EUI CENTRE FOR JUDICIAL COOPERATION

ROBERT SCHUMAN CENTRE

Handbook on Judicial Interaction Techniques in the Application of the EU Charter

THE BEST INTERESTS OF THE CHILD IN THE CONTEXT OF TRANSNATIONAL MOVEMENT

National Courts and the EU Charter of Fundamental Rights

IN THE FRAMEWORK OF THE PROJECT "E-LEARNING NATIONAL ACTIVE CHARTER TRAINING (E-NACT)"

Handbook prepared by the E-NACT Research Unit at the University of Florence

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FUNDED BY THE EUROPEAN UNION'S JUSTICE PROGRAMME (2014-2020)

The Handbook was updated until the end of the project – December 2019.

Published by
European University Institute (EUI)
Via dei Roccettini 9, I-50014
San Domenico di Fiesole (FI)
Italy

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Executive Summary

This Handbook is the outcome of research conducted at the University of Florence within the framework of the 'e-Learning National Active Charter Training (e-NACT)' project co-funded by the European Commission (DG Justice, JUST-AG-2016-04) and coordinated by the European University Institute. The research aims to unleash the potential of the EU Charter of Fundamental Rights (EUCFR) in domestic case law on child protection.

In terms of scope, the research zooms in on two (macro-)sets of situations in which the relevance of EU law is triggered by the circumstance that children or their parents are (or have been) on the move. Attention is paid in particular to the contribution of EU law

- in cases concerning family reunification or family unity, and
- in the context of migration and asylum law.

Concerning the methodology, the research unfolds through three main phases. It begins with a preliminary assessment of the provisions in the EUCFR potentially relevant in child-related cases. The scope and content of EU primary and secondary law concerning the fields chosen – which can trigger the application of the EUCFR according to its Article 51(1) – are then reconstructed. Then, the relevant case law of the European Court of Justice (ECJ) and of the Member States partnering in the project is collected, classified and examined, also in terms of its interrelation with ECtHR jurisprudence. This part of the research was accomplished in close cooperation with legal experts appointed as national contact points by the judicial schools participating in the project and the Italian association for legal studies on migration law (*Associazione per gli studi giuridici sull'immigrazione*; ASGI).

The Handbook unfolds in the following **five parts**:

- **PART I:** sets the legal background for the following two parts, discussing the relevant provisions in the EUCFR, EU treaties and EU secondary law;

- **PART II:** is devoted to the relevance of EU law (and particularly the EUCFR) in cases concerning family reunification or family unity, i.e. cases concerning children whose parents are either Union citizens who exercise the right to free movement or legally residing third-country nationals who seek to rely on the right to family reunification under EU law. Attention is also paid to a recent strand of the ECJ's case law known as the *Zambrano* case law, in which the child is a 'static' Union citizen (s/he has not moved from the Member State of nationality) yet s/he deserves protection under EU law because otherwise s/he would *de facto* lose the possibility of exercising freedom of movement within the Union. This may be the case when the parents on which the children is dependent cannot obtain a right to reside in the Member State of nationality of the child under the national immigration law.

- **PART III:** explores child protection in the context of migration and asylum law with a view to highlighting the relevance of the 'vulnerability' of minors who are third-country nationals and/or asylum seekers. The analysis focuses on the interplay between the best interests of the child and the right to family life and family unity. The purpose is to show the differences and similarities in the approaches of the Court of Justice, the European Court of Human Rights and national courts. The focus is on a balancing exercise between the Member States' legitimate migration policy options and the best interests of a child who has a family member or relative in the Union.

Each part contains several case notes and one hypothetical case study, which can be used to simulate the actual process of adjudicating a case involving child protection in the context of the EUCFR.

Part I – Child Protection under EU Law: Analysis of the Relevant Provisions in the EU Treaties and the EU Charter of Fundamental Rights

1. The EU Legal Framework on Child Protection: An Overview

The Lisbon Treaty elevated the protection of the rights of the child to an objective of Union action, both internally and externally. **Article 3(3)** of the Treaty on European Union (TEU) is relevant in this respect.

Article 3(3) TEU

The Union (…) shall combat social exclusion and discrimination, and **shall promote** social justice and protection, equality between women and men, solidarity between generations and **protection of the rights of the child.**

Next to this, **two specific legal bases** in the Treaty on the Functioning of the European Union (TFEU) empower the Union to adopt measures meant to enhance the protection of children.

First, **Article 79 TFEU** concerns immigration policy and it empowers the Union to adopt measures aimed at combating trafficking in persons, with special attention to women and children.

Article 79 TFEU

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
(…)
(d) combating trafficking in persons, in particular women and children.

Second, **Article 83 TFEU** empowers the Union to establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension, amongst which are trafficking in human beings and sexual exploitation of women and children.

Article 83 TFEU

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish **minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension** resulting from the nature or impact of such offences or from a special need to combat them on a common basis.
These areas of crime are the following: terrorism, **trafficking in human beings and sexual exploitation of women and children**, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Two important binding acts adopted by the Union are worth recalling in this respect:

- Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[1]
- Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography[2]

Beyond the *ad hoc* legal bases of Articles 79 and 83 TFEU, there is no general European Union competence to take actions aimed at the promotion of children's rights. It is also important to recall that the EU Charter of Fundamental Rights cannot extend the competences of the EU beyond those provided for in the Treaties. This is clearly stated in Article 6, paragraph 1, TEU and in Article 51, paragraph 2 of the Charter itself.

Article 6, paragraph 1, TEU
1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties. **The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties**.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter that set out the sources of those provisions.

Article 51(2) EU Charter

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

This means, roughly speaking, that the EU legislator cannot found actions aimed at protecting or promoting children's rights exclusively on one (or some) of the many provisions of the Charter that are relevant in this respect (see Unit 4 below).

However, this does not mean that the objective of protecting and promoting children's rights is limited to the scope of Articles 79 and 83 TFEU. By contrast, it is an objective that the EU can and should realize within the whole set of competences foreseen in the Treaties, i.e. also when the action of the EU is not grounded on these specific legal bases. Indeed, at present there are many pieces of EU legislation that contain provisions specifically targeting children and their protection. For instance, Directive 2010/13/EU of 10 March 2010 on audiovisual

[1] OJ L 101, 15.4.2011, p. 1–11.
[2] OJ L 26, 28.1.2012, p. 1–21.

media services (AVMS Directive)[3] contains provisions aimed at limiting the amount of marketing to which children may be exposed during children's programmes (see in particular Article 9.1(g), Article 10.4, Article 11 and Article 20.

As you will see, this Handbook is mostly concerned with pieces of EU legislation that are not founded on Articles 79 and 83 TFEU.

A broad overview of all the EU legal initiatives – in hard law and soft law – in the field of the protection and promotion of children's rights is provided in a document which is available on the European Commission's web page devoted to the "Rights of the Child."[4]

2. Children's Rights under the EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights has the potential to significantly enhance the protection of children's rights in the Union. Its provisions act as grounds for review and parameters for the interpretation of Union acts and national acts falling within the scope of EU law.[5] By contrast, as mentioned in the previous section, the provisions of the Charter cannot extend the competences of the Treaties (Articles 6(1) TEU and 51(2) EUCFR).

Some provisions of the EUCFR specifically concern children or child-related issues, but many others are potentially relevant in cases involving children. **Article 24** is devoted to the **'Rights of the Child.'** It contains a set of rights of which children are the primary holders. In particular, paragraph 1 of Article 24 affirms the **right of children to the protection and care** that is necessary for their well-being. It also states that **children may express their views freely** on matters concerning them, which shall be taken into consideration in accordance with their age and maturity. Paragraph 2 postulates the pre-eminence of **the best interests of the child**, which **must be a primary consideration** in all actions relating to children taken by public authorities or private institutions. Finally, paragraph 3 states that every child shall have the **right to maintain** on a regular basis a personal relationship and **direct contact with both of his or her parents**, unless that is contrary to his or her interests.

Article 24
The rights of the child
1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[3] OJ L 95, 15.4.2010, p. 1–24.
[4] EU acquis and policy documents on the rights of the child (last updated: October 2017), https://ec.europa.eu/info/sites/info/files/euacquisandpolicydocumentsontherightsofthechild_update.pdf
[5] See Case C-617/10 *Åkerberg Fransson*.

According to the Explanations relating to the EU Charter,[6] this Article is based on the New York Convention on the Rights of the Child[7] ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.

More precisely:

- Art. 24(1) EUCFR – enshrining the right to care and protection – shall be interpreted consistently with Art. 3(2-3) UN Convention. In addition, Art. 24(1) EU Charter covers the procedural and substantive dimensions of the freedom of expression of views as established in Arts. 12-13 UN Convention.
- Art. 24(2) EUCFR frames the best interests of the child as an overarching rule of interpretation on the same wavelength as Art. 3(1) UN Convention.
- Art. 24(3) EUCFR sets forth the right to family life and family unity contained in Art. 9 UN Convention and ensures that – within the Area of Freedom, Security and Justice of the EU – all children maintain on a regular basis personal and direct contact with both of their parents.

Another child-related provision is **Article 32(1)**, which prohibits the employment of children.

Article 32
Prohibition of child labour and protection of young people at work
The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

As members of the family, children may enjoy protection under **Article 7**.

Article 7
Respect for private and family life
Everyone has the right to respect for his or her private and family life, home and communications.

According to the Explanations relating to the EU Charter, the rights guaranteed in Article 7 correspond to those guaranteed in Article 8 of the ECHR. Article 52, paragraph 3 of the Charter lays down a precise interpretative rule as regards the provisions of the Charter guaranteeing fundamental rights already granted by the ECHR.[8]

The parents (or carers) of children are the beneficiaries of fundamental rights granted by the Charter, such as the right to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Article 14, paragraph 3) and

[6] OJ C 303, 14.12.2007, p. 17–35.
[7] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.
[8] On Article 52(3) EUCFR, see section 3 below. In order to ensure a proper interpretation of Article 7 EUCFR, we suggest consulting the "Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence" (https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf), which contains explanations of the notion of 'family life,' including with respect to children.

the right to paid maternity leave and to parental leave following the birth or adoption of a child (Article 31, paragraph 2).

