REFUGEE STUDIES CENTRE

WORKING PAPER SERIES NO. 133

Forging Strategic Partnerships

How civil organisers and lawyers helped unaccompanied children cross the English Channel and reunite with family members

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MSc Refugee and Forced Migration 2017

October 2020

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RSC Working Paper Series

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Acknowledgements

I am very grateful to Cathryn Costello and Jenny Allsopp for supervising this research and editing this project. Thank you to George Gabriel at Safe Passage UK and the entire Safe Passage team. Thank you to the barristers, lawyers, activists, organisers, and nonprofit founders interviewed in this work: Liz Clegg, Rosa Curling, Michael Fordham QC, George Gabriel, Beth Gardiner-Smith, Charlotte Kilroy QC, Georgina Clein, Rowena Moffatt, Nuala Mole, Markella Papadouli, Jason Pobjoy, Charlotte Morris, Francesco Maiani, and Lord Alf Dubs. Finally, thank you to the Refugee Studies Centre in Oxford, especially the 2016–2017 MSc in Refugee and Forced Migration Studies cohort.

Acronyms

AIRE Centre	Advice on Individual Rights in Europe Centre
CAOMIs	*Centres d'Accueil et d'Orientation des Mineurs Isolés*
CJEU	Court of Justice of the European Union
DR	The Dublin Regulation
DR I	The 1990 Dublin Regulation
DR II	The Dublin II Regulation (2003)
DR III	The Dublin III Regulation (2013)
ECHR	1950 European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
Geneva Convention	1951 Convention Relating to the Status of Refugees and 1967 Protocol
HRA	1998 Human Rights Act
JR	Judicial Review
NGO	Non-governmental organisation
SSHD	Secretary of State for the Home Department
TCN	Third-country national
UNHCR	United Nations High Commissioner for Refugees
Upper Tribunal	Upper Tribunal (Immigration and Asylum Chamber)

Abstract

This paper investigates legal and political advocacy of lawyers and civil society organisers in the United Kingdom on behalf of unaccompanied children seeking international protection. In 2015, civil society activists and lawyers in London partnered to assist children in Calais, France, who made the harrowing journey to reach Europe in the hopes of reuniting with family residing in the UK. By turning to the UK courts and engaging in public advocacy, lawyers and activists united hundreds of unaccompanied children with their family members, achieving remarkable legal mobilisation success, despite the country's antagonistic environment for asylum seekers. Drawing on socio-legal scholarship and empirical studies of effective legal mobilisation, this paper explores whether partnership between lawyers and civil rights activists makes overcoming structural and cultural barriers to accessing courts, winning in court, and attaining practical policy change more likely. It highlights the benefits of lawyer-civil society collaboration and identifies the hazards of invoking unaccompanied children's vulnerability as a means to achieve far-reaching political change.

1 Introduction

In 2015, over 250,000 children predominantly from Syria and Afghanistan traversed the Mediterranean and entered Europe unauthorised – many unaccompanied by a parent or responsible adult (Humphris and Sigona, 2016). Over one thousand continued clandestinely to France in the hope of crossing the English Channel and reuniting with family members in the United Kingdom (Chekhar, 2016). These 'third-country national'[1] (TCN) children inhabited makeshift camps, or 'jungles', in Calais, France, living in circumstances 'so bad... (y)ou have to smell conditions like these and feel the squelch of mud mixed with urine and much else through your boots to appreciate the horror'.[2] While most desired international protection under the *1951 Convention on the Status Relating to Refugees and 1967 Protocol* (hereafter 'Geneva Convention') or the *European Union Qualification Directive*, they were largely unable and afraid to seek it. There was no age and language-appropriate information about navigating the asylum system, and a dearth of human resources available to formally register and process asylum claims; most unaccompanied TCN children mistrusted French authorities and feared seeking their assistance (Chekhar, 2016). With no official asylum claim, they were barred from reuniting with family members whilst awaiting refugee status determination – a right conferred on asylum seekers by the *Dublin Regulation*, a European law determining state responsibility for examining international protection applications.

After witnessing these abuses in Calais, civil society activists from Citizens UK, a British non-governmental organisation (NGO) dedicated to promoting social justice through community organising since 1996, sought to change the status quo. They sponsored the project Safe Passage UK (hereafter 'Safe Passage'), and joined forces with lawyers in London to help unaccompanied TCN children in Calais access their legal rights. Turning to national courts for redress, Safe Passage and allied lawyers contacted the UK Secretary of State for the Home Department (SSHD). They requested that she expeditiously admit unaccompanied TCN children in Calais to reunite them with

[1] 'Third-country nationals' (TCNs) are individuals whose origins are non-European (Dublin III Regulation (DR III) Article (1)); this paper uses the qualifier 'TCN', rather than 'migrant', to be in accordance with DR III and duly recognise these children's potential asylum claims.

[2] The words of a 'concerned Englishman' quoted in *ZAT* (§5 Upper Tribunal Judgment and §23 Court of Appeal Judgment).

their UK-based family members. When she refused, they filed the case of *ZAT and Others v. SSHD* [2016] (hereafter '*ZAT*') in the UK Upper Tribunal (Immigration and Asylum Chamber) (hereafter 'Upper Tribunal'), alleging that her refusal disproportionately interfered with children's human right to respect for family life.

It is well established that pursuing legal action to defend or develop universal rights, defined in the literature as 'legal mobilization' (Epp 1998: 18), does not automatically lead to favourable rulings ('legal wins'), or 'policy change with nationwide impact' ('political wins') (Rosenberg 2008: 4). Achieving such change is unlikely when political and legal systems are structurally closed and culturally unreceptive to outsiders' claims. Empirical socio-legal studies suggest that legal mobilisation affords practical change when civil society organisations and lawyers align and combine legal and political mobilisation tactics (e.g. Vanhala, 2017; Andersen, 2005). Scholars posit that sustained partnership between civil society activists and lawyers makes successful legal mobilisation more likely by mitigating (1) structural barriers to accessing courts, (2) legal and cultural constraints to winning in court, and (3) political and cultural constraints to achieving political triumphs after legal ones. To further develop this empirical scholarship, this paper considers the sustained partnership forged between Safe Passage organisers and lawyers to safeguard the right to family life of unaccompanied TCN children in Calais, and examines whether it improved access to courts and increased the likelihood of achieving legal and political gains.

Given the government's restrictive stance towards asylum seekers, the judiciary's tradition of upholding the government's power to regulate immigration, and popular political rhetoric in the UK framing asylum seekers of all ages as 'undeserving' 'cheats' (Berry, Garcia-Blanco, and Moore, 2016: 15; Philo, Briant, and Donald 2013: 32), one would expect 'ZAT legal mobilisation'[3] to be particularly challenging. Yet, it attained considerable impact. In a radical decision, the Upper Tribunal ordered the SSHD to immediately admit *ZAT* claimants to the UK.[4] The ruling established a safe, legal pathway to the UK, which Safe Passage and lawyers utilised to reunite over 850 unaccompanied TCN children in Calais with their UK-based family members. This success provides valuable insight into legal mobilisation for individuals perceived to be threatening to public culture and national security, and for children's rights litigation. With cumulative ZAT legal mobilisation efforts unfolding at the time of analysis, this case study illuminates how legal mobilisation is negotiated and contested in real time. While this case study is generally consistent with the empirical and theoretical literature, it suggests that partnership between lawyers and civil society activists may be double-edged. Where overcoming structural and cultural barriers requires invoking marginalised individuals' vulnerability, combining legal and political mobilisation tactics may limit lawyer/civil society activists' ability to achieve far-reaching political change.

