

## Germany ? Administrative Court Muenster, 20 December 2018, 2 L 989/18.A

**Country of Decision:**

Germany

**Country of Applicant:**

Syria

**Date of Decision:**

20-12-2018

**Citation:**

2 L 989/18.A

**Court Name:**

Administrative Court Muenster

**Relevant Legislative Provisions:**

International Law

International Law &gt; UN Convention on the Rights of the Child

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1]

Council of Europe Instruments

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 8](#) [2]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3] > [Article 7](#) [4]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3] > [Article 24](#) [5]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(13\)](#) [7]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(14\)](#) [8]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(15\)](#) [9]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Recital \(19\)](#) [10]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 2](#) [11]

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3] > [Article 47](#) [12]

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [3] > [Article 51](#) [13]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 6](#) [14]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 8](#) [15]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 9](#) [16]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 10](#) [17]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 11](#) [18]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 12](#) [19]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 13](#) [20]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 17](#) [21]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 20](#) [22]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 21](#) [23]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 22](#) [24]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 27](#) [25]

---

**Headnote:**

Article 8 (1) of the Dublin III Regulation provides for a subjective right to family reunification, both for the applicant himself and for the family members present in the Member State responsible. This right is also justiciable to the extent that denial of transfer affects the rights to family unity and the best interest of an unaccompanied minor.

The expiry of the time limit for the submission of a take charge request pursuant to Article 21 (1) of the Dublin III Regulation, as well as for the submission of a request to review the rejection of a take charge request (so-called "remonstration") pursuant to Article 5 (2) of the Implementing Regulation to the Dublin II Regulation, does not reverse the responsibility back to the requesting Member State if the failure to comply with the time limit cannot be attributed to the applicant and family unity and the best interests of the child take precedence over the procedural rules on time limits.

Due to the paramount importance of the right to family unit and the best interests of the child, the discretion under Article 17(2) of the Dublin III Regulation translates into a legal obligation of the Member State to invoke the sovereignty clause where there are close family ties. Beyond such family ties, no further special relationship or interdependency is required.

Whether a minor is "unaccompanied" within the meaning of Article 2 lit. j of the Dublin III Regulation depends on the domestic law in the Member State where the minor is present.

### **Facts:**

The applicants, both Syrian nationals, are brothers. The older brother entered Germany in September 2015 with his wife and two children and applied for international protection. In August 2016, he and his family were granted subsidiary protection status. The younger brother arrived in Greece as a minor together with his adult cousin and applied for international protection in August 2016. The cousin was appointed as his representative and temporary guardian by the Greek authorities. In November 2016, the cousin made a written request to the Greek authorities on behalf of the first applicant to be reunited with his brother living in Germany.

In February 2017, the Greek Dublin Unit submitted a take charge request to the Federal Office for Migration and Refugees (Federal Office) referring to Articles 8 and 17 (2) of the Dublin III Regulation. The Federal Office rejected the initial request, as well as all subsequent requests by the Greek Dublin Unit to re-examine. The Federal Office argued, *inter alia*, that Article 8 of the Dublin III Regulation did not apply as the first applicant was accompanied by his adult cousin. With regard to Article 17(2) of the Dublin III Regulation, the Federal Office held that there were no humanitarian considerations since there was no evidence of a particularly dependent relationship. The last request of the Greek authorities, which referred to the revocation of the temporary guardianship of the cousin and their spatial separation for the protection of the first applicant, was rejected by the Federal Office arguing that the time limit for remonstrance of three weeks had already expired.

After this final rejection, the applicants lodged an application for an interim measure with the Administrative Court of Muenster.

---

### **Decision & Reasoning:**

The Court first stated that both applicants had a subjective right to request that Germany is recognised as the Member State responsible for the asylum application of the younger brother under Article 8(1) of the Dublin III Regulation. The Court argued that the criteria determining the Member State responsible for an asylum application laid down in Articles 8 to 10 of the Dublin III Regulation were an expression of the fundamental rights guaranteed under Article 8 ECHR as well as Articles 7 and 24 CFREU, which have to be complied with when applying the Dublin III rules.

Correspondingly, the refusal to assume responsibility for the examination of an asylum application by the Member State responsible in accordance with these criteria must also be justiciable to ensure that the justiciability of such a right is not undermined. The latter must be particularly protected when denial of transfer affects the rights to family unity and the best interest of an unaccompanied minor, which must be treated with priority as overarching goals of the Dublin III framework. Consequently, the provisions of the Dublin III Regulation on family reunification evidently aim to protect family members living in the Member State responsible, in this case the older brother living in Germany, who can then rely on the provisions on their own account.

Furthermore, the Court held that the BAMF was responsible for the examination of the asylum application of the younger brother under Article 8 of the Dublin III Regulation. The younger sibling must be regarded as an unaccompanied minor within the meaning of Article 2 lit. j of the Dublin III Regulation as the cousin was not an adult responsible for him in this sense. Whether that was the case should be determined in line with the relevant law or practice of the Member State where

the minor was staying. According to Greek law, to admit that the cousin is responsible for the minor would require the transfer and actual exercise of parental care. The appointment of the cousin as provisional caregiver/temporary guardian did not amount to such transfer since it constituted temporary representation but not permanent legal guardianship.

