Dublin III Regulation: The application of Article 17 of the Dublin III Regulation to family reunification

I. Introduction

1. This legal note will briefly address the applicability of article 17 of the Dublin III Regulation[1] to family reunification. Article 17 of the Dublin III Regulation is relevant for family reunification as Article 17(1) allows a Member State to become responsible for a claim and Article 17(2) allows a Member state to request another to become responsible for a claim in order to unite *any* family relations. As such, this legal note might be useful to cases, which fall outside the scope for family reunification as provided for by Articles 8 – 11 and 16 of the Dublin III Regulation.

2. The legal note begins by explaining that Article 17 of the Dublin III Regulation should be interpreted in conformity with the right to family life, as enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ("Charter") and Article 8 of the European Convention of Human Rights ("ECHR"). It will then go on to discuss arguments raised by domestic decision-makers and courts against this interpretation of Article 17 of the Dublin III Regulation. Lastly, this legal note will clarify the need for preliminary question on the subject of family reunification per Article 17 of the Dublin III Regulation.

3. This analysis should be read in conjunction with the Case Law Note entitled "ECRE/ELENA Case Law Note on the application of the Dublin Regulation to Family Reunion Cases", which aims to gather jurisprudence from national courts on the topic of family reunion with the Dublin III Regulation.

II. The interpretation of Article 17 of the Dublin III Regulation in conformity with the fundamental right to family life

4. In C*. K., H. F., A. S. v Republika Slovenija*, the Court of Justice of the European Union ("CJEU") held that the application of the discretionary clause laid down in Article 17 of the Dublin III Regulation concerns the interpretation of EU law, within the meaning of Article 267 TFEU.[2] As such, this provision is not solely governed by national law and by the interpretation given to it by the constitutional court of that Member State. Instead, Article 17 of the Dublin III Regulation should be interpreted in accordance with the jurisprudence of the CJEU.

5. According to the settled case-law of the CJEU, the provisions of the Dublin III Regulation[3] must be interpreted and applied in accordance with the fundamental rights as safeguarded by the Charter.[4] The discretionary clause under Article 17(1) of the Dublin III Regulation should therefore be interpreted and applied in conformity with the fundamental right to family life per Article 7 of the Charter and Article 8 of the ECHR.

6. This furthermore follows from the recitals to the Dublin III Regulation, which serve as an interpretative guidance to the terms of the Dublin III Regulation.[5] In these recitals, it is highlighted that respect for family life as safeguarded by Article 7 of the Charter and Article 8 of the ECHR should be a *primary* consideration of Member States when applying the Dublin III Regulation.[6] It is moreover emphasized that Member States should be able to derogate on humanitarian and compassionate grounds from the responsibility criteria in order to bring together family members and examine their application for international protection.[7]

7. This indicates that a Member State may choose to conduct its own examination of that person's application by making use of the discretionary clause laid down in Article 17(1) of the Dublin III Regulation, if the transfer of an asylum seeker would constitute a breach of the right to family life as per Article 7 of the Charter. In this respect, it should be noted that the meaning and scope of Article 7 of the Charter should at least be the same as Article 8 of the ECHR, as required by Article 52(3) of the Charter. The European Court of Human Rights ("ECtHR") has on several occasions concluded that also a temporary breach of the right to family life could result in a breach of Article 8 of the ECHR.[8]

8. It should be noted, however, that Article 17(1) of the Dublin Regulation, read in the light of Article 7 of the Charter, cannot be interpreted as requiring that Member State to apply that clause.[9] This follows from the judgment C*. K., H. F., A. S. v Republika Slovenija*, in which the CJEU held that "[a]rticle 17(1) of [the Dublin III Regulation], read in the light of Article 4 of the Charter, cannot be interpreted as requiring, in circumstances such as those at issue in the main proceedings, that Member State to apply that clause."