Article 31
Family and professional life
1. The family shall enjoy legal, economic and social protection.
2. **To reconcile family and professional life**, everyone shall have the right to protection from dismissal for a reason connected with maternity and **the right to paid maternity leave and to parental leave following the birth or adoption of a child.**

Article 14
Right to education
1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the **right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected**, in accordance with the national laws governing the exercise of such freedom and right.

Children may therefore **benefit from the effective enjoyment of these fundamental rights by their parents (or carers)**. For instance, in the preliminary ruling in Case C-149/10 *Chatzi*, the Court of Justice discussed the interaction between the right to parental leave and the right of children to receive the protection and care necessary for their well-being. The case concerned national measures implementing the EU Directive on parental leave. The Court affirmed that Article 24 does not require that children hold an individual right to see their parents obtain parental leave. It is sufficient that this right is conferred on the parents themselves, who can decide how best to perform their parental responsibilities. At the same time, however, the Court of Justice said that, in the implementation of the right to parental leave, observance of the principle of equal treatment is all the more important in implementing the right to parental leave, because the latter is a fundamental social right granted by the Charter. The EU Directive is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, the national legislator or, if necessary, national courts shall ensure that that the parents of twins receive treatment that takes due account of their particular needs.

At the same time, conflicts may arise between the rights of children and the enjoyment of their parents or carers' fundamental rights. For instance, Article 14, paragraph 3 states that the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected. If the choices of the parents are in conflict with the best interests of the child, the latter shall prevail.

Another example is provided by the judgment of the Court of Justice in the preliminary reference in Case C-147/17 *Sindicatul Familia Constanța*. The Court, relying on the general clause in the Charter on limitations to the exercise of the fundamental rights granted, upheld the compatibility with Article 31, paragraph 2 of the Charter on the right of workers to periods of daily and weekly rest of national legislation that made the enjoyment of these rights by foster parents contingent on an authorisation from the employer. The Court found that the limitation was necessary for the protection of the best interests of the child, which was the objective pursued by the legislation.

Importantly, Article 52, paragraph 1 of the Charter states that "the essence of [the] rights and freedoms guaranteed by the Charter" must always be respected. The best interest of the child should be regarded as belonging to the "essence" of any fundamental rights whose protection is claimed by a child. At the same time, interestingly, the best interest of the child may justify a limitation to the enjoyment of that same child's fundamental rights, as Article 24, paragraph 3 of the Charter itself suggests.

Article 52, paragraph 1
Scope and interpretation of rights and principles
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
(…)

Whilst the provisions of the Charter just mentioned have an evident connection to child protection, many others may be relevant in cases involving children. As human beings, they are beneficiaries, in principle, of all the fundamental rights granted by the Charter. In this Handbook, you will find cases involving children that also touch on the following fundamental rights:

- Article 1 ("Human dignity");
- Article 4 ("Prohibition of torture and inhumane or degrading treatment");
- Article 7 ("Respect for private and family life");
- Article 14 ("Right to education");
- Article 18 ("Right to asylum");
- Article 19 ("Protection in the event of removal, expulsion or extradition);
- Article 21 ("Non-discrimination");
- Article 41 ("Good administration");
- Article 47 ("Right to an effective remedy and a fair trial").

3. The Shaping of the Best Interest of the Child in the light of Public International Law Sources – Introduction

Unlike the Charter, the ECHR does not contain a provision specifically devoted to children's rights. However, the European Court of Human Rights in Strasbourg has decided several cases involving children which trigger the application of different fundamental rights granted by the Convention, as you can see from this factsheet.

The fundamental rights on which the Strasbourg Court has relied are also protected under the EU Charter. When there is such a correspondence, a specific interpretative rule applies:

Article 52(3) EUCFR

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The Explanations relating to the Charter provide several indications on this interpretative rule, which “is intended to ensure the necessary consistency between the Charter and the ECHR.” Importantly, the Explanations point out that “the meaning and the scope of the guaranteed rights are determined (…) also by the case law of the European Court of Human Rights.”

The text of the explanation reads as follows:

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the texts of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:

- Article 2 corresponds to Article 2 of the ECHR,
- Article 4 corresponds to Article 3 of the ECHR,
- Article 5(1) and (2) corresponds to Article 4 of the ECHR,
- Article 6 corresponds to Article 5 of the ECHR,
- Article 7 corresponds to Article 8 of the ECHR,
- Article 10(1) corresponds to Article 9 of the ECHR,
- Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR,
- Article 17 corresponds to Article 1 of the Protocol to the ECHR,

- Article 19(1) corresponds to Article 4 of Protocol No 4,
- Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,
- Article 48 corresponds to Article 6(2) and 6(3) of the ECHR,
- Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.

2. Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:

- Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
- Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level,
- Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
- Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents,
- Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,
- Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States,

Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

Whilst the Charter assigns a specific role to the ECHR (and the case law of the Strasbourg Court) as regards the reconstruction of the protection afforded by the Charter, this does not mean that other human rights treaties cannot be used for this purpose. As you may recall, for instance, Article 24 of the Charter draws on the UN Convention on the rights of the child.

Part II – Child Protection in Cases Concerning Family Reunification and the Preservation of Family Unity

1. Introduction

The main purpose of this part of the handbook is to explore the role of the EU Charter in family reunification cases that fall within the scope of EU law. An overview of the applicable EU legislation and the relevant ECJ case law is provided. As we shall see, the Court has delivered several judgments that offer a fundamental-rights-oriented interpretation of the relevant EU legislation. Furthermore, the Court has extended the application of EU primary law on EU citizenship to situations that otherwise would have fallen outside the scope of the Treaties with a view to enhancing the protection of a specific category of children.

More precisely, we shall address three different situations currently governed by EU law:

- the right of EU citizens to circulate and reside in the EU together with their family members, or to be joined by them in the host Member State;
- family reunification of third-country nationals lawfully residing in a Member State;
- the preservation of family unity in cases where a static Union citizen who is a minor would risk leaving the EU in consequence of the expulsion of his or her parents who are third-country nationals.

Each of these situations falls under a specific set of EU law provisions, respectively:

- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (EU Citizenship Directive);[9]
- Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive);[10]
- Article 20 TFEU on EU citizenship, as interpreted by the Court of Justice in its judgment in Case C-34/09 *Zambrano*,[11] and in the post-*Zambrano* case law.

2. Child Protection in the context of Family Reunification under the EU Citizenship Directive

Since the entry into force of the Maastricht Treaty (1st November 1993), any citizen of a Member State of the EU is automatically also an EU citizen. EU citizenship is not a mere symbolic status: being an EU citizen means enjoying a set of subjective rights *vis-à-vis* the Union institutions and the Member States. These rights are spelled out in **Articles 20-25 TFEU** and in **Chapter V of the EU Charter**.

Amongst the EU citizenship-derived rights are the rights of any EU citizen to move and reside freely within the territory of the Member States. These rights are rooted in EU primary law, namely Articles 20 and 21 TFEU. At the same time, the conditions for, and limits to, their exercise are laid down by EU secondary law, notably in Directive 2004/38/EC (EU Citizenship Directive).

Interestingly, this Directive also grants the rights to move and to reside freely within the territory of the Member States to the "family members" of Union citizens, irrespective of their nationality.

[9] OJ L 158, 30.4.2004, 77-123.
[10] OJ L 251, 3.10.2003, 12-18.
[11] CJ, judgment of 8 March 2011, Case C-34/09 *Zambrano.*

Note, however, that this Directive concerns only (and all) those Union citizens "who move to or reside in a Member State other than that of which they are a national" (Article 3(1)). In other words, a citizen of a Member State who has not exercised the free movement granted by EU law (thus, a 'static' EU citizen) cannot, as a rule, rely on Directive 2000/38/EC to claim derived residence rights for his/her family members (they are subject, instead, to the domestic legislation on migration).

The rationale for the extension of free movement and residence rights to family members of Union citizens lies in the need to ensure that a Union citizen can exercise his/her movement rights "under objective conditions of freedom and dignity" (recital 5). As a matter of reality, families may need – or wish to – move together, and these families may consist of EU citizens and non-EU citizens. In consequence, the children protected under the scope of the Directive are both EU citizens and non-EU citizens.

In order to have a more accurate **identikit of the children concerned**, we consider the **definition of 'Family member'** provided in **Article 2 of the Directive**. Interestingly, this provision does not use the expression 'children' but refers to:
- the direct descendants of an EU citizen who are under the age of 21;
- the direct descendants of an EU citizen who are dependants (i.e. including when they are aged over 21)
- the direct descendants of the spouse or partner of an EU citizen who are under the age of 21 or are dependants.

Minors falling under these categories have a right to accompany or join in another Member State the EU citizen (i.e. the mother, the father or the spouse/partner thereof) who is exercising the primary right under Articles 20-21 TFEU).

The added value of the extension of free movement rights to family members of EU citizens concerns primarily cases in which the family member (who may be a minor) is not an EU citizen and so does not have free movement rights under EU primary law. However, the extension may also prove useful for children who are EU citizens, particularly in respect of the right to residence in another Member State for more than three months. The exercise of this right requires that the EU citizen (who is not a worker) has "sufficient resources (…) not to become a burden on the social assistance system of the host Member State." Usually, children cannot satisfy this requirement by themselves. Hence, they will rely on a right to move and reside as family members of the (adult) EU citizen who is exercising the primary right under Articles 20-21 TFEU.

