Dublin III Regulation: the "exception" that became the rule

Last year, Germany received over 60%[1] of the total number of take charge requests for family reunification by asylum seekers from Greece to other EU countries. According to the Greek Asylum Service's statistics, this percentage was more or less the same during the previous years. However, the latest data regarding the first trimester of 2018 demonstrate a radical decrease of acceptances followed by an increase of rejections.

In particular, a significant increase of rejections of family reunification requests by the German authorities[2] is observed, creating a series of obstacles during the implementation of the Dublin III Regulation. These rejections are largely based on repeated patterns, such as the lack of official translations of documents from the country of origin, a demand coming from the German Authorities which, of course, does not derive from any of the Regulation's provisions. Furthermore, a large number of responses by the German Asylum Service (BAMF) are not sufficiently -or at all- justified, especially with regards to cases using article 17 of the Regulation as a legal basis for the family reunification claim. This practice combined with the fast pace of responses by the German administration to a large number of requests during the first trimester of 2018,[3] creates serious doubt as to whether the substantial part of these requests has been examined. Additionally, in many cases, the rejection has been unilaterally characterized as "final" by Germany, while issues have also been raised concerning the formerly acceptable practice of "holding" some cases, in order to collect the necessary documents so as not to miss the re-examination deadline.[4]

Recently, Germany has been observed to repeatedly reject family reunification requests on the basis of the recent jurisprudence of CJEU (6th July 2017), case *Tsegezab Mengesteab against Bundesrepublik Deutschland*, C-670/16,[5] regarding the starting moment

[1] See the Official Statistics of the Greek Dublin Unit (07.06.2013-31.03.2018), http://asylo.gov.gr/wp-content/uploads/2018/04/Dublin-stats_march18GR.pdf, where out of the 9.675 requests for 2017, 5.827 requests were to Germany.

[2] Ibid.

[3] Specifically, in some cases undertaken by our program, the German Administration's response was sent the next or even the same day after the re-examination request.

[4] This deadline is set out in art. 5 paragraph 2 of the Implementing Regulation 1560/2003 and is defined within three weeks of the receipt of the rejection.

[5] Decision of the 6th of July 2017, *Tsegezab Mengesteab against Bundesrepublik Deutschland,* C-670/16.: «Article 20 (2) of Regulation No 604/2013 must be interpreted as meaning that "*an application for international*

of the three month time limit, set out in the Dublin Regulation from which the take charge request of an application for international protection shall be made. Whereas according to the so far implementation of the Dublin III Regulation, the three month time limit as laid down in article 21 would be initiated by the date of the full registration, i.e. the date of application for international protection; following the interpretation made by the CJEU on article 20 § 2 of the Regulation the aforementioned time limit is deemed to start running earlier, in practice from the moment the Asylum Service is notified by the public authorities (i.e. police) via the "Alkioni" electronic database on the fact that a third-country national has expressed the desire to seek international protection, namely the so-called "statement of intention".[6]

This abrupt change in the application of the Regulation's time limits results in the submission of time-off requests according to the exclusive time-limit of Article 21, which constitutes a precondition for the application of the Regulation's binding articles[7] and consequently their rejection as inadmissible. The only solution is to invoke Article 17 of the Dublin III Regulation, i.e. the "discretionary clause",[8] which requires no deadline but, because of its very nature, is not binding for Member States. Moreover, the increasing number of requests under the "discretionary" article (Article 17) is met by Germany's consistent practice of not accepting family reunification claims for which the three month time limit of the Regulation has expired, without assessing substantially the take charge requests. This attitude of Germany is more or less based on the fact that Article 17 constitutes the legal basis for family reunification cases which do not fall within the scope of the binding criteria, namely for reunification outside the concept of the nuclear family.[9] Germany, therefore, considers that Article 17 should not be misused for cases where binding criteria could be applied, but for which the time limits laid down by the Regulation were

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protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority", par. 105.

[6] Indeed, in cases undertaken by our program, there seems to be a new tendency of the German administration to invoke the two month time limit of article 21 § 1 2 of the Regulation which is about the returns when Eurodac coincides with data registered in accordance to Article 14 of the Eurodac Regulation. This effectively removes the three-month deadline provided for in Article 21 § 1 (1) of the Regulation for the submission of a request for transfer of responsibility for processing an application for international protection in another Member State.

[7] Family Links (Article 8, 9, 10, 11) and Dependency (Article 16) of 604/13, Dublin III Regulation.

[8] Ibid (footnote 1).

[9] Definition of family, Article 2 of 604/13EU Dublin III Regulation.

unjustifiably missed; but should rather be used only in exceptional cases. Given the implementation of the Dublin Regulation so far; it derives that the Regulation is limited to the relations between Member States by regulating exclusively matters relating to the procedure.