The next part of this paper places the case study in the relevant political and legal context. Political and legal mobilisation scholarship is then reviewed. I present a three-part hypothesis drawn from empirical studies of successful legal mobilisation – that combined legal and political advocacy overcomes structural and cultural barriers to (1) accessing courts, (2) winning in court, and (3) winning politically. I then defend the case study selection, and acknowledge the limitations of my research. The case study is presented in section 5. To resolve whether their partnership increased the likelihood of accessing courts and attaining legal and political triumphs, I identify and assess the

[3] The term 'ZAT legal mobilisation' refers to the multi-faceted actions pursued by civil society organisers and lawyers to advance the family life rights of TCN children in Calais. *'ZAT'* refers to the specific Upper Tribunal and Court of Appeal case wherein ZAT was a named claimant.
[4] *R (on the application of ZAT and Others) v. Secretary of State for the Home Department* (IJR) [2016] UKUT 61

collaboration between Safe Passage and the petitioners' lawyers during the legal mobilisation process. Larger implications for empirical studies and legal mobilisation theory are also considered.

2 Legal and political background to family reunification for unaccompanied TCNs seeking entry to the UK

2.1 1950 European Convention on Human Rights

A child in need of international protection has never had any real prospect of obtaining a standard family reunion visa to reunite with UK-based family. With a 'culture of disbelief' and 'suspicion' surrounding the motives of those seeking international protection, British Immigration Rules are stringent; legal opportunities for family reunification are extremely limited for potential asylum seekers (Souter, 2011; Spijkerboer, 2013; Pike et al., 2016). For UK-based TCNs, visa codes allow only those with formal refugee status or humanitarian protection in the UK to sponsor visa applications for partners and dependent children – not siblings or extended family (HL Paper 34; Gower, 2016).

With family residing in the UK, a TCN child seeking international protection may invoke the *1950 European Convention on Human Rights* (ECHR), which applies to every person within the jurisdiction of a state party to the Convention.[5] Article 8 guarantees him[6] the right to respect for his family life (8(1)), subject to proportionate and lawful restrictions (8(2)). This right may be lawfully limited where doing so is necessary to pursue a legitimate aim, like ensuring national security and public safety. In principle, the unaccompanied TCN child may invoke this right and contact a UK official to request entry to the UK. To substantiate his claim, he must indicate that (1) UK immigration practices are interfering with his right (e.g. by denying him entry); and (2) under the circumstances, this interference, while undertaken to pursue a legitimate aim (e.g. immigration control providing national security), is disproportionate to his right to respect for family life. In practice, case law relating to Article 8 rarely obliges state parties to admit TCN children residing outside a state, even where a child's parents reside inside, as state interference with family life is difficult to prove (Costello, 2016).

2.2 UK juxtaposed controls in Calais, France

Because it is exceedingly challenging to obtain a family reunification visa and invoke Article 8 ECHR rights prior to entering – and even once in – Europe, a TCN unaccompanied minor who crosses the Mediterranean and enters a European state must rely on irregular routes of travel. If he wishes to reach the UK, he may continue surreptitiously to Calais, France, 50km south of Dover, UK. There he must bypass both French exit and UK-operated entry immigration checkpoints (juxtaposed controls) established to enhance border control in Calais under the 2003 French-British Treaty of Le Touquet. Since 2003, these controls have been largely designed to thwart and deter him from irregularly crossing the Channel and 'cheating' normal European asylum processes (Thomson, 2003; Souter, 2011; Guiraudon and Lahav, 2013). This final segment of the journey has become increasingly perilous. Many TCNs seeking international protection have perished, falling from

[5] It has been established and confirmed that, in exceptional cases, 'jurisdiction' may not be confined to a Contracting State's own national territory (see *Hirsi Jaama and Others v. Italy* [2012] 55 EHRR 21).
[6] I use male pronouns because most unaccompanied minors entering EU Member States in 2015 and 2016 were male; most asylum seekers are male, as it is often more difficult for women to journey to the 'global north' (see Chimni on 'exilic bias', 1998: 351).

trains, suffocating inside lorries, and even drowning in the canal at the Channel Tunnel entrance (Bajekal, 2015).

2.3 The Dublin Regulation

Once the child has reached France, or any other 'Dublin Member State'[7], he may lodge a formal claim for international protection and apply for transfer to the UK via the *Dublin Regulation* (hereafter 'Dublin' or DR I, II, or III).[8] As the 'cornerstone' of the Common European Asylum System (CEAS), Dublin establishes a system for allocating responsibility for processing asylum applications lodged in any Dublin Member State (Maiani 2016: 101). It provides that every application is (1) examined, (2) by a single Member State, (3) determined responsible according to 'objective' criteria set out in the Regulation.[9] In principle, Dublin strives to be compatible with human rights precepts laid out in the ECHR, the Geneva Convention, and the *Charter of Fundamental Rights of the European Union* (EUCFR) (Maiani, 2016; Brandl, 2016). 'Respect for family life' and unaccompanied minors' 'best interests' must be 'a primary consideration' when applying the regulation (Recital 13 and 14 DR III). Accordingly, where an unaccompanied minor applies for asylum in one Member State, 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)).

When a TCN lodges an application for asylum in one Member State (State A), that state must interview him and determine which Member State is responsible for processing his claim. If State A decides that another Member State (State B) is responsible for examining his application, it can issue State B with a 'take charge' or 'take back' request (Article 21 and 24).[10] State B must examine the request and reply within 2 months (Article 22(7) and 25(2)). Discretionary clauses permit State B to examine his asylum application (Article 17(1)), and issue a take charge request on his behalf 'to bring together any family relations' on 'humanitarian grounds', even if Article 8-11 family unity criteria have not been fulfilled (Article 17(2)).

In practice, most Member States work to make themselves less attractive to TCNs than their European neighbours (Mouzourakis, 2014). They 'deflect' asylum seekers by setting stringent evidential requirements for fulfilling Dublin family criteria and/or failing to identify or invoke criteria in the first place (Noll 2000: 194; Garlick, 2016). The UK is one such state. It insists on DNA testing to substantiate take charge and take back requests on family unity grounds (see *MK, HK and IK* [2016]), and has rarely accepted a take charge request based upon family unity (AIDA, 2015, 2016; Williams, 2016; Pike et al., 2016). As of March 2016, *not a single* unaccompanied minor had been transferred from France to the UK since DR III took effect on 29 June 2013 (Chekhar, 2016).

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[7] Dublin 'Member States' are state parties to Dublin; they are the 22 countries in the European Union (EU) and Norway, Iceland, Switzerland, and Liechtenstein.

[8] Dublin was established as an inter-governmental agreement by the 1990 Schengen Convention and the 1990 Dublin Convention. It was incorporated into European Community legislation in 2003 (DR II) and recast as an EU Regulation (DR III) in 2013.

[9] Criteria are 'objective[ly]' determined by Member State without regard to asylum seekers' 'subjective' preferences (Recital 4 DR III; Chetail 2016: 6; Maiani 2016: 104).

[10] 'Take back' requests are issued when an applicant has previously applied for protection in another Member State; and 'take charge' requests are issued when the applicant has not previously applied, but another Member State is considered responsible.

3 Theoretical framework for mobilising human rights law

3.1 Constrained civil society

In the face of human rights abuses, civil society organisations have an important function. They play a key role in human rights governance in holding states accountable to rights-based legal commitments (Simmons, 2009; Peruzzotti and Smulovitz, 2006). By mobilising around human rights standards and advocating for their incorporation into local political agendas, pro-rights civil society organisations serve as the 'enforcement mechanism' that many international and regional human rights instruments lack (Hafner-Burton and Tsutsui, 2005; Castles, 2004).[11] They can persuade, pressure, and socialise states to comply with human rights by documenting abuses and disseminating information ('naming and shaming'), submitting evidence of abuse to international bodies, and engaging in political lobbying and public protests (Finnemore, 1996; Risse and Sikkink, 1999).

The success of civil society activism depends on the political context and the 'political opportunity structure' surrounding the rights-based demands in question (Kitschelt, 1986 cited in Hilson 2002: 239; Caponio, 2005; McMahon, 2015). When political systems are open to 'bottom-up' claims and political elites are receptive to collective action, civil society activists can affect policy change at the national, regional, or international level (ibid.). Where political structures are closed off and political elites are antagonistic or unreceptive towards rights-based claims, it is difficult to mobilise politically; actors are unlikely to achieve substantive policy changes with traditional political lobbying, protesting, and 'naming and shaming' tactics (ibid). In this politically challenging terrain, civil society actors are more likely to abandon conventional strategies and mobilise legally (Hilson, 2002).