Interestingly, however, in the *Chen* judgment,[12] the Court of Justice clarified that EU law does not require that the sufficient resources are provided by the EU citizen: they may also come from a third-country national who is a family member. In the *Chen* case, this interpretation led the Court to affirm that a baby born with Irish nationality could rely on her free movement rights as an EU citizen to settle in the UK together with the mother, a Chinese national. The woman provided the sufficient resources required to satisfy the condition for the enjoyment, by the baby, of her free movement rights under EU primary law. In turn, the woman could qualify for derived free movement rights under the Directive, as the family member of an EU citizen.

A further extension of the children concerned may derive from Article 3 of the Directive, which provides for the duty of the host Member State to "facilitate" entry and residence for any other family members, irrespective of their nationality, who in the country from which they have come are dependants or members of the household of the Union citizen having the primary right of

[12] Case C-200/02, *Chen.*

residence. These other family members may occasionally be children. In this case, however, there is no right to move and reside automatically conferred on the family member (as there is, by contrast, for the family members under Article 2). Instead, the host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

An express reference to 'minors' can be found, by contrast, in Article 28 of the Directive ("Protection against expulsion"). As a rule (see Article 27, "General principles"), the host Member State may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. However, Article 28 sets a limit to this power when the expulsion decision would be issued against a minor (who is either an EU citizen or the family member of an EU citizen). The rule is that no expulsion is allowed unless:
- the decision is based on imperative grounds of public security, as defined by the Member State concerned;
- the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Moreover, based on the case law of the Court of Justice, issues concerning child protection may also act as limits to the power of Member States to issue expulsion decisions against adult EU citizens or their family members. Any such decision must pass a test of proportionality, which requires, amongst other things, that the national measure will not result in a breach of fundamental rights protected under EU law. In this respect, the Court of Justice has put the emphasis on the protection of the right to respect for family life (Article 7 EUCFR) and of the rights of the child (Article 24 EUCFR). Accordingly, national administrative authorities and courts must take these provisions of the Charter into account when they decide, respectively, whether to issue an expulsion order or whether the order issued should be annulled.

3. Child Protection under the EU Family Reunification Directive

In the previous section, we learnt that the EU Citizenship Directive (i.e. Directive 2004/38/EC) allows the family reunification of third-country nationals who are family members of EU citizens. Either the former or the latter may be children.

Outside the scope of Directive 2004/38, third-country nationals who are lawfully resident in a Member State – but are not family members of EU citizens – can rely on Directive 2003/86/EC on the right to family reunification. As we saw with Directive 2004/38, Directive 2003/86 may also allow the first entry into the EU – not only inter-Member States movement – of a third-country national who is a family member of another third-country national already residing in the EU (hereafter, the 'sponsor'), regardless of whether the family relationship arose before or after the resident's entry.
The Court of Justice stressed this point in its *Chakroun* judgment,[13] where it stated that the lack of a distinction based on the circumstances in and the time at which a family is constituted is coherent with Article 7 of the Charter and Article 8 ECHR. Accordingly, Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive.

The Directive is premised on the idea that "family reunification helps to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also

[13] Case C-578/08,*Chakroun.*

serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty" (recital 4). Interestingly, in the *Parliament v. Council* (Case C-540/03) judgment,[14] the Court of Justice made clear that Directive 2003/86 "imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by [it], to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation."
Moreover, in the *O and S.* judgment,[15] the Court of Justice clarified that whilst Directive 2003/86 does not apply to EU citizens its application cannot be excluded solely because one of the parents of a minor third-country national is also the parent of a Union citizen, born from a previous marriage.

Unlike the EU Citizenship Directive, Directive 2003/86 only deals with family reunification of third-country nationals: it confers no rights to freely move in the Union and residence rights are limited to the Member State of the sponsor. However, in the same way as the sponsor, the sponsor's family members shall be entitled to access to vocational guidance, initial and further training and retraining, and access to employment and self-employed activity (although the Member States may place certain limits on this).

If on the one hand Directive 2003/86 grants some individual rights, on the other hand the notion of 'family member' is more limited – also in relation to children – than under Directive 2004/38. Several provisions in fact allow for a margin of discretion which Member States can use to restrict the category of actual beneficiaries.

Article 4 defines the categories of third-country nationals to whom the Member State of the sponsor shall authorise the entry and residence. These are:
(a) the sponsor's spouse;
(b) minor children of the sponsor and of his/her spouse, including adopted children;
(c) minor children (including adopted children) of the sponsor or of his/her spouse where the sponsor/spouse has custody and the children are dependent on him/her. However, when the custody is shared, the Member State may authorize family reunification when the other party sharing custody has given his or her agreement.

Concerning category a) (the sponsor's spouse), Article 4, paragraph 5 states that the Member State may require the sponsor and his/her spouse to be of a minimum age, with a maximum of 21 years, before the spouse is able to join him/her. The purpose of this provision is "to ensure better integration and to prevent forced marriages in Member States." This objective is also hence understood as the limit to the leeway granted to the Member States. Concerning the categories of children b) and c), Article 4, paragraph 1 points out that they "must be below the age of majority set by the law of the Member State concerned and must not be married." There is thus a striking difference compared to Directive 2004/38. As we saw in the previous unit, descendants of an EU citizen or his/her spouse or registered partner are granted family reunification generally if they are below 21, but this limit does not apply when the descendants are also dependent on their parents.

Another provision contains a difference to Directive 2004/38: the last sentence of Article 4, paragraph 1 states that where a child is aged over 12 years and arrives independently from the rest of his/her family the Member State may, before authorising entry and residence under the Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of the Directive. According to recital 12, this possibility of limiting the right to family reunification "is intended to reflect children's capacity

[14] Case C-540/03, *Parliament v. Council*.
[15] Joined Cases C-356/11 and 357/11, *O and S.*

for integration at early ages and shall ensure that they acquire the necessary education and language skills in school."

The European Parliament challenged the compatibility of this provision with EU primary law, particularly the right to respect for family life. In its *Parliament v. Council* (Case C-540/03) judgment, the Court of Justice did not share the view of the European Parliament and observed that the Directive does not restrict the right to respect for family life in a manner inconsistent with Article 8(2) ECHR.

At the same time, however, the Court pointed to three limits to the discretion of Member States:

- first, the fact that the concept of integration is not defined by the Directive cannot be interpreted as authorising the Member States to adopt implementing provisions that would be contrary to the right to respect for family life;
- second, as required by Article 5(5) of the Directive, Member States must have due regard for the best interests of minor children when they examine applications for family reunification;
- third, Article 17 of the Directive requires Member States to take due account of the nature and solidity of the person's family relationships and the duration of his/her residence in the Member State and of the existence of family, cultural and social ties with his country of origin.

It is up to Member States to decide whether they want to authorize the entry and residence of:
- adult unmarried children of the sponsor or his or her spouse when they are objectively unable to provide for their own needs on account of their state of health;
- the unmarried partner of the sponsor and unmarried minor children, including adopted children, as well as adult unmarried children who are objectively unable to provide for their own needs on account of their state of health.

Finally, Article 4, paragraph 6 allows Member States to foresee in their implementing legislation that applications concerning family reunification of minor children must be submitted before the age of 15. If the application is submitted after the age of 15, the Member States which decide to apply this derogation *shall* authorise the entry and residence of such children on grounds other than family reunification. In its *Parliament v. Council* (Case C-540/03) judgment, the Court pointed out that this has the effect of authorising a Member State not to apply the general conditions in Article 4(1) of the Directive to applications submitted by minor children over 15 years of age. However, the Member State is still *obliged* to examine the application in the interests of the child and with a view to promoting family life.

Article 7 of the Directive provides that Member States may require the sponsor to have accommodation "regarded as normal for a comparable family in the same region," sickness insurance and "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned." In the *O and S.* judgment, the Court pointed out that Article 7 must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the Charter, which require Member States to examine applications for reunification in terms of the interests of the children concerned and with a view to promoting family life. In stating this, the Court rooted in the EU Charter – and therefore into EU primary law – the duty of Member States to have due regard for the best interests of minor children when they examine applications for family reunification, as stipulated in Article 5, paragraph 5 of the Directive.

Moreover, in the *Chakroun* judgment, the Court clarified that Member States cannot establish different levels of sufficient resources depending on whether the family relationship arose

before or after the entry of the sponsor into the Member State concerned. Moreover, if under the applicable national legislation the sponsor is entitled to special assistance in order to meet exceptional individually determined essential living costs, tax refunds granted by local authorities on the basis of his income or income-support measures in the context of local-authority minimum-income policies, this does not automatically mean that he does not have sufficient resources for the purpose of Article 7.

4. The Protection of Family Unity in Cases Involving 'Static' EU Citizens: The Zambrano case law

Both the EU Citizenship Directive (Unit 2) and the Family Reunification Directive (Unit 3) concern situations involving movement. The former applies to Union citizens who have moved to or reside in a Member State other than that of their nationality and to their family members, as expressly provided for in its Article 3(1). The latter applies to third-country nationals who have moved to a Member State of the Union in order to seek family reunification and are lawfully residing there.

Can we conclude that EU law, including the EU Charter, can never be invoked in cases of family reunification (or preservation of family unity) not involving movement? The answer is no. Based on the case law of the Court of Justice, there are two situations in which EU law (and the Charter) can apply regardless of the absence of actual movement. Importantly, neither of these situations concern families only made up of third-country nationals. Both strands of the Court's case law – which will be described separately below – constitute developments of EU citizenship.

