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Dublin Family Reunification: neither subject to limits nor delay - Note on the Administrative Court Wiesbaden, decision from 15 September 2017

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This journal contribution is to be read in conjunction with the EDAL case summary: [Wiesbaden Administrative Court 6 L 4438 / 17.WI, 15 September 2017](#) [1]

I. Introduction

In the past, Dublin transfers were principally at issue when applying Article 13 [Dublin Regulation III](#) [2] (?DRIII?). Yet, ever since the irregular journey within Europe became more and more difficult, the importance of DRIII as an instrument for family reunification gained practical relevance.

As a consequence of the heightened need to utilise the family reunification provisions (Articles 8-11 DRIII), the practical process of family reunification under the Regulation has become even more salient and is one which presents specific issues for practitioners. This is especially manifested in [transfers from Greece to Germany](#) [3]. According to the [German government](#) [4], more than 3000 asylum applicants residing in Greece are awaiting their transfer to Germany on the basis of the family unity clauses in the Regulation. However, the German and the Greek government [agreed on a ?cap?](#) [5] or a slow-down of the transfers; the exact terms and conditions of which were not disclosed to the wider public. The agreement was [criticised](#) [6] by 27 Greek, German and European NGO`s. On 15 September the nature of this agreement and its consequences on those waiting to be transferred was brought before the Administrative Court of Wiesbaden who [confirmed](#) [7] their legal opinion in an interim measure procedure. In the meantime, the German government [announced](#) [8] that the transfers ?can take place in the foreseen six-month deadline in the near future?.

II. The Case

The claimant in the case was a minor Syrian asylum seeker residing in Germany. His parents and three minor brothers applied for asylum in Greece. Germany accepted the Greek request to take charge (cf. Art. 21 (1), 22 (1) Dublin III) on 30 March 2017 based on Art. 10 Dublin III. According to Art. 29 (1) Dublin III, the transfer had to take place within six months of the acceptance of the request to take charge by the responsible member state.

The respondent in the case was the *Bundesamt für Migration und Flüchtlinge* (BAMF), which is the responsible administration for asylum processes in Germany and thus for Dublin procedures. The claimant requested an interim measure from the Administrative Court of Wiesbaden to ensure the

family members right to be transferred to Germany within the deadline of Art. 29 (1) Dublin III. According to the applicants, the Court should oblige the BAMF to communicate to the Greek Dublin unit that the family members are to be transferred in time. The claimant argued that the German authorities were responsible for the delays in transfers and the influence of the German-Greek ?agreement? meant that family reunification transfers had slowed down considerably. Referring to the recent CJEU judgement in [Mengesteab](#) [9], the claimant argued that there is a subjective right for applicants for the deadlines to be adhered to. A bilateral modification of the deadlines would not be possible.

The BAMF denied that the deadline would end on 30 September. It argued the deadline would start running after the BAMF received confirmation that the Greek authorities had received the acceptance of the take charge request. Therefore, the deadline would expire on 3 October since the BAMF received that confirmation on 3 April. It is noteworthy that the judge, in his decision, did not even refer to this argument, arguably since there is no legal basis for that argumentation (cf. the clear wording of Art. 29 (1) Dublin III: ?The transfer [?] shall be carried out [?] at the latest within six months of acceptance of the request by another Member State?). Lastly, the BAMF stated it would not insist on compliance with the deadline.

The court had several questions for the BAMF and in particular asked for the disclosure of the agreement in respect of the administrative practices between Greece and Germany. The BAMF did not accede to that request and seemingly did not answer the court's questions adequately. The statements of the BAMF led the judge to conclude that the reason for the delay in transfers were, at least, partly on the side of the German administration (see III.).

The judge followed the claimant's argumentation and obliged the BAMF to inform the Greek Dublin unit that the transfer of the family to Germany had to be taken within the deadline of Art. 29 (1) Dublin III. According to the family's lawyer, the family was transferred in time.