3.2 Constrained courts

Mobilising human rights law does not necessarily guarantee substantive respect for the rights of marginalised individuals. Legal claims do not assure legal victories; legal victories do not translate automatically into policy changes; and even new policies may be neglected in practice (Galanter, 1974; Scheingold, 1974; Rosenberg, 1991, 2008). According to critical legal theory and socio-legal scholarship, the success of legal mobilisation depends on a state's 'legal opportunity structure' – that is the structural openness of legal institutions, the formal legal culture, the powers of the judiciary, the existing body of law, and the receptivity of the judicial elite to the specific rights-based claims (ibid., Epp, 1998; Andersen, 2005; Vanhala, 2011, 2012, 2017). 'To get through the courthouse door', there are many procedural and substantive issues that civil society organisations must satisfy (Vanhala 2012: 536). Navigating standing rules and judicial regulations and procedures often requires legal expertise and organisational skills (Börzel, 2006; Alter and Vargas, 2000; Cichowski, 2007), and time and capital (Epp, 1998; Evans Case and Givens, 2010).

[11] Civil society is a diverse space commonly understood as a 'dense network of civil associations [that] promote the stability and effectiveness of the democratic polity through…mobiliz[ing] citizens on behalf of public causes'; it includes charities, NGOs, humanitarian organisations, professional associations, lobby groups, unions, churches and other associations (Walzer 1991 quoted in Barbulescu and Grugel, 2016: 257). This paper considers pro-rights, independent civil society organisations exclusively.

Once civil society actors have accessed the courts, they must present legally persuasive arguments to achieve a favourable ruling, a 'legal win', but winning is difficult. The existing body of law (legal stock) available to organised actors established by international, regional, constitutional, statutory, administrative, common, and case law shapes the types of available legal claims and determines their persuasiveness (Andersen, 2005; Hilson, 2002). As law and culture are 'mutually constitutive', wherein 'cultural symbols and discourses shape legal understandings', existing laws typically replicate social hierarchies; litigation generally privileges the socially powerful already protected by the law (Andersen 2005:14; McCann 2004, 2006). When mobilising law, the 'haves' tend to 'come out ahead' (Galanter, 1974).

If civil society activists achieve a 'legal win', their efforts still may not lead to 'policy change with a nationwide impact' (Rosenberg 2008: 4). In his landmark study, *The Hollow Hope: can courts bring about social change?* (1991), Gerald Rosenberg argues that individuals and groups looking to the courts to achieve change are likely to be disappointed. According to Rosenberg, 'courts act as "fly-paper" for social reformers who succumb to the '"lure of litigation"' (341). Drawing on examples of civil rights, abortion and women's rights, and same-sex marriage (second edition, 2008) litigation in the U.S., he asserts that courts are 'constrained' and often unable to produce significant change. Even when the judiciary reaches a more radical ruling, court orders tailor to the specific facts of the case (Donald and Mottershaw, 2009; Clements and Morris, 2004). Moreover, without 'the pen' or 'the purse', courts lack the implementation tools necessary to enforce court decisions (Rosenberg 2008: 21). The government and relevant public bodies retain the power to determine whether policy changes follow favourable court orders and whether they are implemented in practice (Halliday, 2004; Halliday and Hertogh, 2004). Courts thus lure reformers 'to an institution that is structurally constrained from serving their needs, providing only an illusion of change' (Rosenberg 2008: 341).

3.3 Sustained civil society-lawyer partnerships

While socio-legal scholarship contends that strict procedural rules, high costs, limited legal stock, and constrained courts effectively 'shut down' NGO legal mobilisation for human rights demands (Kritzer, 1992 cited in Vanhala 2017: 7), most empirical case studies present a more nuanced picture. Using test cases involving social movements for gender equality (McCann 1994, U.S.; Alter and Vargas 2000, UK; Hilson 2002, UK; Fuchs 2013, Switzerland, Germany, France, and Poland), environmental defence (Vanhala 2012, UK; Vanhala 2017, UK, France, Finland, and Italy), lesbian and gay rights (Hilson 2002, UK; Andersen 2005, U.S.), and the rights of disabled persons (Vanhala 2011, UK), scholars have found that, even where legal opportunity is limited, legal action may alter some aspect of the social, economic, and political status quo. They argue that litigation is not always a 'fly-paper,' but rather 'a match': 'when struck, it is unpredictable… [but] it can…light a path out of the darkness' (Andersen 2005: 218).

Empirical case studies suggest that legal mobilisation may achieve practicable policy change when lawyers and civil society organisations work together because their partnership makes (1) accessing courts, (2) winning in court, and (3) winning politically more likely. Procedural and structural hurdles are more easily overcome when civil society actors pool resources to cover legal fees, identify and unite claimants, and gather evidence of wrongdoing (Epp, 1998; Andersen, 2005; Vanhala, 2011). Once they have accessed the courts, civil society organisations and lawyers can partner to package evidence persuasively; they can enlist the assistance of other like-minded groups to demonstrate that legal claims have public support and fit squarely within existing judicial applications of the law (Alter and Vargas, 2000; Andersen, 2005; Vanhala, 2017). If civil society and lawyers obtain a favourable judgment, they can engage in and/or leverage the threat of further

litigation to hold the government accountable to its human rights commitments (Epp, 2009; Morris, 2010; Vanhala, 2012, 2017). They may lobby politicians and publicly protest around the ruling to pressure the government/relevant public body to reconsider its policies/actions more comprehensively (Donald and Mottershaw, 2009; McCann, 2006; Sarat and Scheingold, 2006). Empirical studies also indicate that mobilising legally and politically can widen legal opportunity structure over time, since access to courts and legal stock are not stagnant, but shift with the passage of new case law and new legislation that reflects the changing socio-political context (Andersen, 2005). Partnership between civil society and lawyers may foster the circumstances under which litigation can successfully light a 'path out of the darkness', even where political and legal activism are structurally and culturally constrained.

4 Methodology

4.1 Aims

This paper seeks to determine whether civil society and lawyer partnerships make accessing the courts, winning legally, and winning politically more likely, as empirical case studies suggest. To answer this motivating question, I take a predominantly 'bottom-up' methodological approach (McCann, 1994), and analyse partnership between Safe Passage and partnering lawyers from September 2015 to May 2017. I specifically examine their collaborative effort to safeguard the right to family life of unaccompanied TCN children with family ties to the UK, residing in Calais, France (i.e. ZAT legal mobilisation).

I consider the British political and legal structure, traditionally described in the literature as closed to human rights-based activism (Epp, 1998; Hilson, 2002; Maiman, 2004, 2005). In the UK, civil society activists and marginalised individuals have great difficulty accessing local politicians and airing grievances before Parliament (Davis et al., 2005). Political elites also dominate the public space, making protest and public advocacy challenging (Statham and Geddes, 2006; Berry, Garcia-Blanco, and Moore, 2016). While this may inspire NGOs to turn to the judiciary, several legal hurdles exist. With a 'loser pays' fee system that requires the losing party to pay the victorious party's legal fees, it is often risky and costly to litigate (Vanhala, 2012, 2017). Moreover, under the doctrine of parliamentary sovereignty, the courts are generally barred from striking down Parliamentary legislation.[12] An organisation may appeal to the judiciary through judicial review (hereafter 'JR') when an act/omission of a public body is unlawful and incompatible with existing legal stock. The applicable legal stock is vast, including British statutes, common law, EU law, the ECHR and the *1998 Human Rights Act* (HRA), which gave the ECHR domestic effect, and case law from national courts, the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR). Yet, most court orders preserve the implementation powers of Parliament or the relevant public body (Administrative Guide Judicial Review, 2016). The government frequently responds to court orders in a 'reactive' or 'piecemeal' way (Donald and Mottershaw 2009: 357). It avoids comprehensive policy reform and often engages in defensive 'risk-proofing' of policies to evade only fact-specific incompatibilities with the law (Clements and Morris 2004: 215).