1) The first situation concerns a Union citizen (who may be a minor) who has not exercised free movement but who has the nationality of another Member State. For instance, in the *Réndon Marin* case,[16] a child had always lived in Spain with her father (who was a third-country national) but she had Polish nationality (because the mother, who was no longer living with the family, was Polish). The father had to leave Spain because he had a criminal record and under the domestic legislation this automatically prevented the renewal of his residence permit. The case was referred to the Court of Justice, which had to establish whether a residence right for the father could be derived from EU law. The Court found that the situation in the host Member State of a national of another Member State who was born in the host Member State (the daughter) and has not made use of the right to freedom of movement cannot for that reason alone be assimilated into a purely internal situation. The Court held that Article 21(1) TFEU and Directive 2004/38 *in principle* conferred a right to reside in Spain on Mr Rendón Marín's daughter. 'In principle,' because the actual enjoyment of the right requires the conditions laid down in Directive 2004/38 for residence periods longer than three months to be satisfied (in particular, the sufficient economic resources requirement – on this, see Unit 2). If the child can establish a right for herself, she can also claim a derived residence right for her family members (again provided that the conditions foreseen in the Directive are satisfied).

Importantly, in this case the derived residence rights of the family members are not without limitations. The provisions of the Directive also apply in this respect. Therefore, expulsion of the family member is possible, for instance, on grounds of public order. However, in the *Réndon Marin* judgment the Court held national legislation under which the expulsion of a third country national who is a family member of an EU citizen is the automatic consequence of the person having a criminal record to be incompatible with EU law. There must be a specific assessment of whether the person represents an actual threat to public order. Moreover, the

[16] Case C-165/14, *Rendon Marin.*

Court also pointed out that before issuing an expulsion order it is necessary to take account of the fundamental rights granted by the EU, in particular the right to respect for private and family life as laid down in Article 7 of the EU Charter, which must be read in conjunction with the obligation to take into consideration the child's best interests as recognised in Article 24(2) of the EU Charter.

2) In a string of cases known as *Zambrano* case law (after the leading *Zambrano* judgment), the Court of Justice held that a third-country national who is the parent (or carer) of a 'static' Union citizen can obtain an EU residence right in the Member State of nationality of the latter when otherwise the Union citizen would be *de facto* obliged to leave the territory of the Union. This is the case when the third-country national cannot obtain a residence right based on the national law of the Member State concerned and the Union citizen is 'dependent' on him/her. This situation does not fall within the scope of Article 21 TFEU or of Directive 2004/38 EC yet the Court based the derived residence right of the family member on Article 20 TFEU, the provision that assigns Union citizen status to any citizen of the Member States. Indeed, the Court stated that in very exceptional circumstances (i.e. the risk that the EU citizen abandons the EU) Article 20 TFEU precludes national measures which have the effect of *de facto* depriving Union citizens of the genuine enjoyment of the substance of rights conferred by virtue of their status as Union citizens.

According to the Court, dependency may be legal, financial or emotional (see the *O. and S.* judgment). However, the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third-country nationals and a Union (static) citizen to be able to reside with that citizen in the territory of the Union in the Member State of which s/he is a national is not sufficient. The crucial element is the risk that the Union citizen is *de facto* obliged to leave the Union to follow the family member who is a third-country national. Therefore, the national court hearing the case must examine all the circumstances of the case in order to determine whether a decision to refuse to grant a residence permit to the third-country national is liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizen concerned. In this respect, the Court clarified that cohabitation between the static Union citizen and the third-country national family member is not decisive, since it cannot be ruled out that some family members who are subjects of an application for family reunification may arrive in the Member State concerned separately from the rest of the family.

While the scope of the *Zambrano* rule is not limited to this situation, so far its application has concerned cases in which there were static Union citizens who were minors with third-country national parents. Most often, this will be the case when the Union citizen is a minor (see in particular the *O. and S.*, *Réndon Marin* and *K.A. and others* judgments.[17] Interestingly, in the *O. and S*. case the Court pointed out that the application of the *Zambrano* rule is not confined to situations in which there is a blood relationship between the third-country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived. In another case (*K.A. and others*), the Court clarified that, in the best interests of the child pursuant to Articles 7 and 24 of the EU Charter, the existence of a relationship of dependency must be based on consideration of all specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his/her emotional ties both to the EU citizen parent and to the third-country national parent and the risks which separation from the latter might entail for the child's equilibrium.

[17] Case C-82/16, *K. A. and others.*

Note, however, that a residence right derived from Article 20 TFEU does not affect the possibility of Member States limiting the right on grounds of public policy and safeguarding public security. However, before issuing an expulsion order, the administrative authorities of the Member State must assess the situation taking into account the right to respect for private and family life as laid down in Article 7 of the EU Charter and the obligation to take into consideration the child's best interests recognised in Article 24(2). An expulsion order cannot be issued if this would entail a violation of these rights as it would be incompatible with Article 52(1) of the EU Charter (i.e. the provision that lays down the conditions that any limitations to the enjoyment of a fundamental right granted by the Charter must satisfy).

Casesheet No. 1 – The right of residence under Article 20 TFEU of a third-country national parent of a minor EU child in the Member State of the EU child's nationality

Reference case

- CJEU (Grand Chamber), judgement of 8 March 2011, *Ruiz Zambrano*, case C-34/09

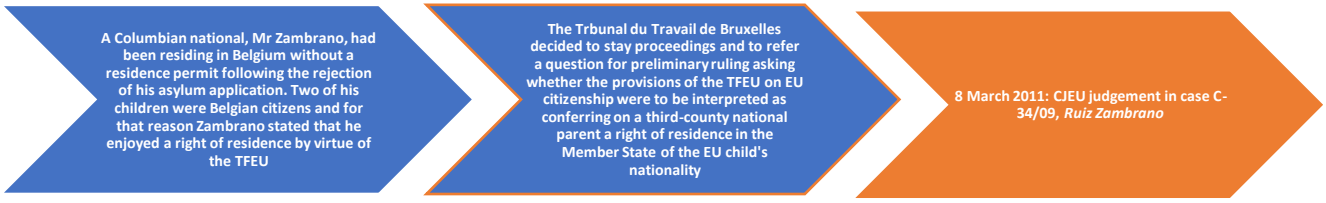
1. Core issues

For the first time, the CJEU held that Article 20 TFEU precludes a Member State from refusing to grant a right of residence to a third-country national on whom his minor children, who are EU citizens and nationals of the Member State, are dependent, and from refusing to grant a work permit to that third-country national, in so far as it would deprive those children of the genuine enjoyment of the substance of the rights attaching to their status as European Union citizens.

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Belgium	• Free movement of EU citiziens • Immigration Law	• Article 20 TFEU	• Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Employment Tribunal of Brussels, concerning interpretation of the provisions of the TFEU on EU citizenship	• The CJ found that the national practice at issue was in contrast with Artilce 20 TFEU.

3. Timeline



4. Description

a. Facts

A Columbian national, Mr Zambrano, who was in possession of a regular visa issued by the Belgian embassy, applied for asylum in Belgium. The national authorities refused his application and ordered him and his wife to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country. In the meantime, Mr Zambrano worked without authorization for some time. He attempted several times to have his family situation regularised but his applications were always rejected by the national authorities. During the illegal stay in Belgium, Mr Zambrano's wife gave birth to two children, who acquired Belgian nationality.

Mr Zambrano and his wife brought an action before the national court to obtain, *inter alia*, a right of residence as they were ascendants of a minor child who was a national of the Member State. Through such a derivative right, Mr Zambrano also sought to obtain a work permit. In these circumstances, the Employment Tribunal of Brussels decided to stay the proceedings and to refer essentially the following question to the CJEU:

Are the provisions of the TFEU on European Union citizenship to be interpreted as meaning that they confer on relatives in the ascending line who are third-country nationals, on whom their minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State?

b. Reasoning of the CJEU

At the outset, the CJEU examined the scope of application of Directive 2004/38/EC. According to Article 3 of the Directive, it does not apply to a situation such as that at issue, which concerns an EU citizen who has not exercised his right to move to or to reside in another Member State other than that of which he is a national. Hence, in the case at stake a right of residence under Directive 2004/38/EC could not be recognised to the third-country national family member of an EU static citizen.
However, the CJEU noted that Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State and citizenship of the Union is intended to be the fundamental status of nationals of the Member States. According to the Court, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.
The Court found that in the circumstances of the case, a refusal to grant to a third-country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. Indeed, such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents and they would be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union. At the same time, if a work permit were not granted to such a person, the third-country national would risk not having sufficient resources to provide for himself and his family, which would also result in the EU children having to leave the territory of the Union.
The Court concluded that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing to grant a right of residence to a third country national on whom his minor children, who are EU citizens and nationals of the Member State, are dependent, and from refusing to grant a work permit to that third-country national, in so far as it would deprive those children of the genuine enjoyment of the substance of the rights attaching to their status as EU citizens.

c. Outcome at national level

Not available

5. Analysis

a. Role of the Charter

In principle, a situation in which a third-country national family member of an EU citizen who has not exercised his right to move to or to reside in another Member State is a purely domestic situation and it does not fall within the scope of application of EU law (in particular Directive 2004/38/EC) and as a consequence the Charter does not apply (Article 51 CFR). However, in the *Zambrano* judgement, the ECJ ruled that even in the absence of a cross-border element the rights attaching to the status of EU citizen under the Treaties (particularly Article 20 TFEU) may be relied upon against national measures, such as a refusal to grant a right of residence or a work permit, which would deprive EU citizens of the substance of the rights conferred on

them by virtue of their status. Hence, the Court recognised that the case at issue fell within the scope of EU law. This means that even if the Court made no reference in the judgement to the Charter, the latter was in principle applicable under Article 51(2) CFR. It should be noted that reference was made to Articles 21, 24 and 34 CFR by the referring court, which asked *inter alia* whether fundamental rights in the Charter had to be taken into account for the purposes of determining the compatibility of the national measure with the Treaty provisions on EU citizenship. However, in the *Zambrano* judgement, the Court did not clarify whether the fundamental rights concerning respect for family life and the rights of the child have to be taken into account for the purpose of verifying whether a national measure deprives an EU minor of the rights attaching to his or her status as an EU citizen (see *Dereci and Ymeraga* judgements – Issue 2).