III. Important aspects of the decision

There are three important elements to this decision: 1) the recognition of a subjective right to be transferred in time, 2) the third-party interest of the German family members, 3) the German influence on the date of the transfer.

1. Subjective right to be transferred in time

The judge recognised a subjective right to be transferred in time, a conclusion which flowed from the recent CJEU judgement [Mengesteab](#) [10]. In this case the CJEU ruled that applicants can *rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant?* This judgement strengthened the subjective rights of the applicants within the Dublin procedure and upheld the reasoning expressed by the CJEU in [Karim](#) [11] and [Ghezelbash](#) [12] (cf. Hruschka/Nufer on [EDAL](#) [13]). However, the recent series of Dublin judgments by the CJEU concerned those in which a *transfer decision* was challenged by the effected asylum seeker. Conversely, the case in front of the Wiesbaden Court concerned the reverse: the goal of the applicant was not to challenge the transfer decision but to enforce the transfer. In this manner, the decision by the Administrative Court Wiesbaden is one of the first national decisions which has applied the reasoning on subjective rights by the CJEU to those *reversed?* cases. The judge makes it as simple as it is by saying that the deadlines in the Dublin process are subjective rights for the applicant and their correct application is required in order to achieve an effective enforcement of the DR III.

2. Third-party interest

The claimants in this case were not the family members in Greece, but the minor child in Germany. The judge reasoned that the right of the family to be quickly transferred (Art. 29 (1) Dublin III and Art. 8 (1) of the [Implementing Regulation of the Dublin Regulation](#) [14]) is in the interest of the family member in Germany, especially given that said family member is a child. Since the best interests of the child and the respect for family life shall be primary considerations when applying Dublin III (cf. recitals 13, 14 of the Regulation), the family unity clauses are to be applied in the interest of the family members that already reside in the responsible Member State. Therefore, the claimant was able to claim the transfer of his family members to Germany.

3. *The Agreement and Influence of the German Authorities*

(SOME) EVIDENCE FOR THE EXISTENCE OF THE AGREEMENT

The leaked [letter](#) [15] of the Greek Minister of Migration to its German counterpart

The [report](#) [3] by a Greek lawyer for Pro Asyl

The [answer](#) [16] of the Greek Asylum Service to AITIMA

As to the reasons behind the delayed transfers from Greece to Germany the judge concluded that Germany does have an influence on the dates and the number of transfers, and that a precise number of transfers per month exists based on the documents presented by the claimant. This is important since the German government did not acknowledge the existence of such a 'cap' of transfers from Greece to Germany. The judge clearly stated that any necessary coordination between the Member States cannot justify an 'extension' of the deadline of Art. 29 (1) Dublin III. Since the German Government, and even the [EU Commission](#) [17], have denied any legal problems regarding these administrative practices, the decision can be seen as a success for the NGO's trying to challenge the agreement by both judicial and political channels (for a more detailed legal discussion see [Verfassungsblog](#) [5]).

IV. Rejecting delayed transfers?

One important argument in the decision for granting an interim measure is the effect of a delay of the transfer laid down in Art. 29 (2) Dublin III: where the six months deadline expires responsibility lies with the Member State where the application was lodged.

In this case Greece would be responsible for the asylum applications of the family members and the family reunification to Germany would not take place. The court seems to assume that the right to be transferred only exists within this time limit. However, the German BAMF states it would not reject transfers based on the expiry of a deadline. The legal situation after expiry of any deadline within the Dublin procedure is important. Can asylum applicants still demand to be reunited with their family members? [In my opinion](#) [5], recital 14 DRIII as well as the overall priority of the family unity provisions within DRIII show that the Regulation itself places great value on family unity. The overall scheme of DRIII and the principle of *effet utile* therefore demand the realisation of family unity. And this is possible even after a deadline has expired: Germany could make use of the humanitarian clause of Art. 17 (2) DRIII. This clause shall be applied in cases where a literal application of the Regulation's provisions would lead to a separation of family members. Therefore, in instances where there are delays, for example due to evidentiary requirements or communication between Dublin units (cf. [UNHCR](#) [18] for further detail), the only possible lawful decision would be for a Member State to use its discretion and apply the humanitarian clause. As a consequence, Germany is not allowed to refuse delayed transfers that are based on family unity provisions, but has to undertake the transfer under Art. 17 (2) DRIII. This is not a generous act or a good practice (cf. [UNHCR](#) [18], p. 131), but a legal duty.