Additionally, the Court found that the reunification with his brother was also in the best interests of the minor. This general rule is also supported by the specific circumstances of this case: the brother was the closest relative, being the only member of his nuclear family in Europe, and the child had repeatedly voiced the absolute wish to live with his brother in Germany. The Court further considered that the cousin could not be considered as an alternative caregiver as he had abused his position as a representative, in order to attempt to personally benefit from the family reunification. Moreover, the relationship with the cousin had deteriorated dramatically, so that the first applicant had to be physically separated from the cousin in order to guarantee his safety. Finally, the Court argued that the cousin was neither a family member within the meaning of Article 2 lit. g nor a relative within the meaning of Article 2 lit. h of the Dublin III Regulation.

The Court also held that Germany's responsibility has not lapsed due to the expiration of time limits. The fact that Greece submitted the request to take charge only after the time limit of three months (cf. Articles 21(1), 20(2) of the Dublin III Regulation) had expired could not be taken into account to the detriment of the child. The responsibility for the delay could not be attributed to him but only to the Greek authorities and his cousin. In particular, the Court took into account that the Greek authorities insisted on a written request for family reunification without any basis in EU law and contrary to the best interests of the minor. The cousin further delayed the procedure by submitting it after trying to be included in the request.

Moreover, the strict application of Article 21(1) of the Dublin III Regulation in cases of family reunification that are based on the criteria laid down in Articles 8 to 11 of the Regulation would have the consequence of making such reunification permanently impossible due to the expiration of procedural time limits. Although time limits aim at streamlining and accelerating the Dublin procedure, they are also set to serve the interests of the applicant. In light of the family and child-related guarantees, any conflict between those and procedural time limits may only be resolved in a way that the Member State accepts a take charge request even after the time limit has expired. The same considerations applied to the lack of compliance on behalf of the Greek authorities with the time limit to request a re-examination. The Court found the BAMF's reference to the Greek authorities' non-compliance was not made in good faith since the BAMF itself did not comply with any time limits.

In any case, the applicants had a right to request the activation of the sovereignty clause under Article 17(2) of the Dublin III Regulation. In the Court's view, the overarching importance of the right to family unity and the best interests of the child, transform Article 17 discretion into an obligation of the Member State. In light of the close family ties between the applicants as siblings there were humanitarian grounds for family reunification. No further special relationship or interdependency is required beyond such established family ties.

Lastly, the Court considered that pending the decision of the Greek authorities on the merits of the child's asylum claim created a situation of urgency that justified an interim measure. If the case was decided in Greece, the applicant would no longer fall within the scope of the Dublin III Regulation and would remain separated from his brother for an unforeseeable period of time.

---

**Outcome:**

The application was granted and the BAMF, by means of an interim measure, was ordered to

declare itself responsible for the examination of the minor's application for asylum due to the fact that he is a family member of the second applicant.

---

**Other sources cited:**

Nestler/Vogt, Dublin-III reversed - ein Instrument der Familienzusammenführung?, ZAR 2017, S. 21 ff

(Nestler/Vogt, Dublin-III reversed ? an instrument for family reunification?, Journal of Aliens Law and Policy 2017, p. 21 et seqq.)

Filzwieser/Sprung, Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem, Stand 1.2.2014, Art. 2 Dublin III-VO

(Filzwieser/Sprung, Dublin III Regulation, The European system of responsibility for asylum applications, as of 1.2.2014, Art. 2 Dublin III Regulation)

Filzwieser/Sprung, Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem, Stand 1.2.2014, Art. 8 Dublin III-VO

(Filzwieser/Sprung, Dublin III Regulation, The European system of responsibility for asylum applications, as of 1.2.2014, Art. 8 Dublin III Regulation)

Filzwieser/Sprung, Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem, Stand 1.2.2014, Art. 21 Dublin III-VO

(Filzwieser/Sprung, Dublin III Regulation, The European system of responsibility for asylum applications, as of 1.2.2014, Art. 21 Dublin III Regulation)

Filzwieser/Sprung, Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem, Stand 1.2.2014, Art. 17 Dublin III-VO

(Filzwieser/Sprung, Dublin III Regulation, The European system of responsibility for asylum applications, as of 1.2.2014, Art. 17 Dublin III Regulation)

Ministry of Migration Policy Greece, Asylum Procedure ([http://asylo.gov.gr/en/?page\\_id=72](http://asylo.gov.gr/en/?page_id=72) [26])

Universita Telematica Internazionale UNINETTUNO, Comparative Study on Guardianship in European Union, July 2017 (<http://www.re-future.eu/Data/Sites/13/GalleryImages/Toolkit/WP6-Guardian...> [27])

**National / Other Legislative Provisions:**

[Germany ? VwGO \(Administrative Court Act\) - § 123 \(1\) sentence 2](#) [28]