b. Judicial dialogue

Direct vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

At the EU level, the *Zambrano* judgement is a landmark case in the context of EU citizenship and it impacted greatly on the ECJ's decisions subsequent to that initial ruling. With this judgement, the Court stated that even in the absence of a cross-border element and even if the secondary legislation on free movement cannot apply Article 20 TFEU may be relied on to recognise a right of residence to a third-country national parent of an EU minor child in the Member State of the child's nationality, under the only condition that a relationship of dependency exists between them. However, the Court did not clarify how in the absence of a cross-border element, the *Zambrano* judgement could apply.

d. Additional relevant cases

CJEU

On the scope of application of *Zambrano* jurisprudence (see Casesheet No. 2):

- CJEU, judgement of 5 May 2011, *McCarthy*, C-434/09
- CJEU, judgement of 15 November 2011, *Dereci*, C-256/11
- CJEU, judgement of 8 May 2013, *Ymeraga*, C-87/12
- CJEU, judgement of 10 October 2013, *Alokpa*, C-86/12
- CJEU, judgement of 30 June 2016, *NA*, C-115/15

On assessment of the relationship of dependency between a third-country national parent and an EU child (see Casesheet No. 3):

- CJEU, judgement of 6 December 2012, *O. and S*., C-356/11
- CJEU, judgement of 10 May 2017, *Chavez Vilchez*, C-133/15
- [See also CJEU, judgement of 8 May 2018, *K.A. and others*, C-82/16 – see Casesheet No. 5]

On the third-country national parent having a criminal record (see Casesheet No. 4):

- CJEU, judgement of 13 September 2016, *Rendòn Marin*, C-165/14
- CJEU, judgement of 13 September 2016, *CS*, C-304/14

On the existence of a return decision and an entry ban against the third-country national parent (see Casesheet No. 5):

- CJEU, judgement of 8 May 2018, *K.A. and others*, C-82/16

National decisions

- High Court (Ireland), decision 03.04.2012, No. 2011 972 JR, *A.O. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*

“22. (…) the applicant cannot realistically invoke Ruiz-Zambrano in the present case. Baby C. is not dependent on Mr. O. (who, in any event, has not contributed to the child 's upkeep) and, as an Irish citizen, her right (and that of her mother, Ms. Y.) to reside in Ireland derives from Article 9 of the Constitution and not at all from European Union law. Nor is there any prospect that Baby C. will be obliged to leave the territory of the Union even if Mr. O. were to be deported.” (…)

24-25. “[As regards] Article 24(3) of the EUCFR, it is difficult to disagree with Mr. O'Shea's submission to the effect that if Mr. O. is deported it would be difficult to see how Baby C could maintain any personal relationship with her father or have any direct contact with him were he to be deported to Nigeria. Indeed, given the nature of the estrangement between her parents, the (relative) inaccessibility of that country from Ireland and the potentially indefinite nature of any deportation order, the stark probability is that, as we have already noted, Baby C. will never see him again.”

26. “Nor can it presently be said that permitting supervised access to Baby C. on the part of Mr. O. would be contrary to her interests. It is true that Mr. O. has a criminal conviction and that in the course of his ruling on the issue of access, Judge Lindsay observed that Mr. O's appreciation of honesty and truthfulness was "casual at best." Furthermore, Judge Lindsay also found that Mr. O. had made a threat to abduct Baby C. to Ms. K., even though he considered that Mr. O. did not have the wherewithal to remove her from the jurisdiction. It was for this reason – among others – that Judge Lindsay directed that any access should be supervised.”

27. “The fact remains, however, that Judge Lindsay did direct that Mr. O. have limited supervised access. The very fact that he did so means that this court must proceed on the basis that such contact is positively in Baby C.'s interests and, furthermore, that refusal of access would not be contrary to her interests.”

Casesheet No. 2 – The scope of application of the Zambrano jurisprudence: the criterion for the denial of the genuine enjoyment of the substance of the rights conferred to an EU citizen by virtue of EU citizen status

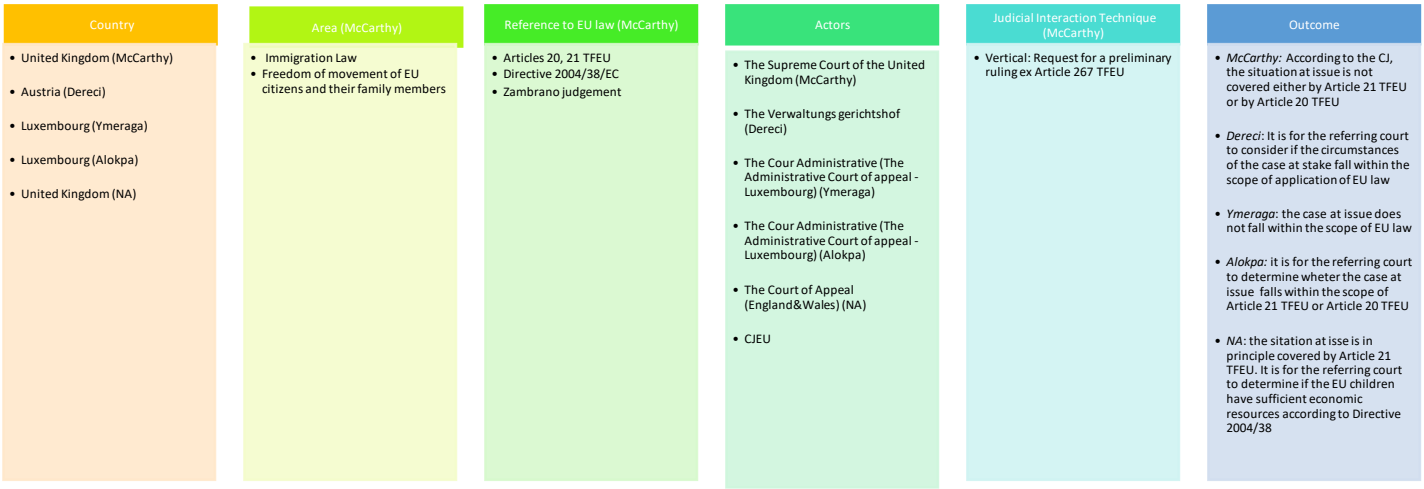
Reference cases

- CJEU, judgement of 5 May 2011, *McCarthy*, C-434/09
- CJEU, judgement of 15 November 2011, *Dereci*, C-256/11
- CJEU, judgement of 8 May 2013, *Ymeraga*, C-87/12
- CJEU, judgement of 10 October 2013, *Alokpa*, C-86/12
- CJEU, judgement of 30 June 2016, *NA*, C-115/15

