ACTIVISM IN LUXEMBOURG: ANOTHER LOOK AT THE CJEU'S RECORD

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IN REPLY TO MAYA LESTER QC

Part of our series on "Debating Judicial Power: Papers from the ALBA Summer Conference".

Maya Lester, firstly, accuses Leave campaigners of populist attacks on the Luxembourg Court; secondly, is unsure what critics mean by "judicial activism"; and thirdly, can identify hardly any actual cases in which the CJEU has gone too far. Having been a Remain campaigner myself, I can sympathise with her on the first; I can offer help on the second; and I disagree strongly on the third.

My definition of "judicial activism" is the forcing of an unnatural meaning on the wording of a legal instrument in order to achieve an outcome which judges would like to achieve as a matter of political or public policy.

The Luxembourg Court has done this on more than the two occasions discussed by Maya Lester. Here are some others:-

- In *Google Spain*[1] the Court stretched the meaning of "data controller" to cover Google, which is actually an indexing system, in order to create a judicially enforceable "right to be forgotten", notwithstanding that the proposals for such in the EU legislative institutions had not been adopted.

- In *Nelson v Lufthansa*[2] the Court held that passengers on a flight which was delayed over 3 hours had been on a flight which was "cancelled", even though it then flew.

- In the Brussels planning case [3] the Court held that there must be an environmental assessment on a voluntary city planning code, since the words "regulated by legislation" must be read as meaning "required by legislation", even though a Commission proposal of a draft Directive containing the latter phrase had been rejected, and the Directive had only been enacted when it had been replaced by the former.

- In *Ruiz Zambrano*[4] the Court extended the effect of the residence rights of EU citizens to mean that a failed Moroccan asylum seeker must be paid unemployment

[1] Case C-131/12 *Google Spain SL v Agencia Espanola*
[2] C-581/10, C-629/10 [2013] 1 CMLR 42
[3] *Inter-Environnement-Bruxelles v Region de Bruxelles-Capitale* C-567/10
[4] *Ruiz Zambrano v Office national de l'emploi case* C-34/09, [2012] 2 WLR 886

benefit because otherwise he would have little alternative to leaving Belgium, and in that case his young children who had been born whilst he was in Belgium would in practice move also, and thus for a number of years would not enjoy their residence rights.

- *Mangold*[5] concerned the Framework Directive[6] which was enacted in 2000 to address discrimination on grounds inter alia of age. Germany was allowed a period until December 2006 for implementation. Nonetheless, the Grand Chamber held that in 2003, that is three years before the Directive came into force, employment under a fixed term contract, which would have been unlawful under German law for younger workers, was, therefore, also unlawful for older workers. That result was achieved on the basis of a general principle of EU law against age discrimination – a principle of which the EU legislators manifestly had not been aware.

The main CJEU case which Maya Lester discusses is, in fact, a good example of where I diverge from her assessments. This is *NS,*[7] which she describes as a "straightforward interpretation of Dublin II". The EU asylum legislation encourages migrants who wish to seek asylum within the EU to do so in the first member state they enter. Council Regulation 343/2003 (commonly known as "Dublin II") creates the concept of the member state primarily responsible for considering an application: by art 10 this is the state whose border the migrant first irregularly crossed. The Court accepted that Dublin II had been conceived on the assumption that all participating states respected human rights.

NS was an Afghan who entered the EU in Greece, where he was arrested and then expelled to Turkey. He escaped from detention in Turkey and later arrived in the UK, where in 2009 he claimed asylum. The Home Secretary decided to remove him to Greece, to enable his application for asylum to be considered by Greece. Greece was on a list of countries deemed "safe" in human rights terms in Schedule 3 to a 2004 UK statute

Regulation 343/2003 art 3(2) provides:-

> "By way of derogation from [the usual criteria for the state responsible for examining an application], each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Regulation"

A reader might think that those words meant no more than that it would have been permissible for the UK to examine NS's application if it had wished to do so. The Home Secretary chose not to do so. That, one might think, would have been that.

However, the CJEU reached the conclusion that the UK had infringed the Regulation. It did so by the following steps. First, the Court held that as a matter of fact in 2009 there was a real risk of asylum seekers in Greece being subjected to inhuman or degrading treatment. Next the Court held that, in consequence of step one, sending an asylum seeker to Greece would constitute an infringement of the EU Charter of Fundamental Rights. Thirdly, the Court held that when deciding whether to derogate from the normal procedures and to choose to examine an application which was not its own responsibility, a Member State "must be considered as

[5] C-144/04 *Mangold v Helm*
[6] Directive 2000/78
[7] *R(NS (Afghanistan)) v Secretary of State for the Home Department* [2013] QB 102

implementing EU law".[8] Therefore, far from having a mere discretion to examine the asylum application, it held that the UK was under a positive obligation to do so. Thus text, whose normal meaning would connote a mere permission, has become transformed into text connoting a mandatory duty.

The most controversial step in this process of judicial reasoning is that holding that when deciding whether to take advantage of a derogation a state is "implementing EU law".[9] That test is crucial because the Charter has effect "only when ... implementing Union law". Common sense might suggest that when exercising a derogation from a requirement in an EU Regulation a state would be doing the very opposite of implementing EU law. Thus what Maya Lester regards as a "straightforward interpretation" strikes me as one which distorts the meaning of language.

One sees the same pattern in all these cases. The judges have a viewpoint on a social or political issue. They want to give life to the concept of European citizenship. They are concerned about the conditions of asylum seekers in Greece. They wish that a right to be forgotten had been enacted. They dislike discrimination on grounds of age. They would have preferred environmental assessments to have been made mandatory in a wider range of situations. They sympathise with passengers whose flights are delayed. So they push words to have something other than their natural meaning.

Because forced meanings of words are unexpected, this undermines the concept of the Rule of Law, of which the first characteristic is that the law should be certain and predictable.

"Judicial activism" in the above sense is a phenomenon of real and definable meaning. It is also, according to the political values of some of us, fundamentally wrong.

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[8] Judgment [68]
[9] Charter art 51(1)