

ECRE/ELENA CASE LAW NOTE ON THE APPLICATION OF THE DUBLIN REGULATION TO FAMILY REUNION CASES



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INTRODUCTION

Family reunion has been enumerated in the Dublin Regulation III¹ ('DRIII') by means of both material and procedural provisions, provisions which in turn relate to the determination of a State's responsibility for an asylum application. Whilst, in some respects,² family reunion clauses within the Dublin Regulation ('DRIII') have been bolstered³ compared to its predecessor, the topic of family reunion continues to be a pressing issue for practitioners. The factual matrix laying as a basis to the judgments listed below are symptomatic of ongoing challenges for asylum applicants to unite with their family members. To illustrate, amongst the judgments identified, applicants have appealed decisions which separate spouses who have new born children; decisions which place exceptionally difficult evidentiary burdens in order to prove family life;⁴ decisions which transfer unaccompanied children back to a country where they have no family member, relative or sibling in breach of Article 8(4) of the DRIII and CJEU jurisprudence.⁵ Recent research by the UNHCR provides insight as to some of the reasoning behind such decisions including an overzealous emphasis on an Eurodac or Visa Information System ('VIS') hit, an unawareness on the part of applicants as to what information and/or evidence is needed for the application of the family reunion clauses and at what time it should be furnished, significant differences between Member States evidentiary requirements and a lack of proactivity on the part of authorities to commence family tracing procedures.⁶

Alongside these administrative deficiencies, Member States conjure up new methods of stultifying family reunion. By way of example, in 2017 Germany entered into an informal arrangement with Greece restricting the number of transfers it receives under the Regulation to 70 persons per month.⁷ The implementation of family reunion within the DRIII has thus been steeped in a(n often deliberate) misapplication of the family criteria, which is coupled with a passive approach on the part of Member States to investigate family links or to purposely place administrative hurdles before applicants. As a consequence, the family reunion provisions within the DRIII are, as the Dublin II Regulation,⁸ under used or, where applied, lead to extremely lengthy procedures well beyond the prescribed deadlines in the Regulation.

It is with this backdrop in mind that this legal note aims to gather jurisprudence from national courts on the topic of family reunion within the Dublin Regulation. Its structure follows the legislative standards in EU law and international law as well as the jurisprudence of the European Courts before moving on to domestic case law on family reunion provisions. This section is structured according to jurisprudence on Articles 8-11 and 16 and 17 of the Dublin Regulation. The structure has been chosen as such due to the difficulty in detangling the often overlapping issues of Dublin criteria and procedural and substantive rights within the case law. The note includes case law which can be deemed as protective of the family unit and case law which can be deemed as restricting family reunion under the Regulation. Whilst every effort has been made to extrapolate relevant jurisprudence for this note it is, of course, subject to the resources available within the ECRE Secretariat and amongst ELENA National Coordinators.

1. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59.
2. See Family Unity and Family Reunification in the Dublin System: Still Utopia or already Reality? in the Dublin System, in: Chetail, V./DeBruycker, P./Maiani, F., *Reforming the Common European Asylum System*, Leiden 2016, 143-158, accessible at: <http://bit.ly/2hbZ9eZ> and F. Maiani, *L'unité de la famille sous le Règlement Dublin III : du vin nouveau dans de vieilles outres*, in S. Breitenmoser et al. (dir), *Schengen et Dublin en pratique: questions actuelles*, Zürich: Dike Verlag, accessible at: <http://bit.ly/2zagnEI> 2015 amongst others which discuss the improvements and pitfalls of the Dublin Regulation III in respect of family reunion.
3. Similarly, the Commission's proposal for a DRIV aims at broadening the concept of family members and thus family reunion. For a comprehensive analysis of the DRIV proposal, including on the topic of family reunion, please see, ECRE Comments on the Commission Proposal for a Dublin IV Regulation, accessible at <https://goo.gl/z2bbjy>.
4. UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, p.55 accessible at <http://bit.ly/2kPx9SX>.
5. See Austrian Federal Administrative Court, W242 2138529-1, 5 May 2017 and Luxembourg Administrative Tribunal, Application no. 39131, 21 April 2017.
6. UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, see accessible at <http://bit.ly/2kPx9SX>. For further information on administrative practices in respect of Dublin and, in particular, family reunion, see ICF, *Evaluation of the Implementation of the Dublin III Regulation*, March 2016, accessible at: <https://goo.gl/7vdTXC>.
7. Reference was made to the informal agreement and cap of 70 persons in parliamentary questions, 'Answer given by Mr Avramopoulos on behalf of the Commission', 1 August 2017, accessible at: <http://bit.ly/2w8TmjO>. See AIDA, *Greece/Germany: Cap on transfers under Dublin provisions*, 12 May 2017 for more information, accessible at: <http://bit.ly/2tpuMZp>. It is unclear whether there is a cap of some amount still in force. Whilst the German Government confirmed in September 2017 that regular transfers would take place again in the medium term in accordance with the provisions of the Dublin Regulation, statistics from the German Ministry of Interior demonstrate that whilst transfers from Greece to Germany exceed 70 the numbers of transfers were still relatively low (352 in December 2017), NOZ: *Strittige Migration: Familiennachzug aus Griechenland wieder verlangsam*, accessible at: <http://bit.ly/2BZOMTI>.
8. See European Council on Refugees and Exiles (ECRE), *Dublin II Regulation – Lives on Hold* (2013) for more information, accessible at: <http://bit.ly/2zPYd7Q>.

USE OF TERMINOLOGY

A differentiation in the text is made between the terms ‘right to respect for family life’, ‘family reunification’, ‘family reunion’, and ‘family unity.’ The right to respect for family life refers to Article 8 of the European Convention of Human Rights (‘ECHR’) and Article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’). ‘Family reunification’ refers to the process by which applicants seek to make use of their Article 8 ECHR/7 Charter rights and in this note, family reunification relates to reunification which falls outside of the DRIII. Conversely, family reunion refers to the provisions within the DRIII and its Implementing Regulation which do relate to unifying or keeping families together, namely Articles 8-11, 16 and 17 of the Regulation. Lastly, family unity refers to the principle of family unity as used in Recital 16 of the DRIII.