[12] The doctrine of parliamentary sovereignty mandates that Parliament is the supreme legal authority. It may enact or repeal any law. Acts of Parliament may be struck down only when incompatible with EU law.

By considering actions undertaken to change UK implementation of EU asylum law, this paper takes one step further into thorny terrain. As non-citizens, TCNs are precluded from voting and effecting policy shifts via the ballot box. They are not part of the *demos* and cannot leverage the political power of their democratic vote (Gibney, 2003; Bustamante, 2002; Messina, 2007). Accessing the courts is also difficult for UK-based TCNs seeking international protection; legal aid cuts in 2012 and 2014 have abolished state-funded legal assistance for most immigration matters (AIDA, 2015; Connolly and Pinter 2015). Extra legal hurdles exist for TCNs seeking entry into UK territory, since UK courts consider it 'one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory and to regulate and enforce the terms on which they may do so'.[13] By studying legal mobilisation specifically pursued in the UK for TCNs seeking international protection, this paper elucidates how partnerships achieve legal mobilisation success in particularly hostile political and legal environments.

4.2 Case study selection justification

ZAT is an interesting test case for three primary reasons. First, to my knowledge, few scholars have conducted empirical studies applying legal mobilisation theory to asylum policy in the UK – or Europe. Doing so provides valuable insight into mobilising law for individuals excluded from the *demos*. As full respect for family life rights of TCNs in the ZAT case entails an 'affront' on national sovereignty, the case study is also instructive for future cases mobilising what Tanya Basok (2009) terms 'counter-hegemonic human rights values' – values that 'challenge the status quo' either by 'undermining the political economic foundations of liberal democracies and/or the principles of national sovereignty' (184). Second, ZAT is a valuable case study because it taps into two distinct legal/political cultural frames: that of asylum seekers and that of children. Understanding how civil society organisations and lawyers exploit these frames may instruct further litigation in both arenas. Lastly, because ZAT's outcome was unfolding at the time of the study, the case analysis takes place in 'real time'. As Donald and Mottershaw (2009) assert, 'there is value in evaluating impact over time, or even in "real time", as this would allow better understanding of the triggers for change' (352). To date, most case studies investigate long-term impact or impact over time, as the significance of any case varies vastly with the passage of time. Presenting a snapshot of impact in the moment contributes to the discourse by illuminating how outcomes are disputed in a single instance.

4.3 Limitations

Examining a single case study, I cannot boast robust, replicable conclusions that span different jurisdictions or policy areas. Likewise, I cannot claim to present a detailed picture of the whole UK story. This research focuses on a single piece of a larger picture. There were many partnerships between and among lawyers in the UK working to advance child asylum seeker and refugee rights in Calais and across Europe at the time of this study – many of which I refer to only briefly. I note too that advocating for safe, legal pathways to realise family reunification is but one concern of actors looking to safeguard children's best interests throughout their migration journey *and* upon their arrival in the UK. Moreover, without including the voices of unaccompanied TCN children, this research does not and cannot claim to be conducted purely from the 'bottom-up'. I cannot determine what is in a child's 'best interest' without considering his individual voice; whether litigation is truly in his 'best interest' remains a qualified position.

[13] ZAT Upper Tribunal (§56), quoting Lord Bingham of Cornhill in *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2008] UKHL 27 (§4).

As my research focuses on real-time events, I can identify and assess only the short-term effects of legal mobilisation. I cannot study, nor claim to know the effects of ZAT over the long term. Several scholars have found that asylum law and policy evolves in a 'cat-and-mouse game' (Gammeltoft-Hansen 2014: 11), wherein states learn and adapt when they 'lose' legally and politically (Barbulescu and Grugel, 2016). In the long run, states seek new venues for immigration control and may enlist new allies, including private and third-country actors, to regain the political high ground (ibid.). Short-term legal mobilisation gains presented in this research may not endure.

4.4 Methods

For this case study, I collected and analysed data from publicly accessible Hansard records of parliamentary debates, policy briefs, official press releases, news media, international organisation and NGO reports, court submissions, and EU and UK case law related to the issues and actors involved in *ZAT*. I draw from field notes taken while attending the public *Citizens UK v. SSHD* substantive hearing on 23 and 24 May 2017 in the Royal Court of Justice; and 12 semi-structured interviews that I conducted with NGO workers, barristers, and solicitors between January and May 2017. Seven took place in person, four via Skype, and one through email. Eleven of the 12 were audio-recorded. I identified and contacted participants through online research and employed snowball sampling. Each participant was interviewed about his/her personal involvement in *ZAT* and other strategic cases pursued in the issue area of asylum seeker rights. Because litigation was ongoing, interviewees were unable to disclose select information yet to be filed in court. This prevented some interviewees from speaking openly and sharing all pertinent information. At the same time, conducting interviews 'in the heat of the moment' facilitated passionate accounts that were truthful to the present with no benefit of hindsight.

5 Case study: Mobilising the right to family reunification for unaccompanied TCN children in Calais

When Citizens UK organisers first went to Calais in September 2015, unaccompanied TCN children with family ties to the UK were not being transferred from France to Britain. Today over 850 children have crossed the Channel legally and safely to reunite with their family members in the UK. The following sections trace and analyse lawyers and Safe Passage organisers' partnership thus far.

5.1 Timeline of events from September 2015 to May 2017

In August 2015, while NGOs compelled Britain to support unaccompanied TCN children in Europe, 'the Calais story' was one of immigration control (Berry, Garcia-Blanco, and Moore, 2016). The government signed a 'Joint Declaration'[14] with France to implement DR III 'efficiently and effectively' (§ 24), but mainly to fortify border security (§ 10). This began to shift in September, when a small team of Citizens UK organisers travelled to Calais and met several unaccompanied TCNs. After learning from lawyers that those wanting to reunite with British-based family members may have legal remedy in the UK, Citizen's UK launched Safe Passage UK to dedicate funds and manpower exclusively to the cause.

[14] *Managing Migratory Flows in Calais: Joint Ministerial Declaration on UK/French Co-Operation.*

In partnership with lawyers from one legal-aid NGO and three private solicitor firms and barrister chambers based in London (hereafter 'ZAT lawyers'[15]), Safe Passage began pursuing a mixed strategy of strategic litigation, parliamentary lobbying, and grassroots community organising. They interviewed children in Calais and compiled a list of the 12 most compelling cases for transfer—eleven unaccompanied children and one dependent adult all of whom had siblings residing as registered refugees in the UK. ZAT lawyers contacted the SSHD and requested that she admit them to the UK without a Dublin take charge request, citing her ability to do so under the DR III discretionary clause (Article 17). When she refused, ZAT lawyers filed for JR in the Upper Tribunal as a matter of urgency. Proceedings were scheduled for late January 2016.

In anticipation of the JR, Safe Passage publicised its work and arranged for religious leaders, celebrities, and parliamentarians to visit the 'jungle'. The government, on the other hand, worked to fend off scrutiny and legal accusations. It announced a 'Children at Risk' resettlement scheme to resettle refuge children from the Middle East and North Africa, and allocated £10 million to support TCN children in Europe and improve the handling of Dublin transfers (HCWS497 and HLWS487). By late January, four Calais claimants remained: three Syrian unaccompanied children (ZAT, IAJ, KAM) and one dependent Syrian adult (AAM) who had been refused entry to the UK by the SSHD. The others had disappeared from the 'jungle' and had attempted to cross the Channel clandestinely.