III. Counterarguments raised by decision-makers and national courts

9. In domestic legal proceedings concerning the application of the terms of the Dublin III Regulation, there is resistance against the interpretation of Article 17 of the Dublin III Regulation in conformity with the fundamental right to family life as per Article 7 of the Charter. The following counterarguments will be described and discussed below: (i) the option to apply for (regular) family reunification through the domestic legal framework and (ii) the right to family life has solely been incorporated in Articles 8 – 11 and 16 of the Dublin III Regulation

The option to apply for (regular) family reunification through the domestic legal framework

10. In most Member States of the European Union, the national proceedings do not provide for the possibility of family reunification per the Dublin III Regulation if the 'sponsor' has obtained the nationality of the host Member State. Under those circumstances, family reunification is often solely regulated in the domestic legal framework of the Member States. As a result, national decision-makers and national courts are inclined to reject the invocation of Article 17(1) of the Dublin III Regulation in cases of family reunification as, according to their view, those family members have the possibility to request a regular residence permit.

11. In the Netherlands, for instance, the Administrative Jurisdiction Division of the Council of State ("Council of State") is of the opinion that there is no obligation on the Immigration and Naturalization Service ("IND") to protect family relations other than those mentioned in Articles 8 – 11 and 16 of the Dublin Regulation. According to the Council of State, the Dublin III 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.[10]

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[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 [2013] OJ L 180/31 ("Dublin III Regulation").

[2] Case C-578/16 PPU *C. K., H. F., A. S. v Republika Slovenija* [2017] ECLI:EU:C:2017:127, paras 53 – 54.

[3] See also Dublin III Regulation, recitals 32 and 39.

[4] Case C-578/16 PPU *C. K., H. F., A. S. v Republika Slovenija* [2017] ECLI:EU:C:2017:127, para 59.

[5] Case C-244/95 *Moskof v Ethnikos Organismos Kapnou* [1997] ECLI:EU:C:1997:551, paras 78 and 86.

[6] Dublin III Regulation, recital 14.

[7] Dublin III Regulation, recital 17.

[8] See e.g. *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 3 October 2014).

[9] Case C-578/16 PPU *C. K., H. F., A. S. v Republika Slovenija* [2017] ECLI:EU:C:2017:127, paras 88 and 97.

[10] Council of State of the Netherlands, Decision 201609676/1/V3, 16 October 2017, accessible at: ECLI:NL:RVS:2017:2777; Council of State of the Netherlands, Decision 201507801/1/V3, 9 August 2016, accessible at: ECLI:NL:RVS:2016:2276; Council of State of the Netherlands, Decision 201505706/1, 19 February 2016, accessible at ECLI:NL:RVS:2016:563.

12. With this statement, the difference between an application for a regular residence permit on the grounds of family reunification and the mere request to take responsibility for the examination of a request for international protection in light of the right to family life is not acknowledged. The family member is merely requesting the Member State to take responsibility for the examination of their request for international protection on the grounds of Article 17(1) of the Dublin III Regulation. It follows from the settled case-law of the CJEU that the provisions of the Dublin III Regulation, including Article 17(1) of the Dublin III Regulation, must be interpreted and applied in accordance with the fundamental rights as safeguarded by the Charter.

13. By referring to the possibility to apply for a regular residence permit based on family reunification instead of examining the possible breach of the right to family life, the applicants are effectively denied an effective remedy, as safeguarded by Article 27(1) of the Dublin III Regulation and Article 47 of the Charter. In *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*[11] and *George Karim v. Migrationsverket*[12], the CJEU held that Article 27(1) of the Dublin III Regulation, read in light of recital 19 thereof, provides "an asylum applicant with an effective remedy against a transfer decision of him, which may, inter alia, concern the examination of the application of that regulation and which may therefore result in a Member State's responsibility being called into question".[13]

14. By referring to the possibility to apply for a regular residence permit based on family reunification instead of examining the possible breach of the right to family life, an asylum applicant has not been afforded an effective remedy against a transfer decision made in respect of him or her, as safeguarded by Article 27(1) of the Dublin III Regulation and Article 47 of the Charter. The national authority responsible for examining an application for international protection and the domestic court responsible for examining an applicant's subsequent appeal are therefore obliged to examine whether the Member State should exercise its right to examine the asylum application on humanitarian grounds in accordance with the requirements of Article 17(1) of the Dublin III Regulation, if otherwise there would be a (temporary) breach of the right to family life.