[\(3\)](#) [29]

[Germany ? VwGO \(Administrative Court Act\) - § 42 \(2\)](#) [30]

[Germany ? VwGO \(Administrative Court Act\) - § 52 No. 2 sentence 3](#) [31]

[No. 3 sentence 2](#) [32]

[Germany ? AsylG \(Asylum Act\) - § 88 \(1\) No. 2](#) [33]

[Germany ? AufenthG \(Residence Act\) - § 25 \(2\) sentence 1 second alternative](#) [34]

[Germany ? GG \(Basic Law/German Constitution\) ? Art. 16a \(2\) sentence 1](#) [35]

[Germany ? ZPO \(Civil Procedure Act\) ? §§ 920 \(2\)](#) [36]

[294](#) [37]

---

**Links:**

[1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[2] [https://www.asylumlawdatabase.eu/node/195#toc\\_46](https://www.asylumlawdatabase.eu/node/195#toc_46)

- [3] <https://www.asylumlawdatabase.eu/node/453>
- [4] [https://www.asylumlawdatabase.eu/node/453#toc\\_42](https://www.asylumlawdatabase.eu/node/453#toc_42)
- [5] [https://www.asylumlawdatabase.eu/node/453#toc\\_108](https://www.asylumlawdatabase.eu/node/453#toc_108)
- [6] <https://www.asylumlawdatabase.eu/node/4037>
- [7] [https://www.asylumlawdatabase.eu/node/4037#toc\\_23](https://www.asylumlawdatabase.eu/node/4037#toc_23)
- [8] [https://www.asylumlawdatabase.eu/node/4037#toc\\_24](https://www.asylumlawdatabase.eu/node/4037#toc_24)
- [9] [https://www.asylumlawdatabase.eu/node/4037#toc\\_25](https://www.asylumlawdatabase.eu/node/4037#toc_25)
- [10] [https://www.asylumlawdatabase.eu/node/4037#toc\\_29](https://www.asylumlawdatabase.eu/node/4037#toc_29)
- [11] [https://www.asylumlawdatabase.eu/node/4037#toc\\_59](https://www.asylumlawdatabase.eu/node/4037#toc_59)
- [12] [https://www.asylumlawdatabase.eu/node/453#toc\\_198](https://www.asylumlawdatabase.eu/node/453#toc_198)
- [13] [https://www.asylumlawdatabase.eu/node/453#toc\\_217](https://www.asylumlawdatabase.eu/node/453#toc_217)
- [14] [https://www.asylumlawdatabase.eu/node/4037#toc\\_114](https://www.asylumlawdatabase.eu/node/4037#toc_114)
- [15] [https://www.asylumlawdatabase.eu/node/4037#toc\\_135](https://www.asylumlawdatabase.eu/node/4037#toc_135)
- [16] [https://www.asylumlawdatabase.eu/node/4037#toc\\_143](https://www.asylumlawdatabase.eu/node/4037#toc_143)
- [17] [https://www.asylumlawdatabase.eu/node/4037#toc\\_146](https://www.asylumlawdatabase.eu/node/4037#toc_146)
- [18] [https://www.asylumlawdatabase.eu/node/4037#toc\\_149](https://www.asylumlawdatabase.eu/node/4037#toc_149)
- [19] [https://www.asylumlawdatabase.eu/node/4037#toc\\_154](https://www.asylumlawdatabase.eu/node/4037#toc_154)
- [20] [https://www.asylumlawdatabase.eu/node/4037#toc\\_165](https://www.asylumlawdatabase.eu/node/4037#toc_165)
- [21] [https://www.asylumlawdatabase.eu/node/4037#toc\\_185](https://www.asylumlawdatabase.eu/node/4037#toc_185)
- [22] [https://www.asylumlawdatabase.eu/node/4037#toc\\_217](https://www.asylumlawdatabase.eu/node/4037#toc_217)
- [23] [https://www.asylumlawdatabase.eu/node/4037#toc\\_229](https://www.asylumlawdatabase.eu/node/4037#toc_229)
- [24] [https://www.asylumlawdatabase.eu/node/4037#toc\\_238](https://www.asylumlawdatabase.eu/node/4037#toc_238)
- [25] [https://www.asylumlawdatabase.eu/node/4037#toc\\_285](https://www.asylumlawdatabase.eu/node/4037#toc_285)
- [26] [http://asylo.gov.gr/en/?page\\_id=72](http://asylo.gov.gr/en/?page_id=72)
- [27] <http://www.re-future.eu/Data/Sites/13/GalleryImages/Toolkit/WP6-Guardianship-in-European-Countries-july-2017.pdf>
- [28] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11035>
- [29] <https://www.asylumlawdatabase.eu/de/taxonomy/term/8134>
- [30] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11036>
- [31] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11037>
- [32] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11038>
- [33] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11039>
- [34] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11040>
- [35] <https://www.asylumlawdatabase.eu/de/taxonomy/term/9821>
- [36] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11041>
- [37] <https://www.asylumlawdatabase.eu/de/taxonomy/term/11042>