On the first day of proceedings, ZAT lawyers argued that the DR III procedures were inadequate to provide those in Calais the 'practical, expeditious and effective protection' they were due; and that Article 8 ECHR placed a positive duty on the SSHD to admit ZAT, IAJ, KAM and AAM to the UK to reunite all seven claimants (§33). The SSHD countered that no legal duty was owed to claimants in Calais under Dublin since they had not formally applied for asylum and the French had not issued a take charge request; and that the legitimate aim of maintaining orderly immigration control proportionally outweighed interference with claimants' rights to respect for family life (§31). *ZAT* claimants prevailed. On 21 January 2016, the Upper Tribunal held that the SSHD had disproportionately interfered with the family life rights of all seven claimants (Appendix §3). To 'harmonise' Dublin and the ECHR, the Tribunal ordered the SSHD to immediately transfer ZAT, IAJ, KAM and AAM to the UK once they submitted letters to French authorities claiming asylum (Appendix §4). The siblings reunited later that day.

The government appealed, challenging the Upper Tribunal's legal reasoning but not the order admitting *ZAT* claimants to the UK. In the meantime, it liaised with French authorities to make Dublin transfers more efficient. ZAT lawyers and Safe Passage assisted the SSHD in this endeavour by identifying unaccompanied children with family links to the UK. The first children arrived pursuant to Dublin procedures in March 2016. When the government refused to make viable Dublin transfers, ZAT lawyers challenged denied transfers in the Upper Tribunal. At the same time, Safe Passage lobbied to change national legislation. It supported the passage and implementation of Section 67 of the Immigration Act 2016, commonly referred to as the Dubs' Amendment after its sponsor Lord Alf Dubs. The government was slow to implement this national legislative change and publicly cited the number of children it had transferred under Dublin as progress made under s. 67—transfers that had largely relied on persistent identification and legal representation by Safe Passage and ZAT lawyers. Of the 60 transfers the government boasted in the summer of 2016, 58 were Safe Passage/ZAT lawyer clients.

[15] I refer to the British lawyers representing *unaccompanied children* from Calais as 'ZAT lawyers', although there were other claimants in *ZAT* and the relevant cases that followed.

In late June 2016, the *ZAT* appeal commenced.[16] The SSHD presented evidence of a fully functioning Dublin system in Calais, again assuming credit for ZAT lawyers/Safe Passage's identifying unaccompanied minors and their UK-based family members (§ 58). With *amici curiae* briefs from the AIRE Centre, a specialist NGO providing 'Advice on Individual Rights in Europe', and the Office of the United Nations High Commissioner for Refugees (hereafter 'UNHCR'), ZAT lawyers advocated to uphold the *ZAT* precedent. On 2 August, the Court of Appeal ruled the Upper Tribunal had erred by permitting 'strong' family reunification cases to sidestep Dublin mechanics (§ 92). It held that the SSHD was required to bypass Dublin procedures only in 'especially compelling cases' where applicants could demonstrate that such procedures were objectively incapable of responding adequately to family unity needs (§ 92 and §95).

When France announced the impending demolition of the 'jungle' shortly thereafter, roughly 200 unaccompanied children had been transferred to the UK. Yet many remained in Calais, unable to initiate the DR III process. Safe Passage rapidly pushed the government to transfer them to the UK. Rather than litigate, ZAT lawyers presented the SSHD with a redacted list of 400 unaccompanied TCN children whom they deemed eligible for DR III transfers. Safe Passage publicised the number in public campaigns. It released information obtained from a freedom of information request to reveal that the government had spent over £100,000 in legal fees fighting Safe Passage 'to make it harder to reunite refugees in Calais with their families in Britain' (Travis, 2016). As the registered charity Citizens UK, Safe Passage also applied to the Administrative Court of Appeal to systemically challenge the SSHD's acts/omissions under DR III, but was denied JR permission.

In late October, the SSHD announced her 'absolute commitment to bring to the UK as many children as possible with close family links' (*Statement on Calais*). She met many of Safe Passage's demands and adopted a policy initiating an expedited process that bypassed formal Dublin procedures: with approval from the French, UK Home Office officials interviewed unaccompanied children who had been in Europe before 20 March 2016 and were present in Calais before demolition to determine their eligibility for transfer to the UK. The process concluded in February 2017, by which time 550 children had been transferred to the UK and reunited with family members, totalling over 850 TCN children reunited with family. However, hundreds had been denied transfer, receiving no stated grounds for rejection nor records of their interviews. Safe Passage/Citizens UK re-applied for systemic JR, this time obtaining permission for a substantive hearing in May.[17] ZAT lawyers also wrote to the SSHD and pressed her to provide redress. In mid-February, the government agreed to review rejected cases and consider new information substantiating family links. UK Home Office officials conducted a second round of ad-hoc interviews, but again rejected many unaccompanied TCN children. While awaiting the Citizens UK hearing, ZAT lawyers applied for JR on behalf of ten individuals twice rejected under the expedited interview process. The SSHD attempted to stay all proceedings pending the Citizens UK hearing, but the Upper Tribunal held that, 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 (§28).[18]

When the Citizens UK hearing commenced on 23 May, ZAT lawyers had won five individual cases in the Upper Tribunal and convinced the SSHD to concede in three others—two cases were dismissed where children absconded. Citizens' legal representatives (i.e. ZAT lawyers) encouraged the Court to follow the Upper Tribunal's reasoning; declare the expedited system procedurally unfair

[16] *Secretary of State for the Home Department v ZAT & Ors* [2016] EWCA Civ 810
[17] *Citizens UK v SSHD [2017]* CO/5255/2016
[18] *R (on the Application of AO and AM) v SSHD* [2017] UTIJR 15

according to DR III safeguards and Article 8 ECHR; and order the SSHD to re-conduct interviews or provide all rejected children means of legal recourse—citing *ZAT* and two subsequent Safe Passage cases as precedent.[19] The SSHD argued that, while Article 8 ECHR applied *in principle*, since the system was 'a one–off process, based on the foundation of the Dublin framework but operat[ing] outside of it' (HCWS467), it was not a DR III procedure and not bound by DR III safeguards. After a September 18, 2017 ruling by the UK High Administrative Court[20] and a subsequent appeal, the Court of Appeals held on July 31, 2018 that the 'expedited process' was indeed outside the bounds of DR III.[21] The protections of the rights of children contained in DR III (Article 6) and Article 8 ECHR did not give rise to a freestanding obligation on the UK in the absence of a lodged asylum application in France (§47 and §104). Nonetheless, the Court of Appeals held the expedited system procedurally unfair as a matter of common law (§102). While children who were not accepted for transfer in the expedited process could have applied under Dublin III, the Court recognised, "there will at least in principle have been children who gave up and never made a formal application under Dublin III precisely because they had been given an adverse decision as a result of the expedited process" (§98).

5.2 Examining ZAT legal mobilisation success

To determine whether ZAT legal mobilisation efforts have achieved substantive respect for the right to family life of unaccompanied TCN children, I now consider the three-part hypothesis—that partnership makes overcoming structural and cultural barriers to (1) accessing the courts, (2) winning in court, and (3) winning politically more likely.

5.2.1 Partnership between civil society activists and lawyers makes accessing courts more likely

If this hypothesis is supported, one would expect to see legal mobilisation success more likely due to ZAT lawyers and Safe Passage partnering to identify claimants and enable them to access courts. This was unequivocally the case. Throughout, Safe Passage and ZAT lawyers' collaboration was critical to overcoming resource constraints and practical hurdles to court access. First, Safe Passage's work to identify unaccompanied TCN children in Calais and, on advice of the ZAT lawyers, verify their family ties, was necessary to establishing children's legal right to family reunification in principle. Their work was also necessary in practice since children required adult assistance to file asylum claims in France and commence the DR III process. Once Safe Passage had identified children with family links, ZAT lawyers could wade through the complex DR III transfer system and utilise litigation machinery to ensure that the UK SSHD processed Dublin transfers in accordance with the law.