The right to family life has been incorporated in Articles 8 – 11 and 16 of the Dublin III Regulation

15. Another counterargument usually advanced is that the right to family life has solely been accounted for in Articles 8 – 11 and 16 of the Dublin III Regulation.[14] Yet that disregards the fact that Article 17(1) of the Dublin III Regulation has been adopted specifically with the aim to provide Member States the possibility to derogate from the terms of the Dublin III Regulation. This implies that Member States have the possibility to take responsibility for the examination of the requests for international protection from those family members who fall outside the scope of Articles 8 – 11 and 16 of the Dublin III Regulation.

IV. The need for preliminary questions in cases related to family reunification per Article 17 of the Dublin III Regulation

16. Thus far, the CJEU has not explicitly expressed its view on the interpretation and application of article 17(1) of the Dublin III Regulation in accordance with Article 7 of the Charter and Article 8 of the ECHR. As a result, there is a necessity to request national courts to refer preliminary questions to the CJEU per Article 267 TFEU.

[11] See Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:409, paras 30 to 61.
[12] See Case C-155/15 *George Karim v. Migrationsverket* [2016] ECLI:EU:C:2016:410, para 22.
[13] ibid.
[14] See e.g. Council of State of the Netherlands, Decision 201705045/1/V3, accessible at: ECLI:NL:RVS:2017:2160.

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17. It is worth noting that the CJEU has previously been requested to provide a preliminary ruling on a similar question. In *K. v. Bundesasylambt*[15], the Asylgerichtshof of Austria had requested the CJEU for a preliminary ruling as to whether the 'sovereignty clause' per Article 3(2) of the Dublin II Regulation under certain circumstances may "crystallise into a duty to intervene if the responsibility otherwise prescribed by the [Dublin II Regulation] would constitute an infringement of Article 3 or Article 8 of the ECHR (Article 4 or Article 7 of the Charter)."[16]

18. In his opinion, Advocate General Trstenjak held that under certain circumstances Member States can even be obliged to exercise their right to examine an asylum application on humanitarian grounds in accordance with Article 15 of the Dublin II Regulation (Article 17(1) of the Dublin III Regulation) if otherwise there would be a breach of the asylum seeker's rights as enshrined in the Charter, including the right to family life per Article 7 of the Charter.[17]

19. The CJEU nevertheless refrained from ruling on this question as "[i]n the light of the answer given to the first question, it [was] not necessary, in the context of the present reference for a preliminary ruling, to rule on the second question referred by the national court."[18]

20. In light of the above, there is a necessity for domestic courts to refer questions to the CJEU for a preliminary ruling on the interpretation of Article 17(1) of the Dublin III Regulation in accordance with the right to family life. Domestic courts against whose decisions there is no judicial remedy under national law might even be obliged to refer questions to the CJEU as there remains doubts regarding the interpretation of Article 17(1) of the Dublin III Regulation. As explained and shown above, the doctrine of *acte éclairé* is not applicable in the present case because the CJEU has, thus far, not dealt with a materially identical question.[19] Moreover, the doctrine of *acte claire* does similarly not apply as the correct application of Article 17(1) of the Dublin III Regulation is not so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.[20]

[15] Case C-245/11 *K. v. Bundesasylambt* [2012] ECLI:EU:*C:2012*:685.
[16] Case C-245/11 *K. v. Bundesasylambt* [2012] ECLI:EU:*C:2012*:685, Opinion of AG Trstenjak, para 83.
[17] Ibid, paras 64-66 and 77.
[18] Ibid, para 55.
[19] Case C-283/81 *CILFIT v Ministero della Sanità* [1982] ECLI:EU:C:1982:335, para 14
[20] Ibid, para 16.