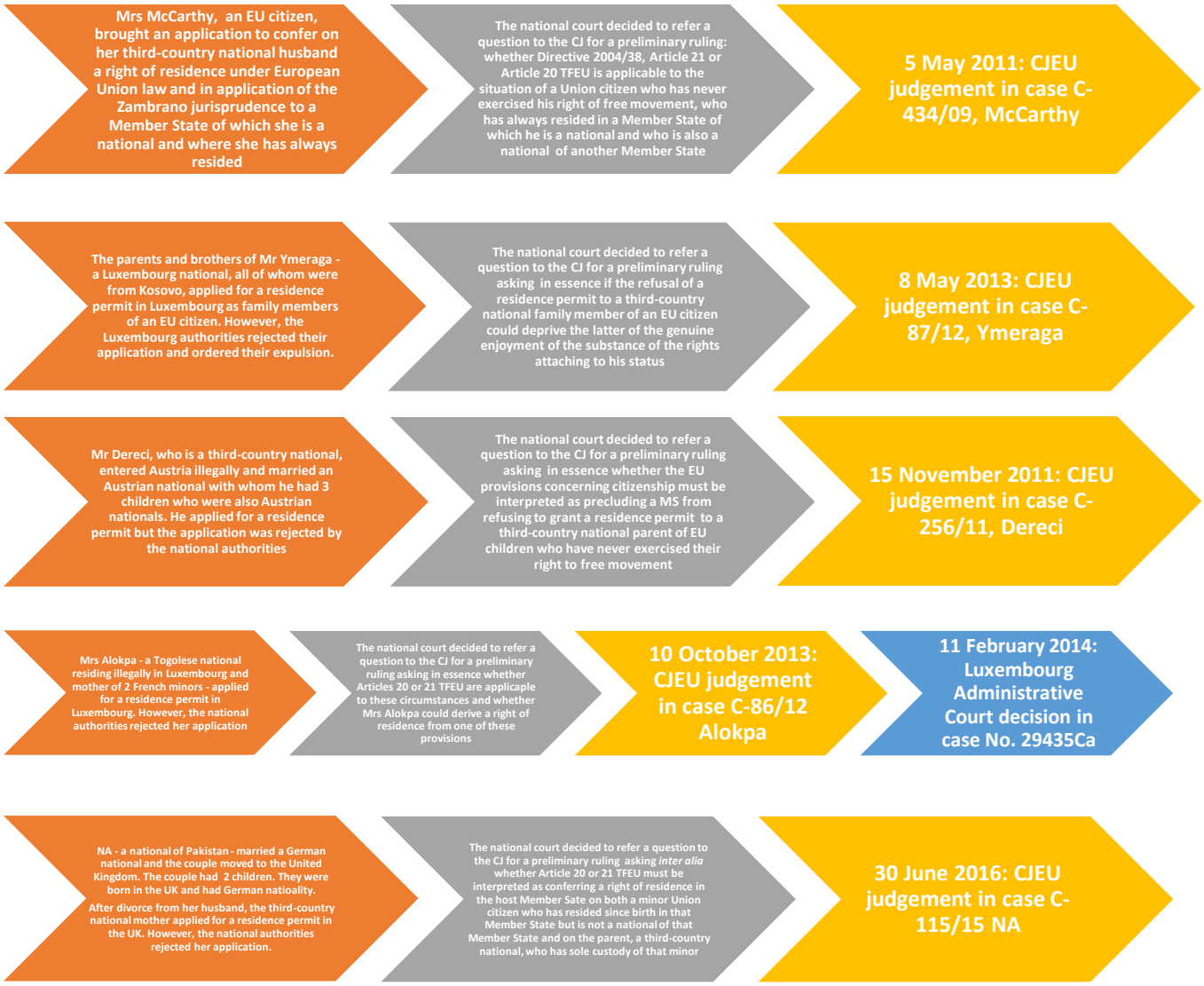
1. Core issues

In all these decisions, the Court of Justice recalled its previous findings in the *Zambrano* judgement and tried to better define when the judgement can apply. If secondary law on the right of residence of third-country nationals is not applicable, Article 20 TFEU may be exceptionally relied upon in order to recognise the right to reside of a third-country national family member of an EU citizen under the only condition that a national measure could have the effect of depriving the EU citizen of the genuine enjoyment of the substance of the rights conferred by virtue of his/her status. This criterion refers to situations in which the Union citizen has to leave not only the territory of the Member State of which he/she is a national but also the territory of the Union as a whole.
Concerning the relationship with the scope of application of Article 21 TFEU, the latter can apply in situations where a national measure has the effect of impeding the exercise of the right of an EU citizen to move and reside freely within the territory of the Member States, while Article 20 requires that national measures do not have the effect of depriving an EU citizen of the genuine enjoyment of the substance of the rights associated with his/her status as a Union citizen. Furthermore, Article 20 TFEU requires neither the existence of a cross-border link (the *Zambrano* jurisprudence can apply only in the Member State of which the EU citizen is a national) nor that the conditions laid down in Directive 2004/38 concerning the economic resources of the EU citizen are satisfied.
Fundamental rights are not relevant in determining the scope of application of Article 20 TFEU, in accordance with Articles 6 TEU and 51(2) CFR.

2. At a glance



3. Timeline



4. Case descriptions

a. Facts

- ***McCarthy***

Mrs McCarthy, a national of the United Kingdom, was also an Irish national. She was born and had always lived in the United Kingdom and she had never exercised her right of free movement. Mrs McCarthy married a Jamaican national who lacked leave to remain in the UK under the Immigration Rules of that Member State. In order to prevent his deportation, Mrs McCarthy and her husband applied to the competent national authorities for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The national authorities refused her application on the ground that she was not an economically self-sufficient person.
The referring court asked the CJ whether Directive 2004/38/EC, Article 21 TFEU or Article 20 TFEU could apply in a situation where the EU family member has never exercised his/her right

to free movement to confer a right of residence to the third-country national husband of the EU citizen.

- ***Dereci***

Mr Dereci, who was a Turkish national, entered Austria illegally and married an Austrian national, with whom he had three children who were also Austrian nationals. At the time, the EU children were minors and had never exercised their right to free movement. Mr Dereci applied for a residence permit in Austria as a father of EU citizens. This was rejected by the national authorities.
In these circumstances, the national court decided to stay the proceedings and to refer a question to the CJ for a preliminary ruling, asking whether Article 20 TFEU, as interpreted in the *Zambrano* judgement, could apply in a situation where the third-country national is the parent of an EU minor who has never exercised his right to free movement and who is maintained by that third-country national.

- ***Ymeraga***

Mr Ymeraga, a third-country national who acquired Luxembourg nationality, lived in Luxembourg. The parents and brothers of Mr Ymeraga – all of whom were adults and from Kosovo – also arrived in Luxembourg, where they applied for a residence permit on grounds of family reunification. However, the Luxembourg authorities rejected their application and ordered their expulsion.
The national court asked the CJ in essence whether, as a consequence of the refusal of a residence permit, the EU citizen would be obliged in practice to leave the territory of the EU altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status.

- ***Alokpa***

Mrs Alokpa, a citizen of Togo residing illegally in Luxembourg, gave birth to twins, who were recognised by a French national and for that reason they were French nationals. Since Mrs Alokpa was unable to settle with her children in France or reside with their father on the ground that she had no relations with him, she applied for a residence permit in Luxembourg. The national authorities rejected her application.
The national court asked the CJ "*whether, in a situation such as that at issue, Article 20 and 21 TFEU must be interpreted as meaning that they preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children, who are citizens of the European Union and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.*"

- ***NA***

NA was a national of Pakistan who married a German national, and the couple moved to the United Kingdom. The couple had two children, who were born in the United Kingdom and had German nationality. After the divorce, NA was granted the sole custody of the two children. Since she did not have a residence permit in the United Kingdom, she made a request for a right of permanent residence. However, her request was rejected by the national authorities.
The national court asked *inter alia* the CJ "*whether Article 20 and/or Article 21 TFEU must be interpreted as conferring a right of residence in the host Member State both on a minor Union citizen who has resided since birth in that Member State but is not a national of that Member State and on the parent, a third-country national who has sole custody of that minor*."

b. Reasoning of the CJEU

- ***McCarthy***

At the outset, the Court verified whether Directive 2004/38 is applicable in a situation where an EU citizen has never exercised his right of free movement and has always resided in a Member State of which he is a national and who is also a national of another Member State. Since that Directive concerns the exercise of the right of free movement and residence of EU citizens within the territory of a Member State other than of which he is a national, the CJ stated that the Directive cannot be applied to the case at issue. This conclusion could not be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides. Indeed, the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement.
Second, the CJ took into account the applicability of Article 21 TFEU. After having recalled that citizenship of the Union is intended to be the fundamental status of nationals of the Member States and Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Zambrano*), the Court noted that as a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of Union citizen under Article 20 TFEU and may therefore rely on the rights pertaining to that status, including in his/her Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.
However, according to the Court, no element in the situation of Mrs McCarthy indicated that the national measure at issue had the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.
Then the Court noted that, in contrast with the *Zambrano* case, the national measure at issue does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Furthermore, that national measure does not constitute an obstacle to freedom of movement (which could in principle be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued).
Therefore, in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, was also a national of Ireland does not mean that a Member State had applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. In this context, the situation at issue was a purely domestic situation. It follows that Article 21 TFEU was not applicable.

- ***Dereci***

At the outset, the Court of Justice noted that neither Directive 2003/86 nor Directive 2004/38 were applicable to the case at issue. Indeed, the former does not apply to members of the family of a Union citizen, while the latter, according to the CJ's case law, applies to all Union citizens who move or reside in a Member State other than that of which they are nationals.
Then the CJ considered whether the Union citizens concerned may rely on the provisions of the Treaty concerning citizenship of the Union. Recalling the *Zambrano* judgement, the Court stated that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.
According to the Court, the criterion concerning the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the

Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole. The criterion is therefore exceptional in character and only applies when a right of residence may be refused to a third-country national who is a family member of an EU citizen, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.
As a consequence, the mere fact that it might appear desirable to an EU national, for economic reasons or in order to keep his family together, for his family members to remain in the territory of the EU, including third-country national family members, is not sufficient to establish that the Union citizen will be forced to leave Union territory if a right of residence is not granted to those third-country national family members.
Then the Court took into consideration the provisions concerning the protection of fundamental rights. First, the Court made a distinction between situations which fall within the scope of application of the Treaty provisions on EU citizenship as interpreted in the CJ's case-law and situations which do not. In these latter cases, the Court could not rely on fundamental rights provisions in accordance with Articles 6 TEU and 51(1) TFEU. On the contrary, if the situation is covered by EU law, as the *Zambrano* and *Dereci* judgements point out, the court must examine whether a refusal of the right of residence undermines the right to respect for private and family life provided for in Article 7 CFR**.**
It is for the referring court to consider if the circumstances of the case at stake fall within the scope of application of EU law. If it takes the view that the situation is not covered by EU law, the national court must undertake the examination in the light of Article 8(1) of the ECHR.

- ***Ymeraga***

As a preliminary point, the CJ held that neither Directive 2003/86 nor Directive 2004/38 were applicable to the case at issue. Indeed, the former concerns the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of Member States and it does not apply to family members of a Union citizen; the latter does not apply to Union citizens who have never exercised their right of freedom of movement and have always resided, as Union citizens, in the Member State of which they hold the nationality.
Recalling its previous case law concerning the applicability of Article 20 TFEU, the Court noted that according to the referring court the only factor which could justify a right of residence being conferred on the third-country family members is the EU citizen's intention to bring about, in the Member State in which he resides and of which he holds the nationality, reunification with those family members, which is not sufficient to support the view that a refusal to grant such a right of residence may have the effect of denying the EU citizen family member the genuine enjoyment of the substance of rights conferred by virtue of his status as a citizen of the Union.
Finally, the Court held that since neither Directive 2004/38 nor Article 20 TFEU were applicable, the situation at issue did not fall within the scope of Article 51(1) of the Charter. Therefore, the Luxembourg authorities' refusal to grant the EU citizen's family members a right of residence as family members of a Union citizen was not a situation involving the implementation of EU law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights could not be examined in the light of the rights established by the Charter. According to the Court, this conclusion does not prejudge an examination of the national provisions at issue in the light of the ECHR.

- ***Alokpa***

At the outset, the Court noted that Directive 2004/38 did not apply to the case at issue. Indeed, when the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependant' relative in the ascending line of the right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State.

However, recalling its previous case law, the Court noted that a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is an EU citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.
Therefore, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Directive 2004/38, the same provisions allow a parent who is the minor's primary carer to reside with the child in the host Member State. In this case, it is for the referring court to ascertain whether EU children satisfy the conditions set out in Directive 2004/38 and have, therefore, the right to reside in a host Member State on the basis of Article 21 TFEU. In particular, the referring court had to determine whether Mrs Alokpa's children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover.
The CJ stated that in the case that the referring court holds that a right of residence cannot be accorded to a third-country family member on the basis of Article 21 TFEU, that court must still determine whether such a right of residence may nevertheless be granted to the parent exceptionally in the light of the fact that as a consequence of such a refusal the EU children would find themselves obliged in practice to leave the territory of the EU altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of their status.