Lawyers also overcame substantive challenges to accessing the British JR process on ECHR claims. Since unaccompanied TCN children were residing outside of UK territory, it was not obvious that the SSHD was actively interfering with their right to respect for family life. By writing to the SSHD and requesting admittance, lawyers established the requisite link between the UK and unaccompanied TCN children in Calais to prove direct SSHD interference and initiate legal action in British courts. This finding supports Donald and Mottershaw's (2009) assertion that legal

[19] *R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department* [2016] UKUT 231; *R (on the application of RSM and Another) v SSHD* [2017] UKUT 00124 (IAC)
[20] *Citizens UK v Secretary of State for the Home Department* [2017] EWHC 2301
[21] *The Queen (on the Application of Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812

mobilisation outcomes often depend on having a 'supply' of lawyers (and to some extent activists) to meet the 'demands' of mistreated individuals; as they note, it is extremely difficult for politically disempowered groups like asylum seekers to 'make headway' in the UK legal system in 'advice deserts' where representation is lacking (355). These 'advice deserts' are amplified for children outside the territory intending to seek asylum, as they cannot access in-country courts, let alone 'make headway' in the system alone.

Identifying individuals, gathering substantiating evidence, and attending to their legal needs required funds and organisational skills. Many of those I interviewed experienced the 'chilling effect' of the loser pays fee system in the UK (Vanhala 2012: 540). They noted its heightened significance in immigration and asylum policy cases, where legal aid cuts have curtailed state funded assistance, and media attention and the government's political commitment to border security have resulted in the government investing time, staff, and capital to fight back. As one barrister mentioned:

> 'The response of the state can be quite forceful. They will throw lots of resources into litigation. On a purely practical level, it's more difficult for lawyers on CFAs[22] to put in that same amount of work… You can't work at such high risk all the time'.

By employing individuals to gather evidence and represent children with funding from its parent organisation Citizens UK, Safe Passage provided financial support to mitigate the lack of state-funded legal assistance and cover initial legal costs. This corroborates Vanhala's findings (2012) that having the support of a larger organisation to fund legal costs may combat some of the 'chilling effects' of the loser pays fee system. The case study also supports Börzel's finding (2006) that each of these steps requires not only funds, but coordination. As the Legal Project Manager of the AIRE Centre commented, 'Strategic litigation is like a complex chessboard'. Managing and harmonizing the moving pieces is crucial for success. By creating an operational context on the ground in London and Calais, Safe Passage managed the moving pieces. It facilitated communication between the children and ZAT lawyers, and created a system of mutual reliance among lawyers, politicians and civil society activists. As one barrister noted:

> 'You need everybody to get together to identify the real nub of the problem. Lawyers can't do it on their own because they simply haven't got the evidence gathering capabilities…and the NGOs can't do it on their own because they don't know what they're looking for…Then you also need to work well with lawyers who have individual clients… That is really the holy grail, when you get all of those groups working together'.

5.2.2 Partnership between civil society activists and lawyers makes winning in court more likely

If this hypothesis is supported by the case study, one would expect to see the likelihood of attaining legal wins increased by ZAT lawyers and Safe Passage partnering to frame evidence and legal arguments as legally persuasive, conventional, and widely supported. This was largely the case. Partnership was crucial to securing the necessary evidence to win both procedurally and substantively in court. From the outset, Safe Passage and ZAT lawyers partnered to gather relevant facts on the ground in Calais and present them effectively before the court. To firmly establish ZAT claimants' right to family reunification under Dublin, Safe Passage and ZAT lawyers presented evidence indicating that ZAT, IAJ, KAM and AAM had strong grounds for obtaining refugee status

[22] Conditional fee agreements (CFAs) are funding arrangements wherein a lawyer's compensation is conditional on her winning the case; these have become commonplace since the 2012 legal aid cuts.

and would have qualified for transfer under DR III, had they been assisted in submitting formal asylum claims. In the Upper Tribunal, Justice McCloskey found the evidence of 'notable pedigree' (§10), and agreed that claimants would have qualified for transfer (§12), proceeding to balance their interests against SSHD interests on the basis that they had a right to family life safeguarded by DR III. Judicial recognition that a child not formally registered as an asylum seeker under Dublin had a DR III right to family life was ground-breaking. Regardless of the substance of the Upper Tribunal's ruling, this procedural victory pushed ajar the door to the courtroom for all unaccompanied children in Europe with family ties in the UK. In the *Citizens UK* May hearing, ZAT lawyers used this wedge to argue that the expedited process should have complied with DR III procedural safeguards, not only because the SSHD initially advertised it as such, but also because children's experiences indicated that the process effectively supplanted normal DR III. While the court ruled that the expedited process was outside the bounds of DR III, it was procedurally unfair and it practically 'became the only game in town'. Just as Vanhala (2012) finds in her research of substantively unsuccessful but procedurally successful litigation undertaken by environmental NGOs in the UK, ZAT lawyers and Safe Passage's procedural win increased the likelihood of legal mobilisation success. By establishing a DR III right to family life, they 'opened the floodgates' to similar future litigation, irrespective of the ruling's substance (Vanhala, 2012: 536).

To win substantively, ZAT lawyers and Safe Passage highlighted children's vulnerable circumstances and enlisted assistance of UNHCR, the authoritative body on the application of the Geneva Convention, and the AIRE Centre, an NGO adept at strategically litigating in EU and ECHR-related legal cases. As human rights law and legal culture protects an individual's rights *not* to be removed more strongly than it does his positive rights to enter another state, achieving a substantive legal win was more demanding. To persuade the judiciary that the SSHD had disproportionately interfered with claimants' right to respect for family life; and that she had an obligation to act above and beyond regular Dublin procedures, ZAT lawyers invoked cultural norms of child vulnerability. As another barrister observed:

> 'It's impossible not to have goodwill towards unaccompanied children languishing in various hellholes across Europe. Everyone can get behind the principle at least'.

And, in the words of another lawyer:

> 'There is extra scrutiny with vulnerable individuals and the law recognises that'.

Highlighting the inherent vulnerability of unaccompanied child claimants thus allowed lawyers to employ a larger body of legal stock. ZAT lawyers effectively utilised supportive EU and ECHR case law holding unaccompanied children's 'best interests' predominate, even where states have a legitimate interest in immigration control.[23] Finding case law supportive of outweighing the strict application of Dublin in favour of children's rights was more difficult. As AIRE Centre Founder Nuala Mole noted, 'Dublin was the devil with horns'. Most ECtHR and CJEU precedent involving the intersection of human rights law and the Dublin Regulation is narrowly set around Dublin transfers that implicate non-derogable human rights. Specifically, case law provides that states must forgo regular Dublin procedures if they require sending an asylum seeker back to a state where he

[23] In *ZAT* for example, ZAT lawyers cited ECtHR cases *Tuquabo – Tekle – v – The Netherlands* (Application No 60665/00) and *Mayeka and Mitunga – v – Belgium* [2008] 46 EHRR 23, as authority; the Court of Appeal also referred to *Tanda-Muzinga v France* (Application No. 2260/10) – all cases where children's 'best interests' were utilised in the Article 8 proportionality test; the Court of Appeal also referred to CJEU case, C-648/11 *R (MA (Eritrea)) v Secretary of State for the Home Department* [2013] 1 WLR 2961.

is at risk of 'inhuman and degrading' treatment (i.e. a violation of Article 3 ECHR).[24] By presenting evidence of the Article 3-like conditions of the 'desperate plight' and 'dire circumstances' facing *ZAT* claimants in Calais (§ 16), ZAT lawyers successfully drew a parallel to Article 3 Dublin-related case law (Appendix §1). While the Court of Appeal narrowed the *ZAT* precedent for those outside Dublin's ambit, the door was never sealed shut.

Just as litigating gay rights in relation to the military's 'Don't Ask; Don't Tell' policy was more difficult given U.S. courts' tendency to defer to the military to assess its own national security needs (Andersen 2005), it was more difficult to achieve a ruling favourable to TCNs where border control concerns existed. By citing EU and ECHR case law upholding claimants in dire circumstances' interests, ZAT lawyers overcame these barriers and effectively forged a route in UK jurisprudence for subsequent litigation. This assertion is consistent with Anagnostou's (2010) finding that ECtHR case law provides significant legal leverage in UK courts and inspires shifts in domestic judicial interpretations of the law.