FAMILY REUNION WITHIN THE DUBLIN REGULATION: LEGISLATIVE AND JURISPRUDENTIAL STANDARDS

I. LEGISLATIVE STANDARDS

Relevant to the application of the various family reunion clauses within the DRIII, is the definition of a family member, relative and/or relation. Applicable to Articles 8-11 and defined in Article 2(g) of the Regulation is the term family members, which include the spouse of the applicant or partner in a stable relationship and minor children of the applicant(s), provided they are unmarried. Where the applicant or beneficiary of international protection is a minor and unmarried, family members are defined as a father, mother or another adult responsible for the minor. In addition, for unaccompanied minors, family reunion can also apply to relatives of the minor. Under Article 2(h) relatives are defined as an aunt, uncle or grandparent present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined in national law.⁹ Moreover, and by virtue of Article 8, family reunion can also apply to a sibling of an unaccompanied minor and where the applicant is a married minor but without their spouse present in the territory of a Member State the definition of family member reverts to Article 2(g) paragraph 3 namely a father, mother or other responsible adult and also includes a sibling.¹⁰ In addition, under Article 11 siblings will fall into the definition of family member if they submit applications for international protection in the same Member State simultaneously.¹¹

Procedurally the Dublin Regulation III along with the Commission Implementing Regulation (EU) No 118/2014, provides for the right to information, including the applicant’s right to be heard in a personal interview as to the presence of family members, relatives or any other family relations in Member States¹² and the possibility to challenge a transfer decision.¹³ Moreover, when considering the responsibility criteria Member States must take into account evidence relating to the presence of family members, relatives or “any other family relations” in another Member State. Such evidence must be produced before another Member State accepts the request to take charge or take back applicant.¹⁴

Explicit guarantees for children are also provided for in the Regulation. In Recitals 13 and 16 as well as Article 6 of the DR III, the best interests of the child is linked to the rights of the child, namely that their well-being and social development is catered for, alongside their safety and security. The best interests of the child, as the

9. In C-245/11 K v Bundesasylamt, 6 November 2012, the CJEU held that relative in Article 15(2) of the DRII applied to an in-law. In the equivalent Article of 16(1) the term relative is deleted and the specific dependency only relates to a child, sibling or parent legally resident in one of the Member States.

10. Article 8(1).

11. On the definition of family members, most notably on unmarried minors, see ECRE comments on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), March 2015, p.10.

12. Recital 17 and 18, Article 4(1)(c) and Article 5. Note the term “any other family relations” is not defined in the Regulation and whilst it is referred to in Article 7(3) in respect of applying Articles 8, 10 and 16, its relevance only comes into bear in Article 17(2). In light of the definitions in respect of family member and relative, family relations presumably cover additional relationships, i.e. step relations, cousins, second cousins etc and in-laws (see above).

13. Article 4(1)(d) and Article 27.

14. Article 7(3).

right to family life, is also deemed as a primary consideration when applying the Regulation.¹⁵ Procedurally their best interests are secured, *inter alia*, by means of their right to be heard and the provision of special procedural guarantees, which are predicated on the child's particular vulnerability. Examples of these are a specific leaflet for unaccompanied minors, a qualified representative to ensure the best interests of the child are respected in all Dublin procedures and competent authorities who are appropriately trained on a child's needs. Additionally, Article 6(3)(a) of the Regulation obliges Member States to take into account family reunification possibilities when assessing the child's best interests. For unaccompanied minors States have specific obligations to identify family members, siblings or relatives.¹⁶ The obligation includes a proactive duty to search for family members¹⁷ and to take into account information furnished by the minor. Moreover, there are duties on States to promptly coordinate and exchange information with other Member States to identify family members, establish the existence of proven family links (by consulting with the other Member State, examining registers, residence permits, evidence of relations and, where necessary, DNA tests) and assess the capacity of the relative to take care of the child.¹⁸

These guarantees are affixed to a system of responsibility allocation.¹⁹ As highlighted above, the most pertinent for family reunion are Articles 8-11 and 16.²⁰ In addition, Article 17(1) and (2) the sovereignty and humanitarian clauses, are relevant for family reunion since the former allows any Member State, if they decide to do so, to become responsible for a claim and the latter allows a Member State to request another to become responsible for a claim in order to unite any family relations for which the underlying basis is humanitarian, in particular where family or cultural considerations are at play. Family reunion within the Regulation cannot, however, be read in isolation.²¹ The implementation of EU secondary law must be interpreted in line with the Charter and, by virtue of Article 52(3) of the Charter, the ECHR, where equivalent rights are affected. Therefore, the application of the DRIII must be set against the legislative and jurisprudential backdrop of Articles 7 and 24 of the Charter and Article 8 ECHR. Indeed, this is made explicit in the Recitals to the DRIII itself, which, as interpretative guidance to the enacting terms of the DRIII,²² state that the respect for family life should be ensured fully and, in accordance with the ECHR and Charter, should be a primary consideration when applying the DRIII. Moreover, and in line with Article 78 of the Treaty on the Functioning of the European Union, Articles 3, 5, 10, 12 and 22 of the UN Convention on the Rights of the Child ('CRC') and Articles 23 and 24 of the International Covenant on Civil and Political Rights ('ICCPR') are equally applicable to the implementation by Member States of the family reunion provisions in the Dublin Regulation.

II. JURISPRUDENTIAL STANDARDS

The family reunion provisions, the right to respect for family life and the best interests of the child within the framework of Dublin procedures has been brought to bear by the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR'). In *K v Bundesasylamt*,²³ the CJEU held that dependency on a family member can be determinative of a Member State's responsibility for a claim. Whilst the clause on dependency in Article 15(2) of the then Dublin Regulation has been amended (and narrowed down) to just parent, child or sibling in Article 16(1), thus rendering the relation aspect of in-laws in *K* redundant, the judgment is still useful for its definition of dependency. Namely, a family member requiring assistance and another member of the family being in a position to provide it is conclusive of dependency.²⁴ Such dependency applies regardless of which family member is dependent on the other; in *K* the daughter-in-law who had refugee status in Austria was dependent on the mother who had applied for asylum in the country. Moreover, Member States are obliged to not only bring together certain family members but also to proactively safeguard the

15. Article 6(1). On the interpretation of Article 6, the Circle Administrative Court (Tribunal Administrativo de Círculo, TAC) of Lisbon offered clear guidance to the administrative authorities in a judgment that quashed a transfer decision to Germany of an unaccompanied child under the care of Portuguese Refugee Council, for failing to give due consideration to the best interests of the child in its reasoning, notably regarding the minor's well-being, social development and views, TAC Lisbon, Decision 2334/17.5BELSB, 24 November 2017, unpublished.

16. Recital 35 and Article 6(4) and (5).

17. Article 6(4) also provides the opportunity for Member States to consult with and receive assistance from organisations with tracing services.

18. Article 12 Regulation (EC) No 1560/2003 and Annex II, List A Commission Implementing Regulation (EU) No 118/2014.

19. F. Maiani, *L'unité de la famille sous le Règlement Dublin III : du vin nouveau dans de vieilles outres*, in S. Breitenmoser et al. (dir), *Schengen et Dublin en pratique: questions actuelles*, Zürich: Dike Verlag, 2015, p. 277

20. Whilst Article 16 is placed under the heading of dependant and discretionary clauses, Recital 16 and Article 17(2) make it clear that Article 16 is a binding criterion in the hierarchy of responsibility.