This explicitly does not conflict with the right to be transferred in time as described above.

V. Conclusions

Family reunification under DR III is often the only legal way to escape insufficient material reception conditions e.g. in Southern or Eastern European countries. Countries who often receive take charge requests ? not only Germany ? have tried to introduce [administrative obstacles](#) [19]. The decision of the Administrative Court of Wiesbaden clarifies that responsibility for a claim and subsequent transfer under Dublin is comprised of subjective rights for the applicant and concomitant duties on the Member State. As such the bilateral modification (or even unilateral modification) by Member States of transfers where deleterious to the applicant's rights is not in compliance with the Regulation. The reaction by the German government that time limits will be complied with in the [?near future?](#) [8] is therefore not taking the court decision seriously: the time limits have to be adhered to in *every single case*.

At the same time the application of the family reunification clauses can conflict with the strict deadlines in the Dublin procedure. This conflict is to be solved in favour of family unity considering the importance of family unity and best interests of the child in Dublin III as described above.

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Keywords:

Dublin Transfer
Unaccompanied minor
Vulnerable person
Best interest of the child
Procedural guarantees
Procedural rights and safeguards

Links:

- [1] <http://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-wiesbaden-administrative-court-6-i-4438-17wi-15-september-2017#content>
- [2] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>
- [3] https://www.proasyl.de/wp-content/uploads/2015/12/Background-Note-Family-Reunification-Dublin_RSA_PRO-ASYL-August-2017.pdf
- [4] <http://dip21.bundestag.de/dip21/btd/18/134/1813428.pdf>
- [5] <http://verfassungsblog.de/family-life-temporarily-not-available-bilateral-limits-on-family-unity-within-the-dublin-system/>
- [6] <https://www.ecre.org/wp-content/uploads/2017/07/CIVIL-SOCIETY-ORGANISATIONS-OPEN-LETTER.pdf>
- [7] <http://www.asylumlawdatabase.eu/en/content/germany-bamf-must-comply-dublin-timeframes-transfer-applicants-greece-despite-agreement>
- [8] <http://www.presseportal.de/pm/58964/3757453>
- [9] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-%E2%80%93-9167016-tsegezab-mengesteab-v-bundesrepublik-deutschland>
- [10] http://www.asylumlawdatabase.eu/en/content/cjeu-c_67016-tsegezab-mengesteab-v-

bundesrepublik-deutschland

[11] <http://www.asylumlawdatabase.eu/en/content/cjeu-case-c-15515-george-karim-v-migrationsverket>

[12] <http://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%9116315-mehrdad-ghezelbash-v-staatssecretaris-van-veiligheid-en-justitie>

[13] <http://www.asylumlawdatabase.eu/en/journal/strengthening-effective-remedies-asylum-seekers-dublin-procedure-abdullahi-ghezelbash-and>

[14] <https://www.easo.europa.eu/sites/default/files/public/DublinEN.pdf>

[15] http://www.efsyn.gr/sites/efsyn.gr/files/wysiwyg/2017-05/epistoli-mouzala2_0.jpg

[16] <http://www.aitima.gr/index.php/en/news/421-14-07-2017-serious-problem-regarding-family-reunification-for-asylum-seekers-in-germany-under-dublin-iii-regulation>

[17] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2017-004791+0+DOC+XML+V0//EN>

[18] <http://www.refworld.org/docid/59d5dcb64.html>

[19] <http://www.asylumlawdatabase.eu/en/journal/formulation-right-family-life-beyond-zat-others-recent-uk-jurisprudence>