Nonetheless, invoking the unique vulnerability of unaccompanied minors in court was a 'double-edged sword' (McCann 2004: 19). While ZAT lawyers would likely not have achieved a legal win if claimants' circumstances did not predominate, utilising vulnerability to outweigh state interests limits the use of case precedent for accompanied child TCNs and other TCNs *not* living under extremely vulnerable circumstances. As the Court of Appeal noted in its ruling, the narrowed *ZAT* precedent for those outside the ambit of Dublin applies to unaccompanied TCNs only in 'especially compelling' circumstances (§92), like the 'Syrian baby left behind in France when the door of a lorry bound for England closed after his mother [alighted]' (§95). This exceedingly high threshold supports McCann's contention that legal mobilisation alone provides only 'limited opportunities for episodic challenges', as 'legal relations, institutions, and norms [ultimately] uphold the larger infrastructure of the status quo' (McCann 2004: 19).

5.2.3 Partnership between civil society activists and lawyers makes winning politically more likely

If this hypothesis is supported, one would expect the Safe Passage/ZAT lawyer partnership to have increased the likelihood of legal victories turning into widespread political ones through lobbying, public protest, and sustained litigation. This was somewhat the case; legal action and its politicization achieved some systemic impact, but no long-term policy or legislative change. Partnership was crucial to pushing the SSHD to safeguard the right to family life of unaccompanied children already in Calais, but two inconsistencies with the literature are apparent: (1) sustained litigation initially allowed the SSHD to shirk both her political and legal obligations; and (2) Safe Passage and ZAT lawyers' emphasis on childhood vulnerability made ZAT political wins susceptible to political backlash and short-lived policymaking.

In August 2015, the dominant media narrative concerning the 'jungle' focused on the 'threat' 'migrants' in Calais posed to the UK's ability to control its borders (Berry, Garcia-Blanco, and Moore, 2016). When Safe Passage and ZAT lawyers went public with their work, their political campaign garnered significant traction; in the words of Safe Passage Lead Organiser, Gabriel, 'there was something scandalous about the fact that, amongst these "swarms", were children who had a full legal right to come to Britain'. As the SSHD never sought to deport the ZAT boys, their presence in the UK and the presence of TCN children who subsequently crossed the Channel, was powerful testament to their legal right to reside in the country. Regardless of the legal import of the *ZAT*

[24] C-493/10 *R (NS (Afghanistan)) v Secretary of State for the Home Department* [2013] (CJEU); *M.S.S. v. Belgium and Greece* (Application No. 30969/09) (ECtHR).

judgment, the notion that unaccompanied TCN children had a 'legal right' to family reunification emboldened Safe Passage's political activism. In contrast to Donald and Mottershaw's finding that litigation pursued to change UK policies addressing destitution of failed asylum seekers[25] 'had no [broad] impact' (2009: 350), political advocacy surrounding *ZAT* had a measurable impact. ZAT political mobilisation concomitant with the legal case garnered the necessary grassroots pressure required to create political pressure for the SSHD to re-consult and reunite 850 unaccompanied TCN children in Calais with their UK-based family members. As the Legal Project Manager for the AIRE Centre commented:

> 'You are not going to save 200 people with one case, but you may help build a shift in policy that will alleviate their suffering and lead them to protection'.

Political lobbying and protesting was so successful because behind the political frame of a 'legal right' lay appreciable legal power. As predicted by empirical case studies, Safe Passage and ZAT lawyers' unremitting litigation pressured the SSHD to better implement DR III, initiate an expedited process, and later re-interview children rejected by that process. By continually instituting legal action, ZAT lawyers built upon case precedent and effectively held the government accountable to its legal obligations. Supplementing political campaigning around the 'legal right' with the continual threat of litigation was necessary to achieve more comprehensive change in government practice:

> 'given the total intransigence of the government and its refusal to accept any refugees across Europe', the continued use of legal tools seemed vital – 'you could campaign till you were blue in the face but, without the legal stick, [the government] would do nothing'.

The strength of sustained ZAT legal action provides support for Epp's (2009) finding that the risk both of legal liability and public condemnation, rather than a judicial holding per *se*, may be a powerful lever to enact change. As stated by one solicitor:

> 'Even if you lose [in court], you achieve a lot. Legal cases create the space for debate about public policy and allow one to question the authorities. You end up in one room with government having to explain and engage in your argument in open court…and no direct reply is safe from public scrutiny'.

Utilizing the possibility of normative judicial censure and the resulting public embarrassment, ZAT lawyers and Safe Passage successfully turned legal triumphs into political ones, even in the absence of an unequivocal court victory. As a lead ZAT barrister commented in March 2017:

> 'We got 821 children into the UK, on the back of a case that the Secretary of State thinks she won!'.

There is some evidence, however, that the legal pursuit of individual cases may initially have harmed the overall strategic goal to advance the right of all unaccompanied TCNs to family reunification. Safe Passage and ZAT lawyers' assistance after the initial *ZAT* case ironically enabled the SSHD to fend off public scrutiny in media and parliamentary debates on the implementation of s.67 and DR III, and judicial scrutiny in the *ZAT* Court of Appeal hearing. When Safe Passage and ZAT lawyers stopped initiating Dublin transfers, they were able effectively to garner enough political momentum and soft legal pressure to push the SSHD to implement an expedited transfer process for all

[25] *R. (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

unaccompanied TCN children with family ties who were present in Calais before the 'jungle' demolition.[26] As many lawyers interviewed in this research indicated, while their duty is first and foremost to their clients, they are not 'hired guns' (term also used in the literature, e.g. Fried, 1976; Silver and Cross, 2000). In certain circumstances, they may advise clients to forgo litigation when it is in their best interests or the best interests of others similarly situated.

While legal pressure and strong political force eventually achieved the expedited process, it did not successfully push the government to substantively change family reunification rules. The political strength of unaccompanied TCN children's legal right to family reunification in the UK – like the legal right itself – hinged on the inherent vulnerability of an unaccompanied child. This prompted and enabled two significant challenges to ZAT legal mobilisation success. First, when ZAT boys arrived in the UK and were not 'visibly vulnerable', but able-bodied 'older looking' males, conservative MPs launched a smear campaign, casting doubt on unaccompanied TCNs. They called for the government to strictly enforce invasive dental checks to avoid being duped by TCNs who 'will say what they need to say to get in' (Wilkinson, 2016). While the SSHD paid no heed to them, popular backlash doubting TCNs age and sincerity weakened the political force of their legal right. Second, vulnerability framing enabled the SSHD to fend off ZAT litigation and respond to public and parliamentary calls to action by maintaining that the government was aiding '*the most vulnerable'* directly from the Middle East and North Africa (Minister of State, HL Deb, 1 November 2016 [emphasis added]). The SSHD was also able to defend the ad-hoc nature of her expedited interview process: the process had to be one-off 'not because of a lack of compassion', but to 'protect those children and stop that crime [trafficking]' (HC Deb, 9 February 2017, cc645; HCWS467). Placing 'protective' cut-off dates on the implementation of the expedited process, the government sidestepped changing family reunification rules for unaccompanied TCNs arriving in Calais after the deadline, and unaccompanied TCNs in other parts of Europe—never facilitating access to the right to respect for family life for a wider group of TCN family members residing outside the UK.

Notably, Safe Passage and ZAT lawyers' lobbying and litigation exposing the persistent vulnerable circumstances facing unaccompanied TCN children in France after the end of the expedited process successfully pressured the SSHD to re-interview rejected children. Individual JRs pursued in the Upper Tribunal after the second round of interviews also placed significant pressure on the SSHD to assist children twice rejected, evidenced by her request to stay proceedings. Nonetheless, on the first day of the *Citizens UK* hearing, the SSHD maintained that she would not re-interview children twice rejected, even if the court declared the expedited process unlawful; and after the final judgment of the Court of Appeals, over a year later, 21 months after the 'jungle's' demolition, the SSHD did not provide relief for these children. The expedited process stands as a one-off, flawed procedure which provided relief to many and left some in a more adverse position. The continuous legal pressure and political advocacy exposing flaws of the expedited process may dissuade the SSHD from implementing a long-term expedited process and/or engaging in future ad-hoc mechanisms. While necessary to instigate the expedited process, ZAT litigation and political lobbying around unaccompanied TCN children's legal right owing to their vulnerable circumstances may prevent more far-reaching political change, proving to be a double-edged sword.