21. Recitals 13, 14, 32 and 39.

22. Case C-244/95 *Moskof* ECR I-6441, paragraphs 78 and 86.

23. C-245/11 *K v Bundesasylamt*, 6 November 2012, summary here: <http://bit.ly/2gJPYoJ>.

24. C-245/11 *K v Bundesasylamt*, para 42.

family unit by keeping them together.²⁵ This is still relevant since Article 16(1) keeps the wording of “keeping or bringing together” as in Article 15(2) DRII. In addition, the CJEU specified the need for authorities to implement the DRII in a manner which guarantees effective access to the procedure and a prompt determination process. Importantly the CJEU held that the application of the dependency clause did not depend on a prior request of another Member State to examine the application. Instead the Member State, where the applicants are, has a duty to examine the need and provision of assistance of their own motion. Arguably, and according to the conclusion from the Court in *K*, the onus on the Member State would equally be applicable to bringing a child, sibling, or parent to a State under DRIII where dependency is proved since Article 16 does also not require a Member State to request another to examine the claim.

In respect of unaccompanied minors the CJEU has held in *MA and Others*²⁶ that they form a particularly vulnerable group of persons and that their effective access to the asylum procedure requires that the procedure is not prolonged. In addition the CJEU held that the best interests of the child in the DRII and explicitly in Article 24(2) of the Charter of Fundamental Rights, requires that their best interests are a primary consideration when applying the Regulation. Combined these factors led the Court to find that the Member State responsible for an unaccompanied minor with no family legally present in the EU and who has lodged asylum applications in more than one Member State, as the State in which the minor is present after having lodged an application there.

As to the European Court of Human Rights (‘ECtHR’) the Court has held that the right to respect for family life is engaged where there is an interference with the exercise of this right by a public authority.²⁷ The Court has held that Article 8 requires States to abstain from interference with the right to respect for family life but also to secure its respect through affirmative action.²⁸ In *B.A.C v Greece*, for example, the Court held that Greece had failed to comply with their positive obligations under Article 8 ECHR to provide an effective and accessible means of protecting the right to private life. As such Greece was obliged to ensure that the applicant’s asylum application was examined within a reasonable time in order to keep his state of uncertainty to a minimum.²⁹ The positive duties under Article 8 have also led the Court to find States in violation of the right where national authorities have not decided to admit a family member of the person concerned to the territory.³⁰ Underpinning such duties are guarantees for the interpretation given to Articles 16 and 17 by national courts the individual that his or her personal circumstances will be taken into account, that the procedure is a fair one and that a fair balance is struck between the general interest of the community and the interests of the individual. In the case of children their interests have been viewed by the Court as a primary consideration, which in turn has required States to positively, expeditiously and humanely facilitate and achieve family reunification for them.³¹

THE INTERPRETATION GIVEN TO ARTICLES 8-11 BY NATIONAL COURTS

*The Hague Court, NL17.9820, 17 October 2017*³²- *best interests of the child*

The defendant is subject to an obligation of investigation of the claimant’s (an unaccompanied child) statements in order to determine whether the transfer would be in the best interest of the child. Whilst the applicant’s brother was legally residing in Switzerland and Article 8(1) of the DRIII would usually have been applicable, the applicant had raised several arguments objecting against his transfer to Switzerland under Article 8(1), namely that he and his brother had no ties and that due to his brother’s age and lifestyle he was unable to take care of him. A transfer to Switzerland would therefore not be in his best interests. The court, relying on Article 6(3), held that the State had failed in its obligation to undertake an assessment of the applicant’s best interests, *inter alia*, through its dismissal of the applicant’s statements as irrelevant or insufficiently substantiated.

25. See here for domestic German judgments, Administrative Court Göttingen, Az. 2 B 912/13, 17 December 2013, accessible at: <http://bit.ly/2xvzc3K> and Administrative Court Munich, Az. M 1 S 13.30170, 26 March 2013, accessible at: <http://bit.ly/2y2pCT0>.

26. C-648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*, 6 June 2013, summary here: <http://bit.ly/2wDZiOl>.

27. *Marckx v. Belgium*, 13 June 1979, Series A no. 31, para 31.

28. *X & Y v. the Netherlands*, Application no. 8978/80, 26 March 1985. Whilst not in the framework of Article 8, but rather Article 3, the ECtHR in *Tarakhel v Switzerland* has additionally held that adapted reception for children and respect of family unity were decisive when considering whether a Dublin transfer would breach the prohibition against inhumane or degrading treatment. *Tarakhel v Switzerland*, Application no. 29217/12, 4 November 2014, summary here: <http://bit.ly/1W5oK9v>.

29. *B.A.C. v. Greece*, Application no. 11981/15, 13 October 2016.

30. *Sen v the Netherlands*, Application no. 31465/96, 21 December 2001 and ECtHR- *Tuquabo-Tekle And Others v The Netherlands*, Application no. 60665/00, 1 March 2006.

31. *Sen v. the Netherlands*, Application no. 31465/96, 21 December 2001; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Application No. 13178/03, 12 October 2006; *Mugenzi v. France*, Application No. 52701/09, 10 July 2014; *Neulinger and Shuruk v. Switzerland*, No. 41615/07, 6 October 2010.

32. On file with the author.

Wiesbaden Administrative Court 6 L 4438 / 17.WI, 15 September 2017³³ - subject right to be transferred

The family members of an unaccompanied child who had applied for asylum in Germany are to be transferred to Germany from Greece within six months from the moment of Germany's acceptance of Greece's take-charge request. By analogy to the CJEU's judgment in *Mengesteab*,³⁴ the right of the family members to be transferred within the deadline is a subjective right. In light of Germany's influence on the number of transfers to the country from Greece in the form of a "cap," the German authorities are obliged to transfer the applicant's family members within the six-month deadline.

Note: The Wiesbaden decision has been followed by a decision from the Würzburg Administrative Court³⁵ which conversely ruled that neither Art. 22(7), 29(1) Dublin III Regulation read in conjunction with Article 8(1) of the Dublin III Implementing Regulation, nor any other legal basis - national or European law - entitles the family members to be transferred within the time limit laid down in Article 8(1) of the Dublin III Implementing Regulation.

However, the Wiesbaden ruling has been followed by a number of other rulings, which have held that the individuals have a subjective right to be transferred within the time limit, namely VG Halle,³⁶ VG Berlin,³⁷ and VG Düsseldorf.³⁸ In the last case the Düsseldorf Administrative Court granted an interim measure right before the end of the 6 months' time limit and ruled that German authorities have to confirm officially that they will take charge of the case.

Austrian Federal Administrative Court, W153 2166337-1, 18 August 2017³⁹- best interests of the child

It is incumbent on the Austrian authorities to make appropriate enquiries as to the whereabouts of an adult brother living in Germany for an unaccompanied child currently in Austria and whether a transfer to Germany would, in that case, be in the child's best interests.

Düsseldorf Administrative Court, 12 L 3641 / 17.A, 26 July 2017⁴⁰- respect for family life

In the case of a child who was born in Germany but whose mother had international protection status in Latvia, Article 9 does not apply since neither the applicant nor his mother have expressed their desire in writing for Latvia to be the responsible Member State for the child. Moreover, Article 20(3) does not apply since both the mother and father have been granted international protection. Whilst Recital 15 is intended to make sure that several applications by one family are jointly treated and decisions are consistent, Articles 8(3), 9 and 16(2) demonstrate that the responsibility for family members can be divided. Since the family unit can and is already protected in Germany, suspensive effect of the deportation order is granted in order to ascertain the responsible Member State. If Latvia cannot be deemed as responsible then Article 3(2) applies and Germany is the responsible State for the child's application.