What is more, the use of article 17 par. 2 as legal basis becomes imperative and seeks to overcome yet another obstacle that Germany puts in the family reunification process. Since last year's final trimester, it has been noticed that a rising number of international protection seekers in Germany, mainly of Afghan origin, receive a status of 'prohibition of deportation' (Abschiebungverbot) as envisaged in Section 60 (5) of the German Residence Act. This creates some obstacles with regards to the process of family reunification through the Dublin Regulation. Given the fact that this is a form of national protection, the binding Articles 9 and 10 of Regulation 604/2013 cannot be revoked since the family members in the country of destination (ie Germany) are not considered to be neither beneficiaries of international protection nor asylum applicants. In addition, the beneficiaries of this status most of the times do not appeal against the decision that rejects their asylum claim as the same decision enables them to remain in Germany for one year with the possibility of renewal. Consequently, in such cases the request for family reunification relies solely on the discretion of Germany under Article 17.

Finally, problems arise also during the stage of transfer of asylum seekers; in cases where Germany has accepted the request for taking responsibility and the transfer of asylum seeker(s) is pending, the procedures following the notification of the decision are not always carried out seamlessly. Since April 2017, when a restriction to the number of monthly transfers to Germany was agreed,[10] the implementation of the Dublin Regulation suffered yet another severe setback as the transfer process was -and continues to be- blocked and the beneficiaries remain stranded in Greece. Apart from the undoubted pressure exerted on asylum-seekers themselves due to this prolonged stay, which in several cases exceeds one year, this decision remains political and, therefore, does not provide the necessary legal guarantees to ensure the transfer of asylum applicants to Germany.

[10] http://www.efsyn.gr/arthro/germaniko-plafon-stin-oikogeneiaki-epanenosi, https://www.theguardian.com/world/2017/aug/25/eu-states-begin-returning-refugees-to-greece-as-german-reunions-slow

More particularly, article 29 par. 1[11] of the Regulation sets a six-month deadline for the transfer of the applicant, after which the responsibility for examining the asylum request rests with the State that submitted the request for take charge, in this case Greece. The reasons for extending the abovementioned six-month deadline are limited to the ones mentioned in Article 29 (2)[12] and do not apply to the majority of asylum seekers, whose transfer is largely delayed due to the above mentioned political agreement. In view of the above, and as long as there is no explicit commitment by Germany to accept the transfer of all those whose transfer deadline of article 29 par. 1 has expired following the above mentioned agreement, the status of these applicants remains legally unspecified.

As of the above, and also because of the denial by the Dublin Unit to accept the majority of the requests for prioritization for the immediate transfer of vulnerable asylum seekers, litigation to the German Courts resulted in the immediate transfer of few asylum applicants[13] within the six-month period. Litigation in German national courts has already given a first sample of jurisprudence, with some Chambers ruling the immediate transfer of asylum applicants within the designated period while others recognised that responsibility lies solely with Greece.[14] In any case, appealing to the German national courts constitutes, without a doubt, a major advantage among advocates; nevertheless the risk of backfiring remains significant, highlighting the importance of strategic litigation, in order to ensure that negative jurisprudence will be limited.

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[11] *"The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)."*

[12] *" Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds. "*

[13] Thus, the decision issued by the Administrative Court in Berlin 23 L 836.17 A of 23/11/2017 which ordered the immediate transfer of the applicants to Germany within the prescribed six-month period as it considered that the expiration of the deadline would mean Germany's discharge of the responsibility to take charge of those applicants.
The case concerns beneficiaries of KSPM-ERP's program "Bring Families Together 2017" . Our collaboration with ProAsyl in Germany proved to be very valuable for litigating cases before the German courts.

[14] Thus the decision issued in 14/12/2017 by the Administrative Court of Trier 7 L 14313/17.TR, which considered that the responsibility for the transfer of the applicant was exclusively borne by Greece.

The year 2018 appears to be the first year with a negative sign in the acceptance of the take charge requests from Greece to other Member States, Germany being responsible to a great extent. The difficulties mentioned above are largely the result of political decisions and this is partly due to the distrust prevailing among the EU Member States with regards to the way European legal texts, such as the Dublin Regulation, are being implemented. The practice adopted by the Member States applying the Regulation arises precisely because of the intense interaction between them as well as the interaction between the states and the applicants of international protection. In other words, since the Dublin III Regulation was not established to manage refugee crises, it is proved to be inadequate in order to ensure not only an equal burden of responsibility among Member States in relation to the examination of international protection claims but also to comply with legal guarantees for refugees. On a practical level, the problematic implementation of the Dublin Regulation has recently discouraged a large number of asylum seekers from following the legal procedure through the Dublin mechanism, resulting in seeking illegal routes for their transfer, a choice that can be proved dangerous or even fatal. The ineffective implementation of Dublin III Regulation is the reason for seeking a new Dublin IV Regulation, which is currently being consulted before the Council, and, as things stand, the suggested solution is the imposition of a more coercive system, which, however, does not solve the problem of the unequal sharing of responsibility that continues to impose an undue burden on the frontline Member States.

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