- ***NA***

At the outset, the Court of Justice recalled its previous case law on Article 20 TFEU and specified that the first condition on which the possibility of claiming a right of residence in the host Member State under Article 20 TFEU, as interpreted by the Court in the *Zambrano* judgement, namely that the person concerned does not qualify for a right of residence in that Member State under EU secondary law, depends was in this case not met. Indeed, NA made a request for a residence permit in a Member State, other than that of which her children were nationals.
In the presence of a cross-border element, the Court took into account Article 21 TFEU and stated that under that provision the right to reside within the territory of the Member States is conferred on every citizen of the Union subject to the limitations and conditions laid down in Directive 2004/38, in particular the condition of having sufficient resources not to become a burden on the social assistance system of the host Member State during the period of residence.
Therefore, according to the Court, it was for the referring court to determine whether as German citizens the children had either themselves or through their mother sufficient economic resources and so they could benefit from a right of residence in the United Kingdom under Article 21 TFEU and Directive 2004/38.
While Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions laid down in Directive 2004/38, those same provisions allow a parent who is that national's primary carer to reside with that national in the host Member State.

c. Outcome at the national level

Alokpa: **11 February 2014: Luxembourg Administrative Court's decision in case n.29435Ca**

Considering the CJEU's preliminary ruling, the Administrative Court concluded that in the case Articles 20 and 21 of the TFEU could be interpreted in such a way as to not oppose a refusal of residence in Luxembourgish territory, since the fact that the children would have to leave the territory of Luxembourg would not mean that they also would have to necessarily leave EU territory (they could still live in France, the country of their nationality). Furthermore, the Court did not consider the refusal of a residence permit in this situation to be in breach of the principle of equality as provided for in Article 111 of the Constitution, nor in breach of Article 8 ECHR.

5. Analysis

a. Role of the Charter

In all these cases, the Court verified whether the situations at issue fell within the scope of EU law, in particular Articles 20 and 21 TFEU. In this regard, fundamental rights were not taken into account for the purpose of determining the scope of application of the Treaty provisions concerning EU citizenship.
According to the *Dereci* and *Ymeraga* judgements, only after having established if a national measure produces the effect of denying the genuine enjoyment of the substance of the rights attaching to EU citizenship or of impeding the exercise of the right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU, can the Charter provisions come into play. This is because according to Articles 6(1) TEU and 51(2) of the Charter, the CJ cannot rely on fundamental rights to expand the scope of application of EU law beyond the competences conferred on the EU by the Treaties.
Therefore, only a national measure which meets the '*Zambrano* criterion' can be examined in the light of the Charter, in particular Article 7 concerning the respect for private and family life and Article 24 concerning the best interests of the child.

b. Judicial dialogue

Direct vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

In all these decisions, the Court of Justice recalled its previous judgement in *Zambrano* and tried to better define when this jurisprudence can apply.

- **The relationship between Articles 20 TFEU and 21 TFEU**

In *McCarthy* the CJ clarified that the *Zambrano* jurisprudence is only applicable when a national measure has the effect of depriving an EU citizen of the genuine enjoyment of the substance of the rights associated with his status. Therefore, Article 20 TFEU can only be relied on when a national measure has a 'deprivation effect' that leads to a loss of the rights attaching to the status of EU citizen. In this case, the application of the Treaty provision does not require the existence of a cross-border link.
On the contrary, when a national measure has the effect of impeding the exercise of the right to move and reside freely within the territory of the Member States, to apply the Treaty provisions on EU citizenship, in particular Article 21 TFEU, requires the existence of a cross-border link (other than those provided for in Directive 2004/38). It follows that the scopes of application of Article 20 TFEU and Article 21 TFEU are different and presuppose different requirements.
However, in *Alokpa* and *NA*, the Court noted that also in a cross-border situation (which does not fall within the scope of application of Directive 2004/38), a national measure can cause the loss of the rights attaching to the status of EU citizen and so fall within the scope of both Article

21 TFEU and Article 20 TFEU. According to the Court, the referring court has to first verify whether Article 21 TFEU can be relied on to recognize a right to reside in the host Member State of a minor child who is a national of another Member State and of a parent who is that minor's primary carer. In this case, the right to reside under Article 21 TFEU can only be recognized if the conditions set out in Directive 2004/38 are satisfied.
On the contrary, a residence permit can be issued under Article 20 TFEU to a third-country national parent in the Member State of which the EU citizen of minor age is a national, and even if the conditions set out in Directive 2004/38 are not fulfilled. In this case, the only condition is that a refusal of the right of residence of the third-country national parent would result in the EU child being obliged in practice to leave the territory of the EU, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status.

- **The role of fundamental rights in determining the scope of application**

In the *Dereci* and *Ymeraga* judgements, the Court recalled its previous case law and pointed out that the criterion concerning denial of the genuine enjoyment of the substance of the rights conferred by EU citizen status is whether the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole. As pointed out in the previous section, these judgements are also relevant to clarify the role of fundamental rights for the purpose of determining the scope of application of Treaty provisions concerning EU citizenship. Only after having established that a national measure can lead to the loss of the genuine enjoyment of the substance of EU citizenship rights (and for that reason it falls within the scope of application of Article 20 TFEU) can that measure be examined in the light of the Charter provisions.

d. Additional relevant cases

National decisions

- **High Court (Ireland), decision of 21.02.2014, No. 2012 459 JR, *K.I. (a minor) & Others v. Minister for Justice and Equality***

"It was claimed, however, that the Minister was required to examine whether R.O.'s deportation violated K.I.'s right to family life under Article 7 of the Charter of Fundamental Rights. I am not satisfied that the provisions of Article 7 apply to this case. Article 51 provides that the provisions of the Charter are addressed to the institutions of the European Union and to Member States 'when they are implementing Union law.' The deportation of R.O. is pursuant to domestic legislation and is not in the course of the implementation of European Union law. The exercise of K.I.'s rights as a European Union citizen is not affected by R.O.'s deportation in any respect."

Casesheet No. 3 – The relationship of dependency between a third-country national parent and a minor EU child

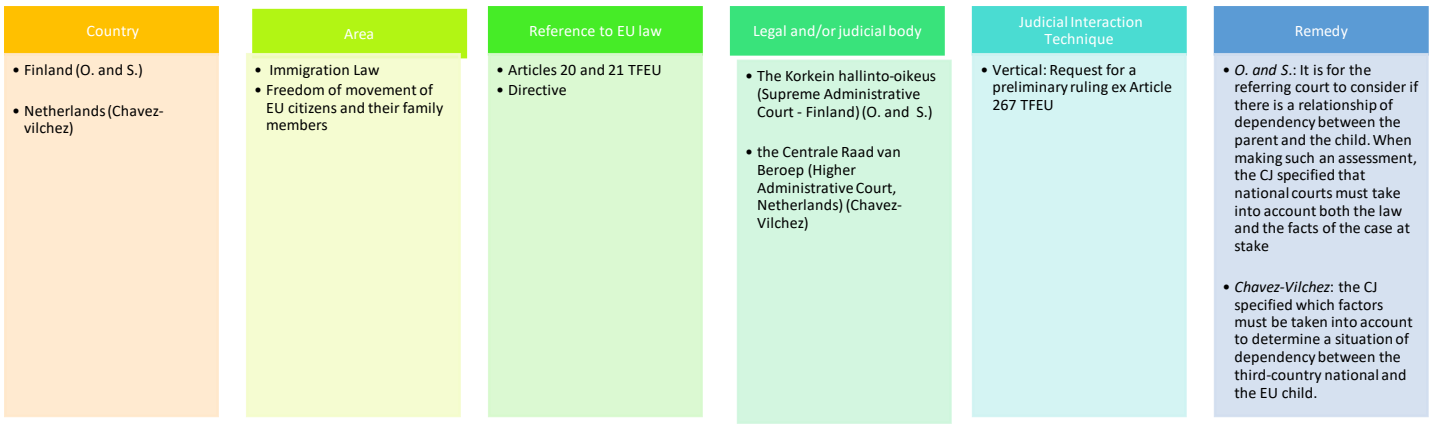
Reference case

- CJEU, judgement of 6 December 2012*, O. and S.*, joined cases C-356/11 and C-357/11
- CJEU (Grand Chamber), judgement of 10 May 2017, *Chavez-Vilchez*, C-133/15