Note: Similar findings were held by the Düsseldorf Administrative Court, 22 L 1290 / 17.A, 6 February 2017 concerning international protection status granted to the mother in Romania and by the Lüneburg Administrative Court, 5 A 194/14, 24 May 2016 where the Court found the decision to deport the child to Italy, on grounds that his mother (currently in Germany) had received international protection status there, to infringe the child's substantive right for one Member State to examine the protection claim. The Court also referred to Article 17 as a means by which Germany could be responsible for the claim.

33. Wiesbaden Administrative Court 6 L 4438 / 17.WI, 15 September 2017, summary here: <http://bit.ly/2zlxuQo>.

34. Case C-670/16 *Mengesteab*, 26 July 2017, summary accessible at: <http://bit.ly/2ggfpP6>.

35. Würzburg Administrative Court, W 2 E 17.50674, 2 November 2017.

36. Halle Administrative Court, 5 B 858/17 HAL, 14 November 2017.

37. Berlin Administrative Court, 23 L 836.17 A, 23 November 2017.

38. Düsseldorf Administrative Court, 12 L 4933/17.A, 24 October 2017.

39. Austrian Federal Administrative Court, W153 2166337-1, 18 August 2017, <http://bit.ly/2jiAk4A>.

40. Düsseldorf Administrative Court, 12 L 3641 / 17.A, 26 July 2017, accessible at: <http://bit.ly/2y0BN2W>.

Austrian Federal Administrative Court, W153 2162325-1, 21 July 2017⁴¹ - unaccompanied minor

The definition of an unaccompanied minor in Article 2(j) DRIII refers to the law of the Member State concerned. In Austria, legal representatives of a child are, *inter alia*, parents or guardians. For a sibling, to act as a legal representative of a minor there must be an appointment by court order. In the case of two siblings, an adult and minor, such a process had not been undertaken. Thus whilst they applied for asylum together in Austria, the minor is to be seen as an unaccompanied minor. Since Article 8(4) DRIII applies Austria is responsible for the minor's application and not Portugal (the country the siblings first entered). Consequentially and in order to avoid a violation of Article 8 ECHR, Austria is required under Article 17(1) to apply its discretion in order to also examine the adult brother's asylum application. On these grounds the finding of the Austrian authorities that Portugal was responsible for examining the application of the adult brother and, by virtue of Article 11, also responsible for the minor brother, was therefore held to be incorrect and was set aside.

Austrian Administrative High Court, Ra 2016/20/0384, 22 June 2017⁴² - respect for family life

Recital 14 of the Dublin III Regulation states that respect for family life should be a primary consideration of the Member States. A joint application of all the members of the family and responsibility for said applications to a single Member State can, according to Recital 15, also ensure that decisions on applications are coherent and that members of the families are not separated.

Article 11 Dublin III Regulation covers cases in which a family unit, within the meaning of that provision, already exists at the time of applying for asylum in a Member State, but that Member State is not competent for all persons of that family unit under the rules of Chapter III of the Dublin III Regulation. This requirement determines the relationship between Article 11 of the Dublin III Regulation and the other jurisdictional criteria of the Regulation. In fact Article 11 of the Dublin III Regulation provides a corrective measure for the basic hierarchy of jurisdictional criteria, as set out in Article 7(2) of the Dublin III Regulation, and ensures that family unity is safeguarded where the usual criteria of jurisdiction would prevent the attainment of those objectives.

Austrian Federal Administrative Court, W144 2160624-1, 12 June 2017⁴³ - best interests of the child

The Austrian authorities had not at all considered the best interests of the child in deciding to transfer to Norway a child who had been there for one and a half years. The best interests of the child must always be placed first in decisions which affect the child, such as a Dublin transfer decision. The principle of the child's well-being is firmly anchored in EU law and it must be placed above any other consideration.

Austrian Federal Administrative Court, W242 2138529-1, 5 May 2017⁴⁴ - unaccompanied child

In accordance with Article 8(4), the CJEU judgment in *MA* and the best interests of the child, Austria is the responsible Member State for an unaccompanied child even if the child has not lodged an asylum application in Austria. The determinative factor is rather where the child currently is. This prevents the child from being sent back to Hungary where he had applied for asylum since it is not in the best interests of unaccompanied children to be sent back to Hungary under Dublin.

Luxembourg Administrative Tribunal, Application no. 39131, 21 April 2017⁴⁵ - unaccompanied child

The Member State responsible for an asylum application of an unaccompanied child is that where an application has been lodged. When considering whether a transfer should take place and what is in the best interests of the child, the Tribunal also considered that a transfer from Luxembourg would destroy the child's schooling and education in Luxembourg.

Luxembourg Administrative Tribunal, Application no. 39098 and 39099, 28 March 2017⁴⁶ - visa

The Tribunal considered whether Article 10 DRIII can apply to a family where the husband had applied for

41. Austrian Federal Administrative Court, W153 2162325-1, 21 July 2017, accessible at: <http://bit.ly/2eRSkxQ>.

42. Austrian High Administrative Court, Ra 2016/20/0384, 22 June 2017, accessible at: <http://bit.ly/2wUomS1>.

43. Austrian Federal Administrative Court, W144 2160624-1, 12 June 2017, accessible at: <http://bit.ly/2vQ2vcR>.

44. Austrian Federal Administrative Court, W242 2138529-1, 5 May 2017, accessible at: <http://bit.ly/2wV1Ubf>.

45. Luxembourg Administrative Tribunal, 21 April 2017, 2017-04-21_39131, summary accessible at: <http://bit.ly/2BDD1BK>.

46. Luxembourg Administrative Tribunal, Application no. 39098 and 39099, 28 March 2017, accessible at: <http://bit.ly/2wRT4NR>.

protection in Luxembourg and his wife and their children had applied two days later but where the wife and children had entered the EU on a Polish visa. Article 10 must be construed as applying to a situation where an asylum applicant has applied in the same Member States as another family member and not solely to cases where family members have made applications in different Member States. In essence, Article 10 covers both scenarios.

Responsibility under Article 9 DR III applies where a family member has international protection status in that Member State and a family member subsequently applies for asylum, whereas Article 10 is applicable to cases where a person has made an international protection claim, the responsible Member State has already been determined and the application is being examined when another family member applies for asylum. Article 11 covers the situation where the determination procedure under Dublin for an individual is being undertaken when another family member applies for asylum. On the basis of this reasoning Article 10 does therefore not apply to the facts of the present case. Instead, and in order to ensure the principle of family unity, Article 11a) applies to the case and Poland, having given the wife and children visas, was responsible for the claim of the whole family.

