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icon for discretionary clause

Discretionary clauses are defined in Article 17 of the Dublin III Regulation. Article 17(1) is also referred to as the sovereignty clause, which allows a Member State to examine an application for international protection lodged by a third-country national or a stateless person, even if such an examination is not its responsibility under the criteria laid down in the regulation.

Article 17(1) was invoked about 3,900 times in 2021, declining for the third consecutive year to the lowest levels since 2015. It was applied most frequently by the Netherlands, followed at a distance by France, Germany, Switzerland and Belgium (in descending order). The discretionary clause was used mostly for Turkish and Syrian nationals in the Netherlands, for Afghans in Germany, as well as for Afghans and Turks in Switzerland.

In the context of the discretionary clause, a partner country is the country deemed responsible for examining an application for international protection according to the criteria set out in the Dublin III Regulation. It is the country to which a take back or take charge request could have been sent before invoking the clause. Greece continued to be identified as the main partner country to which a request could have been sent, mostly in relation to Turkish nationals and, to a lesser extent, Afghans and Syrians. Other commonly identified partners included Italy, Germany, Spain, Romania and Bulgaria (in descending order).

When France became the Member State responsible, whether by the expiry of the transfer time limit or by the application of the sovereignty clause, Forum réfugiés-Cosi reported difficulties faced by applicants in obtaining an appointment to have their application registered.441

Among court cases related to the use of the discretionary clause, the Norwegian Directorate of Immigration did not receive a clear reply from the Hungarian authorities whether Dublin returnees in possession of an expired or valid residence permit issued in Hungary would be able to submit an asylum application on the territory of Hungary based on the special conditions that have been applicable since May 2020 *(see Section 4.1).* Hence, it decided to examine the applications based on the Dublin III Regulation, Article 17(1).

The Swiss Federal Administrative Court delivered a landmark decision related to the meaning of family life in the context of the ECHR and the Dublin III Regulation. The court underlined that the ECHR, Article 8 provides safeguards for families, regardless of their residence or international protection status, but it does not guarantee an entitlement to residence in Switzerland. In this

case, the applicant ignored an entry ban and re-entered Switzerland, married and had another child with her partner, who was provisionally admitted to Switzerland while Croatia was responsible for her application. The court noted that the couple acted in full conscience of their uncertain situation and that even though their separation for the duration of the asylum procedure in Croatia was difficult, family contact could be maintained with due consideration given to the well-being of their child. Hence, the court concluded that Switzerland had no obligation to examine the asylum application and referred the case back to the SEM for a proper assessment on applying the discretionary grounds of the Dublin III Regulation. The civil society platform, humanrights.ch, underlined that civil society organisations have been urging the Swiss authorities to revert to the discretionary clause more often in similar situations.442

The Belgian CALL noted that an applicant living with someone does not constitute family life within the meaning of the ECHR, Article 8. Furthermore, the discretionary clause could not be applied by the Belgian authorities to take charge solely based on the claim that the applicant did not know anyone in France.

- 441Forum réfugiés-Cosi. (2021, May 6). Règlement Dublin: quel accès à l'asile pour les procédures «éteintes» ? [Dublin Regulation: What access to asylum for discontinued procedures?]. https://www.forumrefugies.org/s-informer/publications/articles-d-actualites/en-france/878-reglement-dublin-quel-acces-a-l-asile-pour-les-procedures-eteintes
- 442humanrights.ch. (2021, August 10). Le droit au respect de la vie familiale doit être pris en compte dans la procédure Dublin [The right to respect for family life must be taken into account in the Dublin procedure]. https://www.humanrights.ch/fr/pfi/droits-humains/migration-asile/taf-vie-familiale-procedure-dublin

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