[26] This change is also attributable to *Help Refugees v. SSHD*, a JR filed by the UK-based NGO Help Refugees in partnership with lawyers at Leigh Day Solicitors and Doughty Street Chambers and the AIRE Centre to seek government compliance with s. 67 of the Immigration Act. The first ground in this JR review – that it was unlawful for the SSHD to fulfil her separate Dublin and s. 67 duties by solely transferring Dublin children to the UK – was accepted by the SSHD in her JR grounds of defense filed on 24 November 2016.

5.3 Case study implications

This case study is largely consistent with empirical research indicating that sustained partnerships between civil society and lawyers may overcome structural and cultural barriers to mobilising human rights law on behalf of marginalised individuals. In ZAT mobilisation, procedural and material hurdles to accessing the courts, winning legally, and winning politically were particularly acute. Outside of the UK, unregistered, and unaccompanied, TCN children in Calais had to overcome layers of intractable legal, cultural, and socio-political barriers to their authorised entry to the UK. Through sustained, symbiotic partnership, Safe Passage and ZAT lawyers achieved remarkable success. Combining forces to gather evidence, provide financial resources, and pressure the SSHD to legally recognise TCNs' right to family reunification through political lobbying and unrelenting litigation, they assisted 850 Calais-based TCNs in reuniting with their family members.

While their endeavours overcame many of the constraints impeding children from accessing their legal right to family reunification in the UK, Safe Passage and ZAT lawyers' partnership did not entirely advance political and legal mobilisation in the manner suggested by the literature. To attain legal mobilisation success, Safe Passage and ZAT lawyers relied heavily on popular frames of unaccompanied children's vulnerability and their attendant legal and political force. Given 'the total intransigence of the government', invoking vulnerability was largely required to achieve even modest change for individual claimants and other unregistered unaccompanied TCN children in Calais. But instrumentalising children's dire circumstances inspired a competition of vulnerability. By questioning the 'un-vulnerable' visible characteristics of unaccompanied TCNs from Calais; diverting state resources to those 'most' in need; and confining the application of new policies to children present in Calais before October 2016 in the name of *protection*, ZAT government and parliamentary opponents thwarted significant political pressure. Acting to 'protect the most vulnerable', the SSHD exploited the vulnerability discourse to limit the breadth of the expedited process and evade changing family reunification rules for all TCN family members residing outside the UK.

Ultimately, ZAT suggests that, while partnership is crucial to achieving practicable change, collaborative efforts may be double-edged where vulnerability is concerned. Engaging in continued litigation, political lobbying, and public protest around an articulated legal right, may *not* fully hold the government accountable to its human rights commitments if legal/political claims are contingent on socio-cultural understandings of vulnerability. Drawing on childhood vulnerability to effectively combat structural and cultural barriers impeding legal mobilisation for children cast as 'dangerous cheats,' may constrain future success. While Andersen (2005) acknowledges that legal and political mobilisation itself may widen or close opportunities for social reform by changing the socio-political context, she does not consider how tactics employed by organised actors may hamper prospects for impactful policy change if they are contingent on vulnerability. To my knowledge, no socio-legal scholar has extensively examined nor empirically tested the effects of legal mobilisation success contingent on the invocation of vulnerability, making it an area ripe for future research.

6 Conclusion

This paper has examined whether Safe Passage and ZAT lawyers' sustained collaboration increased the probability of achieving substantive policy change through legal mobilisation by considering whether their partnership made accessing the courts, winning legally, and winning politically more likely. Formed in the context of heightened irregular unaccompanied child migration to Europe, this partnership sought to ameliorate human rights abuses facing unaccompanied TCN children, with family ties to the UK, residing in Calais, France from 2015 onwards. As section two detailed, unaccompanied TCN children in Calais were largely unable to access safe, legal pathways to reunite with their UK-based family members. After relying on irregular means of travel to reach Europe, given the unobtainability of family reunification visas, unaccompanied TCN children in Calais encountered a largely inaccessible and inoperable asylum processing system. While the Dublin Regulation provided them a legal route for transfer to the UK to safeguard and respect their family life, no children were reunited with UK-based family under Dublin. To pressure the UK government to safeguard these children's right to family life, Safe Passage and ZAT lawyers turned to British courts and began an unremitting, joint political and legal mobilisation effort. While ZAT lawyers worked to expand judicial interpretations of the right to family life and pressure the SSHD through litigation, Safe Passage gathered evidence, covered legal fees, galvanised public support, and lobbied Parliament.

Due to the nativist socio-political environment in the UK, prospects for achieving substantive respect for the human rights of TCN children residing outside of the UK were dim. As section three explained, traditional political lobbying, protesting, and 'naming and shaming' advocacy tactics will likely not produce social reform if political structures and dominant political attitudes are hostile to activists' demands. Achieving sweeping substantive respect for human rights through litigation is likewise unlikely. According to socio-legal and critical legal theory, formally claiming legal rights before a court of law will not assure substantive respect of those rights where legal institutions are structurally inaccessible and the existing body of law is unreceptive to legal demands. Wider political gains are particularly unlikely where courts lack implementation powers and are deferential to the government. Section three clarified, however, that empirical research indicates that civil society and lawyers may work together to partially overcome structural and cultural constraints to accessing the courts, obtaining favourable court rulings, and achieving policy change for a larger number of aggrieved individuals.

By tracing the political and legal mobilisation mechanism employed by Safe Passage and ZAT lawyers from September 2015 to May 2017, section five explored how their collaboration made accessing the courts and achieving legal and widespread political gains more likely. As predicted by the literature, through combined political and legal advocacy, Safe Passage and ZAT lawyers successfully pressured the government to bypass inoperable Dublin procedures and expeditiously reunite hundreds of Calais-based unaccompanied TCN children with their UK-based family. By utilising the cultural persuasiveness of unaccompanied children's vulnerability, Safe Passage and ZAT lawyers overcame many of the hurdles posed by the particularly adverse political and legal climate. They achieved ground-breaking judicial recognition that a child not formally registered as an asylum seeker under Dublin had a DR III right to family life. They garnered enough political and legal pressure to push the SSHD to adopt an expedited process for a larger number of TCN children in Calais unable to access expeditious family reunification through Dublin. However, the government instrumentalised childhood vulnerability to combat mounting political pressure. Drawing on the socio-cultural frames invoked by ZAT lawyers/Safe Passage, the government furthered its restrictive stance and effectively evaded making legislative and policy changes with

sweeping, long-term impact. Combined legal and political mobilisation efforts may, therefore, be double-edged where hostilities require civil society/lawyers to fixate on marginalised individuals' vulnerability to make their demands more compelling.

To further explore the intersection between vulnerability claims and legal/political mobilisation, future empirical research should look comparatively at civil society and lawyer partnerships undertaken to advance the rights of marginalised groups with varied cultural vulnerability in similarly hostile political/legal environments. For example, comparing legal mobilisation pursued for accompanied TCN children with that of unaccompanied TCN children, or for TCN children in contrast to TCN adults, might shed light on the double-edged nature of political and legal activism reliant on socio-cultural understandings of vulnerability. As this research focuses on short-term gains, legal mobilisation studies would benefit from future empirical analysis examining how the invocation of vulnerability affects outcomes over the long term. Investigating whether these findings hold for civil society/lawyer partnerships pursued across Europe, for different groups of marginalised individuals, and in different policy areas would verify the reliability and replicability of this study and prove preliminary findings robust.

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