Switzerland Federal Administrative Court, Decision BVGE 2017/IV/1, 10 February 2017- family members

Article 2(g) of the Regulation, defines family members and does not impose any further requirements for (formal) spouses, whereas a permanent relationship is required for unmarried partners. Asylum seekers can refer directly to Article 9 of the Dublin Regulation. Article 9 requires that the family member residing in Switzerland is entitled to stay in Switzerland in his or her capacity as a beneficiary of international protection. In addition to refugee status, international protection also includes protection status due to a serious threat to life and limb resulting from arbitrary violence in the context of armed conflict. This shall also include a temporary admission due to unreasonableness, which is justified by a precarious security situation.

UK Upper Tribunal, The Queen 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, JR/2471/2016, 29 April 2016⁴⁷- investigative duties

The case concerns a take charge request lodged under Article 8 of the DR III for two minors wishing to reunite with their mother in the UK but were refused by the UK authorities on grounds that the family relationship was not credible. The Tribunal held that the duties of enquiry, investigation and evidence gathering “course through the veins of the DR III” as well as the Commission’s Implementing Regulation. Such duties are both explicit and implicit and the content is necessarily context specific. Nonetheless the Member States must take reasonable steps to secure these duties. Moreover these investigate obligations are not extinguished upon the initial refusal decision. Indeed, the Dublin regime acknowledges that there may be several formal requests by one Member State alongside several formal decisions by another. The authority’s erroneous passiveness with regard to the collection or organisation of DNA evidence is incompatible with the increased procedural mechanisms in the Dublin Regulation, *inter alia*, gathering of evidence, as well as the Regulation’s emphasis upon the safeguarding of children and family life. Similarly the inactivity on the part of the authorities violated the procedural aspect of Article 8 ECHR.

Switzerland Federal Administrative Court, Decision D-5785/2015, 10 March 2016- family members

The presence of a family member or sibling in a pending asylum procedure in Switzerland qualifies as “legally present” for the purposes of Article 8(1) of the Dublin III Regulation

Munich Administrative Court, M 12 K 14.50285, 01 March 2016 – family procedure

In this present case, the prerequisites for a family procedure within the meaning of Article 11 (a) of the Dublin III Regulation are fulfilled. The applicant, who was a minor and unmarried at the time of the application, submitted his asylum application on 1 April 2014, only one day after his brother and the rest of his family. The application for international protection was therefore brought by the applicant so closely in time that the procedure for determining the responsible Member State as well as the procedures of his brother and his family can be carried out jointly.

47. UK Upper Tribunal, The Queen 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, JR/2471/2016, 29 April 2016, summary accessible at: <http://bit.ly/1OImDWB>.

COMMENTARY

An important aspect of the case law identified is the interpretation of Articles 6 and 8 of the Dublin Regulation and the guarantees for children who are subject to a Dublin transfer decision. The case law is relatively coherent in that there are proactive duties on Member States to, *inter alia*, investigate and communicate with one another on family links, to make sure that the child has the right to be heard and is in fact heard (applying not only to cases where they risk being sent back to another country but also being sent to a country where a family member is)⁴⁸ and to ensure that at the forefront of decision makers minds is that the transfer is in that child's best interests and to prevent a transfer where that is not the case. Interestingly, a decision from the Luxembourg Administrative Tribunal⁴⁹ considers that as part of this assessment the child's schooling and education must be taken into consideration.

THE INTERPRETATION GIVEN TO ARTICLES 16 AND 17 BY NATIONAL COURTS

High Court of Ireland, M.A. (a minor) -v- The International Protection Appeals Tribunal & ors, 8 November 2017⁵⁰- discretionary clause

The High Court has referred several questions for a preliminary ruling by the CJEU. The case pertains to litigation which has been taken in the Irish courts on whether a determining Member State, for the purposes of the Dublin Regulation, includes a Member State which is exercising its functions under Article 17; in other words is a determining member state one which is applying Article 17.⁵¹ Moreover, the questions relate to the interaction between Articles 6 and 17 and whether the obligations on States under Article 6 (for example the best interests of the child being a primary consideration in *all* procedures under the Regulation) encompass or include the exercise of discretion under Article 17. In respect of both of these questions, the High Court proposes that the concept of a determining Member State does include the determination process under Article 17 and that the 'functions' conferred by Article 6 include the exercise of the discretion under Article 17. Other questions referred to the CJEU by the High Court are the following:

- » when dealing with transfer of a protection applicant under regulation 604/2013 to the UK, is a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU;
- » does the concept of an effective remedy apply to a first instance decision under art. 17 of regulation 604/2013 such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the regulation should be construed as encompassing an appeal from a decision under art. 17;
- » does art. 20(3) of regulation 604/2013 have the effect that in the absence of any evidence to displace a presumption that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, the national decision maker is not required to consider such best interests separately from the parents as a discrete issue or as a starting point for consideration of whether the transfer should be take place.

Council of State of the Netherlands, 201609676/1/V3, 16 October 2017⁵²- dependence

The Dublin Regulation is not intended to serve as a route for obtaining residence with a family member in the Netherlands on regular grounds, i.e. family reunification. The application for family reunification had been correctly denied by the national authorities in a case which concerned a father and his underage child residing in the Netherlands and who had applied for reunification with his adult child since his application had been lodged three months after he had received status recognition. Moreover, the adult child could not rely on Article 17(1) DR III since no dependence between the adult child his father and his younger brother had been substantiated.

48. The Hague Court, NL17.9820, 17 October 2017.

49. Application no. 39131, 21 April 2017.

50. M.A. (a minor) -v- The International Protection Appeals Tribunal & ors, 8 November 2017, summary accessible at: <http://bit.ly/2Eom5o6>.

51. In the Irish context this has been an important consideration to understand which body within Ireland has the jurisdiction to apply Article 17, M.E. -v- The Refugee Appeals Tribunal & ors, 17 July 2017.

52. Council of State of the Netherlands, 201609676/1/V3, 16 October 2017, goo.gl/7cc9gL.

*Austrian Federal Administrative Court, W165 2135349-1, 3 August 2017*⁵³

In a case concerning a sister who acted as a mother for her sibling and half-sibling, the Austrian authorities were obliged to apply Article 17(1) of the DR III so that the siblings' Article 8 ECHR rights were not violated. This applied notwithstanding that the Czech Republic was responsible for the applicant's claim under Article 12(2). Whilst the step-father was present with the children, the sister had the custody of her sibling. Therefore, it was irrelevant to the Court that the sister only had the custody of one of her siblings and not her other half sibling.

Austrian Federal Administrative Court, W175 2162514-2, 10 July 2017- discretionary clause

The examination procedure on the part of the Austrian authorities has been insufficiently conducted. The applicant is in a traditional marriage with her husband, a beneficiary of international protection and Austrian citizen in Austria. Their marriage has been registered in Austria and the applicant is pregnant with their child. The husband also has children from a previous relationship (who have international protection status), the applicant therefore has step children. The authorities have refrained from taking appropriate steps to determine the existence of a family relationship within the meaning of Article 9 DR III. In addition, the consultation procedure conducted with Spain (which had issued a visa to the applicant) has been inadequately conducted since the Spanish authorities were not informed that the applicant's husband is an Austrian citizen and that both he and the applicant's step-children are resident in Austria. Moreover, the authorities are to examine the existence of special family circumstances within the meaning of Article 17(1). Recitals 14 and 17 emphasize that respect for family life should be a primary consideration and States should ensure that family members are not separated from one another. Due to the deficiencies in examining the applicant's circumstances, it is not clear whether there has been an unacceptable interference with the applicant's Article 8 ECHR rights. The applicant's appeal is, therefore, granted.

