civ 616.

²⁷4 UNTS 360, 130.

²⁸Paragraph 92 of the judgment of the Court of Appeal.

claim and validated the decision by the UK Secretary of State for the Home Department. The Supreme Court held that there was no evidence “of a decision or practice of the Vietnam government which treated the appellant as a non-national “by operation of its law” or a decision effective at the date of the Home Secretary’s decision of 22 December 2011.²⁹ The Supreme Court also covered the compatibility of the decision with EU citizenship law and case-law by the Court of Justice of the European Union (CJEU), which is examined in detail in Sect. 5.3 of this book below. The UK Supreme Court reached the opinion that it was not necessary to resolve the dispute in light of EU law, and in particular the EU general principle of proportionality. It concluded in this regard that:

The issue would need to be considered by the domestic courts before it would be appropriate to consider a reference to the CJEU. However, before that stage is reached it is important that the tribunal of fact, SIAC, should first identify the respects in which a decision on these legal issues might be necessary for disposal of the case, including how the EU requirement of proportionality would differ in practice in the present case from proportionality under the European Convention on Human Rights, an issue already before SIAC, or from applying domestic law principles.³⁰

Open Access This chapter is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, duplication, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, a link is provided to the Creative Commons license and any changes made are indicated.

The images or other third party material in this chapter are included in the work’s Creative Commons license, unless indicated otherwise in the credit line; if such material is not included in the work’s Creative Commons license and the respective action is not permitted by statutory regulation, users will need to obtain permission from the license holder to duplicate, adapt or reproduce the material.

²⁹Refer to paragraphs 34–38 of the judgement.

³⁰See paragraphs 58 and 59 of the ruling. Paragraph 71 of the judgment held that “For reasons which will appear, I consider that it is unnecessary and inappropriate at least at this stage to resolve the disagreement between the parties about Union law, or to consider making any reference to the Court of Justice relating to it. The right course is to remit the matter to SIAC, with an indication that it should address the issues in the case on alternative hypotheses, one that the Court of Appeal’s decision in *R (G1) v. Secretary of State* is correct, the other that it is incorrect.” Furthermore in paragraph 98 the Court considered that the principle of ‘reasonableness’ and the EU proportionality principle were of a similar legal nature: “If and so far as a withdrawal of nationality by the United Kingdom would at the same time mean loss of European citizenship, that is an additional detriment which a United Kingdom court could also take into account, when considering whether the withdrawal was under United Kingdom law proportionate. It is therefore improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from Union law”.

References

- Cassarino JP (2007) Informalising readmission agreements in the EU neighbourhood. *Int Spectator* 42(2):179–196
- Cassarino JP (ed) (2010) Unbalanced reciprocities: cooperation on readmission in the Euro-Mediterranean area. Special Edition Viewpoints. Middle East Institute, Washington
- Coleman N (2009) European readmission policy. Third country interests and refugee rights. Martinus Nijhoff, Leiden
- Council of the EU (1999) Action plan for Afghanistan. 11424/99, Brussels, 30 Sep 1999
- Council of the EU (2015) Increasing the effectiveness of the EU system to return irregular migrants. 10170/15, Brussels, 22 June 2015
- Dawn (2015a) Pakistan suspends readmission agreements with Western countries, 6 November 2015. Accessed 31 May 2016
- Dawn (2015b) Pakistan demands ‘proof’ of terror charges for deportees, 17 November 2015. Accessed 31 May 2016
- European Commission (2011) Evaluation of EU readmission agreements. COM (2011) 76, 23 Feb 2011
- European Commission (2015) Communication Managing the refugee crisis: State of play of the implementation of the priority actions under the European agenda on migration. COM (2015) 510, 14 Nov 2015
- European Migration Network (EMN) (2012) Practical measures to reduce irregular migration. European Commission, Brussels
- European Migration Network (EMN) (2013) Establishing identify for international protection: Challenges and practices. European Commission, Brussels
- European Migration Network (EMN) (2014) Good practices in the return and reintegration of irregular migrants: Member states’ entry bans policies and use of readmission agreements between Member States and third countries. European Commission, Brussels
- Frontex (2015) Evaluation report joint return operation Greece to Pakistan. Warsaw, 2 December 2015
- Independent Chief Inspector of Borders and Immigration (2015) An Inspection of Removals. London, UK, October 2014–March 2015
- Panizon M (2012) Readmission agreements of EU member states: a case for EU subsidiarity or dualism? *Refugee Surv Q* 31(4):101–133
- Reuters (2015) EU says fixes deportee deal with Pakistan after spat, 23 Nov 2015
- The Express Tribune (2015) Pakistan suspends deal to accept deportations from Europe, 18 November 2015. Accessed 31 May 2016