*UK Upper Tribunal R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department (Dublin – Unaccompanied Children – Procedural Safeguards), 5 June 2017*⁵⁴-*discretionary clause*

The case is set against the backdrop of an expedited procedure intended to facilitate the unification of unaccompanied children in Calais, who were later accommodated in reception centres across France, with their relatives in the UK. The Tribunal held that the imposition of a "one-off" expedited procedure in France fell within the framework of the Dublin Regulation. As such expedition of procedures for the allocation of responsibility is a core principle of the Regulation and if a Member State wished to waive or relax any formal requirements enshrined in the Regulation (i.e. dispensing with the requirement of registering an asylum claim or lodging a take-charge request) EU law would not, in general, be breached. However, the same cannot be said of a Member State exonerating itself from duties and requirements as laid out in the Regulation. Indeed, to solely apply Article 8 of the Dublin Regulation and to not consider Article 17 meant that the UK had undertaken an expedited process which in EU terms was constitutionally impermissible. Indeed derogating from substantial swathes of the Dublin Regulation was not permissible when set against the legal rules or principles in the Regulation and the Commission Implementation Regulation. Article 17(1) is a justiciable right and Article 8 ECHR places on States positive obligations to facilitate family reunification within a prompt time table, allow for the active participation of children and their family within the decision-making process and take a flexible stance towards applications, especially with regard to documentation.

The Tribunal subsequently gave an Order requiring the Secretary of State to make all the necessary and immediate arrangements for the transfer of AM from France to the United Kingdom.

Note: The legality of the expedited procedure as a whole was subsequently taken to the High Court by Citizen's UK.⁵⁵ Unlike the President of the Upper Tribunal's finding in AM, the High Court held that the expedited process, as a whole, fell outside the Dublin regime. According to the Court the expedited process did not include the making of an application for international protection, without such an application Dublin did not apply. Therefore, the justiciability of Article 17 of the Regulation was purely academic but if it were necessary to deal with the point the High Court would have reiterated the Court of Appeal's finding in paragraph 85 of ZAT and Others.⁵⁶ Whilst acknowledging the differences with AM the High Court stated that the finding by the President may have depended on the application of Article 8 ECHR. The High Court did, however, give

53. Austrian Federal Administrative Court, W165 2135349-1, 3 August 2017, <http://bit.ly/2eT33Yy>.

54. R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department (Dublin – Unaccompanied Children – Procedural Safeguards), summary accessible at: <http://bit.ly/2gYAWvn>.

55. R (Citizens UK) v SSHD [2017] EWHC 2301 (Admin), 18 September 2017, accessible at: goo.gl/Tr8duZ.

56. Secretary of State for the Home Department v ZAT, [2016] EWCA Civ 810, 2 August 2016, accessible at: <http://bit.ly/2x9KwCB>.

permission to appeal. The clear difference in reasoning between AM and the Citizens UK case was fleetingly raised in *Help Refugees Ltd* before the High Court,⁵⁷ who noted the clear conflicting positions of the respective Tribunal and Court but stated that it was not for the Court in *Help Refugees Ltd* to resolve such a difference and that, in any case, AM did not apply to the facts of the particular case before them.

Austrian Federal Administrative Court, W241 2153929-1, 15 May 2017⁵⁸ - investigative duties

The administrative authority had rejected the applicants' (a wife and her children) application on grounds that Poland was responsible for the claim, despite the husband having applied for asylum in Austria in 2014 (an appeal still pending). Whilst Article 10 does not apply to the case, the court rules that the contested decisions proved to be grossly flawed, since the family life of the applicants with the husband or father residing in Austria was not dealt with in any way. By virtue of Articles 16 (1) and 17 (1) and 17 (2), the Dublin III Regulation is fundamentally based on the idea of assessing family ties, which are also connected to humanitarian reasons and/or dependencies, in the context of an overall assessment of their worthiness of protection and, in case of doubt, not to separate applicants and family members. Against this backdrop, it seems necessary that the BFA, within the scope of its discretion, should examine a possible competence to conduct the applicants' asylum procedures in more detail. Since the BFA did not undertake any consideration of the family life of the applicants and the need of its protection the administrative decisions are unlawful.

UK Upper Tribunal R (on the application of RSM and Another) v Secretary of State for the Home Department [2017] UKUT 124 (IAC), 12 April 2017⁵⁹ - discretionary clause

Article 17 forms an integral part of the Dublin Regulation and should be understood and applied in a manner which furthers the aims and objectives of the Regulation in general. In other words, Article 17 does not undermine, but rather enhances the objectives of the Dublin Regulation. The Secretary of State was wrong to assume that Article 17 only applies where the family reunification criteria in Article 8 is not satisfied. Article 17 is a justiciable right and should be particularly relied upon in circumstances where one of the overarching values of the Dublin Regulation, namely expedition, is not being fulfilled in the procedures of the host Member State.

Based on the facts of the case, namely the delays and deficiencies of the Italian asylum and guardianship system, the lengthy procedures that should be expected for a Dublin transfer to be concluded, the lack of assurances that RSM's case would be dealt with enhanced expedition, the obligation under Article 8 ECHR to take the best interests of the child as a primary consideration, all point to the appropriateness of judicial intervention. Thus, the Secretary of State failed to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation and must admit RSM to the UK, so as to be immediately reunited with his family.

Note: This case was appealed to the Court of Appeal and judgment was given on the 18 January 2018.⁶⁰ The Court focused upon the definition of "lodged" in Article 17(1) of the Dublin Regulation III and whether the Secretary of State, as per the Upper Tribunal's judgment, was required to proactively bring an unaccompanied child to the UK **before** a take charge request had been lodged by the "host state" and without the child having entered into the UK's jurisdiction. Unlike the decision of the Upper Tribunal, the Court found that lodging for the purposes of Article 17(1) requires the applicant to be in the jurisdiction of the UK and to have lodged the application there. Therefore, the Upper Tribunal's conclusions and ultimate order was incorrect. In addition, the Court of Appeal held that the Upper Tribunal had incorrectly applied the Article 8 threshold, as laid out in ZT (Syria), and that on the facts of the case neither the Italian processes nor the vulnerability of RSM were sufficient to meet the threshold of an "especially compelling case".

Munich Administrative Court, M 9 S 17.50332, 28 March 2017⁶¹ - discretionary clause

Article 17 of the Dublin III Regulation may be considered if, as a result of the transfer of an asylum seeker to Italy, the family unit is dissolved since the husband would be separated from his wife and new born child. In addition the national authority has not examined in detail as to whether Article 10 of the Regulation can be

57. *Help Refugees Ltd, R (on the application of) v The Secretary of State for the Home Department & Anor* [2017] EWHC 2727 (Admin), 2 November 2017, accessible at: <https://goo.gl/rcBkVV>. The applicants in this case were also granted permission to appeal by the Court of Appeal.

58. Austrian Federal Administrative Court, W241 2153929-1, 15 May 2017, accessible at: <http://bit.ly/2E4D7Yx>.

59. *R (on the application of RSM and Another) v Secretary of State for the Home Department* [2017] UKUT 124 (IAC), 12 April 2017, summary accessible at: <http://bit.ly/2gZap0W>.

60. *RSM (A Child), R. (On the Application of) v The Secretary of State for the Home Department* [2018] EWCA Civ 18, 18 January 2018, accessible at: <http://bit.ly/2E1V3R0>.

61. Munich Administrative Court, M 9 S 17.50332, 28 March 2017, accessible at: <http://bit.ly/2h0lcYX>.

applied in this case. Suspensive effect of the transfer decision is therefore ordered.

The Hague Regional Court, 17 _ 540, 30 January 2017⁶² - dependency

In the light of the information submitted and from the Court's observation at the hearing, the Court is of the opinion that the son provides informal care for the claimant (his mother) and that the claimant may not be able to function independently without that care. The Court concludes that the defendant should investigate and give reasons for the applicability or non-application of Article 16 (1) of the Dublin Regulation in the case of applicants.

Austrian Federal Administrative Court, W232 2140127-1, 11 January 2017⁶³ - investigative duties

From a substantive point of view Latvia is responsible for the asylum claims of a mother and her two children under Article 12(2) DR III. However, the Austrian authorities failed to inform the Latvian authorities that the husband and another son were international protection applicants in Austria and were currently appealing against a negative decision of their asylum claim. As a result of the incomplete information, the Latvian authorities were not in a position to investigate whether Article 17(2) would be applicable in this case. The investigative procedure thus lacked transparency and was incomplete. A separation of the family by sending the mother and two children to Latvia would result in a disproportionate interference with the family life of the family unit under Article 8 ECHR. On this basis and notwithstanding the original jurisdiction of Latvia, Austria is deemed to be responsible for the claim of the mother and her two children.

Austrian Federal Administrative Court, W105 2135499-1, 21 November 2016⁶⁴- discretionary clause

The purpose of the humanitarian clause under Article 17 is to prevent a separation of family members, which could result from the application of the rules determining the responsible Member State. Article 17 (2) of the Dublin III Regulation seeks to prevent, *inter alia*, an infringement of Article 8 of the ECHR.

Council of State of the Netherlands, Decision 201507801/1, 9 August 2016⁶⁵- respect for family life

There is no obligation on the Dutch immigration authorities to protect family relations other than those mentioned in the Dublin Regulation.

Note: in a previous ruling from the Council of State the Council held that the relationship between the asylum seeker and his wife, who had been naturalised and pregnant with his child was not a special, individual circumstance that gives rise to the application of Article 17 of the Dublin Regulation.⁶⁶

The Hague Court, NL 16.1136 and NL 16.1138, 9 June 2016⁶⁷- best interests of the child

If a child were to be transferred back to Germany from the Netherlands he would be transferred with his distant relatives, of whom the child had stated he did not feel comfortable with. He had been physically separated from these distant relatives in the Netherlands and put into the care of Nidos, a Dutch NGO for unaccompanied minors. By deciding that the child could be sent back with his distant relatives the Dutch authorities had not paid attention to the views of the child, did not assess whether the relatives fell within the definition of Article 2(h) of the Regulation and did not examine whether the use of Article 17 would be appropriate in these circumstances.

Czech Supreme Administrative Court, No. 933/2006 Coll. NSS and No. 1655/2008 Coll. NSS, 18 May 2016⁶⁸- discretionary clause

Article 17 (1) of the Dublin III Regulation explicitly states that it is only possible to derogate from a State's jurisdiction provided for in Article 3 (1) of this Regulation. Article 17(1) may be used only where jurisdiction is determined within the meaning of Article 3 (1) of the Dublin III Regulation, that is to say, only where it is

62. Hague Regional Court, 17 _ 540, 30 January 2017, accessible at: <http://bit.ly/2nkiSLQ>.

63. Austrian Federal Administrative Court, W232 2140127-1, 11 January 2017, accessible at: <http://bit.ly/2BTtwTl>.

64. Austrian Federal Administrative Court, W105 2135499-1, 21 November 2016, accessible at: <http://bit.ly/2xtCsN3>.

65. Council of State of the Netherlands, Decision 201507801/1, 9 August 2016, accessible at: <http://bit.ly/2BEMB7d>.

66. Council of State, Decision , 201505706/1, 19 February 2016.

67. The Hague Court, NL 16.1136 and NL 16.1138, 9 June 2016, accessible at: <http://bit.ly/2jIMiu6>.

68. Czech Supreme Administrative Court, No. 933/2006 Coll. NSS and No. 1655/2008 Coll. NSS, 18 May 2016, accessible at: <http://bit.ly/2gZjOpq>.

determined on the basis of the criteria contained in Chapter III of that regulation (Articles 7 and 8 to 15). Where jurisdiction is determined on the basis of the “residual” criterion contained in Article 3 (2) of the Dublin III Regulation, the discretionary power enshrined in Article 17 (1) of this Regulation cannot be used at all. The wording in Recital 17 is to be limited to the wording of Article 17(1) in this respect. In this case then, since neither Articles 7 and 8 to 15 and 17(1) was raised by the applicant, Article 3(2) applies and the responsible State is deemed to be Germany. The Supreme Administrative Court however omitted to rule on whether Germany could apply Article 17(2) and request the Czech Republic to take charge of the applicant in order to bring together family relations even if the Czech Republic is not otherwise responsible for the claim, as the lower court had ruled.

Note that Czech jurisprudence is not consistent on this point since other Courts have examined whether Article 17(1) has been adequately examined even where Article 3(2) applied.⁶⁹

Austrian Federal Administrative Court, W205 2104654-1, 15 May 2016⁷⁰- respect for family life

A family relationship amongst adults can be subject to the protection of Article 8(1) ECHR when additional features of dependency exist. This is met in this case since the family lived together in the country of origin and have only been temporarily separated. Most importantly, where a family flees a civil war it is to be assumed that a particularly close family bond arises as a result of the experiences undergone in a life-threatening war situation and the concurrent likelihood of traumatising events. There is therefore a high degree of mutual dependence, especially when they are faced with an entirely different socio-cultural environment. This relationship therefore is comprised of special features of dependency which are to be qualified beyond normal family ties. In this case it is imperative for the Austrian authorities to make use of their discretion under Article 17(1).

Administrative Court Hannover, Case no. 1 B 5946/15, 7 March 2016⁷¹- discretionary clause

Article 17 of the Dublin III Regulation does not specify the circumstances under which a Member State may derogate from the provisions on responsibility. However, recital 17 of the Dublin III Regulation explicitly states that Member States may derogate from the binding criteria of responsibility laid down in Article 3(1) of the Dublin III Regulation based on humanitarian or compassionate grounds in order to bring together family members, relatives, or persons that are related in any other way. In this context, recitals 13 and 14 of the Dublin III Regulation set out that the best interests of the child and the respect for family life should be primary considerations when applying the Regulation. Article 6 (3)(a) of the Dublin III Regulation also stipulates that Member States shall take due account of the possibility of family reunification when assessing the best interests of the child.

In the event that an application for international protection allows for family reunification and also safeguards the best interests of the child, there is no room for discretion by the Federal Office in making an assessment under Article 17 (1) of the Dublin III Regulation.

Administrative Court Düsseldorf, 13 L 914/15.A, 8 April 2015⁷² - dependency

Legal residency as per Article 16(1) DR III requires that the residence was legalised by an executive or legislative act. Temporary residence for the duration of an asylum process does not constitute such regularisation. Moreover, in the case of the bond between adult children and their parents Article 8 ECHR may apply but this is only in exceptional cases, i.e. where one of the family members is relying on care of another and that such care can only be given in Germany.

69. See Czech Supreme Administrative Court, 78Az 24/2016-42, 28 February 2017, accessible at: <http://bit.ly/2kL5ORw> and Usti and Labem Regional Court, 1 Azs 145/2017 – 32, 15 January 2017, accessible at: <http://bit.ly/2ygoUo5>.

70. Austrian Federal Administrative Court, W205 2104654-1, 15 May 2016, accessible at: <http://bit.ly/2wYKAIO>.

71. Administrative Court Hannover, no. 1 B 5946/15, 7 March 2016, summary accessible here: <http://bit.ly/2w4NWq7>.

72. Administrative Court Düsseldorf, 13 L 914/15.A, 8 April 2015, accessible at: <http://bit.ly/2yJicrk>.

COMMENTARY

The above case law on Articles 16 and 17 raises, amongst others, one key question: how discretionary are the discretionary clauses?

National jurisprudence is divergent on the discretionary nature of Articles 17(1) and (2). In Germany, for example, the Courts have ruled that the assessment of Article 17(1) must be done in compliance with the best interests of the child and family reunification. Where both can be achieved by applying Article 17(1) there is an obligation on the State to apply the sovereignty clause.⁷³ Similar reasoning has been given by the Swiss Federal Administrative Court.⁷⁴ In Austria, the Federal Administrative Court has held that, at the very least, there is an obligation on the authorities to undertake an examination of Articles 16(1), 17(1) and (2) with a view to assessing whether family life should be protected. Indeed, in one case the Federal Administrative Court held that in light of the Regulation's purpose of securing the family unit, wherever there is doubt as to the worthiness of protecting family unity, the family members should not be separated.⁷⁵ By extension this would arguably mean that the dependency or discretionary clauses are to be used in such cases. Interestingly, in several Austrian cases, the Federal Administrative Court also emphasises the duties on Austrian authorities to be transparent and communicate information to other Member States who may otherwise be responsible for an applicant's claim.⁷⁶

Additionally, the case law identified illustrates that the discretionary clauses are not solely applied to situations where a prior assessment and subsequent non-satisfaction of the other responsibility criteria has first been done. In other words, the Courts have assessed the responsibility criteria in conjunction with the discretionary clauses. This finding was also held in the UK in RSM where the Upper Tribunal held that Article 8 DR III read in conjunction with Article 17(1) can serve to expedite family re-unification. On appeal the Court of Appeal partially agreed with this point in para 122 where it stated that Article 8(2) is not self-executing and that Article 17 can be a mechanism to carry out a transfer. However, the Court's conclusion that the applicant needs to be in the UK in order to fulfil the definition of lodging for the purposes of applying Article 17(1) renders the expedition aspect of the Article, and arguably a function of Article 17(1) itself, entirely redundant.

The Court of Appeal's judgment makes the application of 17(1) contingent on the applicant being within the jurisdiction of the UK and unlike the case law highlighted above, which points to a mandatory consideration and even application of Article 17 in specific contexts, the judgment in RSM conversely renders the application of Article 17(1) by Member States far more discretionary. Whilst it is clear that in most of the cases from Germany, Switzerland and Austria the application of 17(1) along with 16(1) and 17(2) concern an applicant who has already made it to the Member State where the family member is (the Court of Appeal made this point in reference to the K and Mengesteab decisions), the national case law identified above demonstrates that 17(1) is to be applied where the best interests of the child and/or protecting the family unit is at stake. Arguably, this is regardless of where the applicant is.⁷⁷

Notwithstanding that the CJEU is yet to rule on the question of whether Article 17(1) can be used by a Member State where the applicant's family is but the applicant is not and no take charge request on the basis of Article 17(2) has been lodged, the Court has ruled in Mengesteab that requiring any formalities over and above a receipt by a public authority to determine whether an application has been lodged under the DR III would result in family reunification under the Regulation being delayed. The Court is therefore wary of administrative hurdles that prevent an applicant wishing to rely on their right to respect for family life and, arguably, by extension, their right to be brought to their family unit in another Member State. By virtue of the recent Irish preliminary reference in M.A. and Others the CJEU will hopefully shed some light on the content of Article 17 and whether it can be used as an autonomous provision in order to establish a Member State's jurisdiction as well as being used alongside another provision in the Regulation (notably Article 6).

73. Administrative Court Würzburg, W 3 K 14.50080, 1 March 2016; Administrative Court (of) Hannover, case no. 1 B 5946/15, 7 March 2016; Administrative Court Munich, M 8 S 16.50301, 30 May 2016 ; Administrative Court Greifswald 5th Chamber, 5 B 1225/17, 10 July 2017. The discretionary nature of Article 17(1) is also reduced to zero where there is an unreasonably long period of proceedings or, due to the applicant's personal circumstances, there would be a breach of his fundamental rights, see Administrative Court Bayern, 13a B 15.50124, 3 December 2015.

74. Federal Administrative Court, E-641/2014, 13 March 2015 "If it is found that the execution of the transfer runs counter to the ECHR or to other commitments of international law to which Switzerland is bound, the Swiss administrative authorities have no choice but to examine the asylum application and thus the exercise of the sovereignty clause becomes mandatory."

75. Austrian Federal Administrative Court, W241 2153929-1, 15 May 2017.

76. Austrian Federal Administrative Court, W232 2140127-1, 11 January 2017.

77. By analogy see, Austrian Federal Administrative Court, W153 2166337-1, 18 August 2017.

According to the Irish High Court who referred the questions, Article 17 can be used both as an autonomous clause and in conjunction with another Article allowing for its use in the alternative where one of the potential grounds for responsibility fails. If the CJEU does rule that the guarantees for minors in Article 6 includes the discretion under Article 17 this could be used to advance the argument that where a child is separated from their family unit, responsibility under Article 17 can be triggered by a Member State even where the child or family member/relative/relation (depending on the facts of the case) are in separate countries and regardless of a formal take charge process.



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