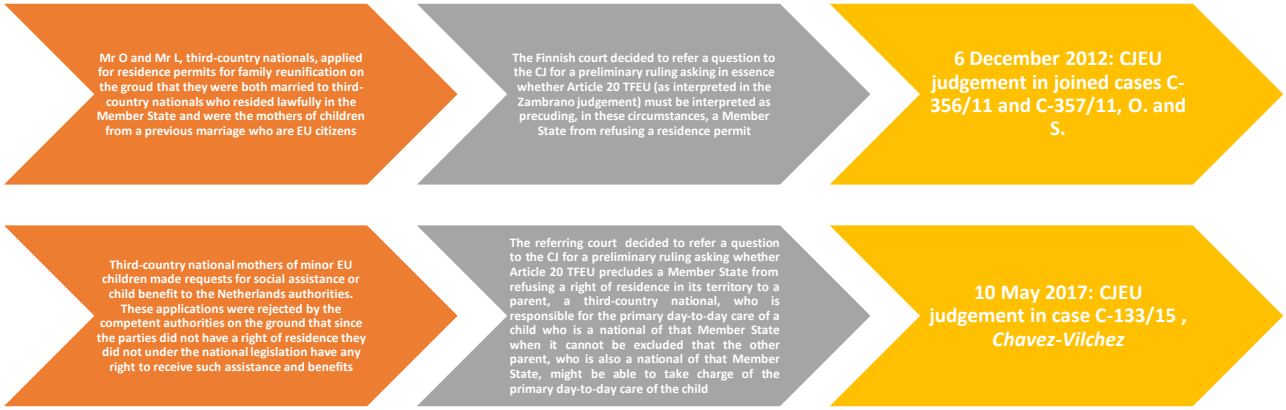
1. Core issues

In these judgements, the CJ specified which factors of relevance should be taken into account for the purpose of determining whether a refusal to grant a right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status.
As part of this assessment, the national authorities must take account of the right to respect for family life, as stated in Article 7 of the CFR, which should be read in conjunction with the obligation to take into consideration the best interests of the child under Article 24(2) of the Charter.
The CJ specified that when making such an assessment, national courts must take into account both the law and the facts of the case at stake. In particular, as regards the factual circumstances, the questions of the custody of the child, which parent is the primary carer and whether the child is part of a reconstituted family are also relevant. However, the application of the principles stated in the *Zambrano* judgement is not confined to situations in which there is a blood relationship between the third-country national and the EU citizen who is a minor from whom the right of residence might be derived. The relationship of dependency of the EU citizen on the third-country national can be of a legal, financial or emotional nature.
In addition, in the best interests of the child account must be taken of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties with both the Union citizen parent and the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

2. At a glance



3. Timeline



4. Case descriptions

a. Facts

- ***O. and S***.

The *O. and S*. judgement concerns two joined cases with the same factual background.
A third-country national legally residing in Finland married a Finnish national with whom she had a child. The child was also a Finnish national who had always lived in Finland. After the divorce, the third-country national mother had sole custody of the EU minor child. Then, she married a third-country national, with whom she had another child who was also a third-country national. The third country national husband applied for a residence permit in Finland. The national authorities refused his application on the ground that he had no secure means of subsistence.
The national court decided to stay the proceedings and to refer a question to the CJ for a preliminary ruling, asking "*whether the provisions of EU law on citizenship of the Union must be interpreted as precluding a Member State from refusing to grant a third-country national a residence permit on the basis of family reunification when that national seeks to reside with his spouse, who is also a third-country national and resides lawfully in that Member State and is the mother of a child from a previous marriage with a Union citizen, and with the child from their own marriage, who is also a third-country national.*"

- **Chavez-Vilchez**

The Chavez-Vilchez judgement concerns several situations with similar factual backgrounds. According to the Court, each situation at issue concerned a third-country national who resided in the Netherlands without holding a residence permit. Each third-country national was the mother of at least one minor child of Dutch nationality who lived with her, was responsible for the primary day-to-day care of that child and was separated from the father of the child, the father also being of Dutch nationality and acknowledging the child as his.
Each third-country national mother made a request for social assistance or child benefit to the Netherlands authorities. These applications were rejected by the competent authorities on the ground that since the parties did not have a right of residence they did not under the national legislation have any right to receive such assistance and benefits.
However, the Court also noted some differences, in particular concerning the situation of the minor children. The relationship between the children and their fathers was either frequent,

seldom or even non-existent. Regarding the situation of the minor children themselves, the child of Ms Chavez-Vilchez lived in Germany with his parents before returning to the Netherlands (the Member State of which he was a national) with his mother. On the contrary, the minor children of the other third-country national mothers had never exercised their right of free movement and they had resided since birth in the Member State of which they were nationals.
The referring court decided to stay the proceedings and to refer a question to the CJ for a preliminary ruling asking in essence whether Article 20 TFEU must be interpreted as precluding a Member State from refusing a right of residence in its territory to a parent, a third-country national, who is responsible for the primary day-to-day care of a child who is a national of that Member State, when it cannot be excluded that the other parent, who is also a national of that Member State, might be able to take charge of the primary day-to-day care of the child.

b. Reasoning of the CJEU

- **O. and S.**

At the outset, the Court stated that Directive 2004/38 did not apply to the case at stake as the EU children had never made use of their right of freedom of movement and had always lived in the Member State of which they were nationals. Next, with respect to Article 20 TFEU, the Court recalled its main findings in the *Zambrano* and *Dereci* judgements and in particular the criterion of denial of genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union. However, the factual background in O. and S. differed substantially from that in *Zambrano* and *Dereci*. In *O. and S.,* the third-country national lived together with her spouse, who was also a third-country national, was not the biological father of the child who was a Union citizen and did not have custody of the EU child.
According to the Court, it was for the referring court to apply that criterion to the case at issue. However, the CJ specified that when making such an assessment, the national court must take into account both the law and the facts of the case at stake. In law, it must be taken into account that the mothers of the EU children hold permanent residence permits in the same Member State of the children's nationality, so that there was no obligation either for them or for the EU citizens dependent on them to leave the territory of that Member State or of the EU as a whole. As regards the factual circumstances which had to be taken into account, the Court noted that the question of the custody of the sponsors' children and the fact that the children were part of reconstituted families were also relevant.
On the contrary, the fact that the person for whom a right of residence was sought on the basis of family reunification lived together with the sponsor and the other family members was not decisive in that assessment. Furthermore, the Court noted that while the principles stated in the *Zambrano* judgement apply only in exceptional circumstances, it does not follow from the Court's case law that their application is confined to situations in which there is a blood relationship between the third-country national and the EU citizen who is a minor from whom that right of residence might be derived. Finally, according to the Court, the relationship of dependency of the EU citizen with the third-country national could be of a legal, financial or emotional nature. Indeed, it is the relationship of dependency between the Union citizen who is a minor and the third-country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the EU as a whole as a consequence of such a refusal. According to the Court, and in the light of the information available which is for the referring court to verify, there might be no such dependency in the case at stake.

- **Chavez-Vilchez**

At the outset, the CJ made some preliminary observations distinguishing, first, the situations of Ms Chavez-Vilchez's child and of Ms Chavez-Vilchez herself in the light of Article 21 TFEU and of Directive 2004/38 and, second, the respective situations of the other children, who had always resided with their mothers in the Member State of which they were nationals, and the situations of the mothers themselves, in the light of Article 20 TFEU.
Regarding Ms Chavez-Vilchez's child and Ms Chavez-Vilchez herself, the Court recalled its previous findings in *O. and S*. and stated that when a Union citizen returns to the Member State of which he is a national, a derived right of residence based on Article 21 TFEU should be granted to a third-country national who is a family member of that Union citizen and with whom that citizen has resided in the host Member State. Even though Directive 2004/38 does not cover such a return, it should be applied, by analogy, in respect of the conditions that it lays down for the residence of a Union citizen in a Member State other than that of which he is a national. It is for the referring court to assess if these conditions are satisfied.
Regarding the other children, the CJ took into account its previous case law and held that a right of residence based on Article 20 TFEU should be granted to a third-country national parent of a minor EU child, when as a consequence of a refusal to allow residence to that third-country national, the EU child might be compelled to accompany his mother and therefore to leave the territory of the EU as a whole. Indeed, in the event that the mother was obliged to leave the territory of the EU, her child would thus be deprived of genuine enjoyment of the substance of the rights conferred on him by his status as a Union citizen.
According to the CJ's case law, factors of relevance for the purposes of determining whether a refusal to grant a right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent.
The Court also stated that it is important to determine in each case at issue which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national. As part of the assessment, the competent authorities must take into account the right to respect for family life as stated in Article 7 of the CFR, which should be read in conjunction with the obligation to take into consideration the best interests of the child recognised in Article 24(2) of the Charter.
In addition, for the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the EU if a right of residence were refused to that third-country national. In the best interests of the child, account must be taken of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both with the Union citizen parent and the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.
It is for the third-country national parent to provide evidence to prove that a refusal of a right of residence to that third-country national would deprive the child of the genuine enjoyment of the substance of the rights conferred on him by virtue of EU citizen status. It is, however, for the competent authorities of the Member State to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess whether a refusal would have such a consequence.

c. Outcome at the national level

Not available.

5. Analysis

a. Role of the Charter

The Court of Justice stated that the Charter, in particular Articles 7 and 24, must be taken into account by national authorities when determining the existence of a relationship of dependency between an EU child and his third-country national parent. However, the Court did not provide a definition of 'the best interest of the child,' stating that this involves taking into account all the specific circumstances, in law and in facts, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both with the Union citizen parent and the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

b. Judicial dialogue

Vertical judicial dialogue ex Article 267 TFEU.

c. Impact of the CJEU decision

In these judgements, the Court referred to the EU child's dependency on the third-country national parent, not only in terms of economic or material dependency but also of 'physical and emotional development' and 'emotional ties' with both parents, and underlined the importance of the effect of separation on the child. These elements are part of the assessment that the national courts must ascertain, taking into account the respect for fundamental rights, in particular the right to respect for family life and the best interests of the child.

d. Additional relevant cases

- **CJ (Grand Chamber), judgment of 8 May 2018, case C-86/16, *K. A. and others*** (see Issue 5)

<u>National cases</u>

- **High Court (Ireland), decision 30.04.2013, No. 2013 154 JR, *B & ors. v. Minister for Justice & Equality***

"51. The fact that the third-country national for whom a right of residence is sought is not a person on whom the children are legally, financially or emotionally dependent must be taken into consideration when examining the question whether the children would be unable to exercise the substance of the rights conferred. The court also held that a finding that the refusal to grant a right of residence to a third-party national parent of a European Union child would result in the children being forced to leave the European Union would be without prejudice to the question of whether on the basis of other criteria the right to reside could not be refused, for example, by reference to the right to the protection of family life.
52. Apart from the fact that the question of whether the children would be forced to leave the jurisdiction has already been considered on a number of occasions by the Minister and that nothing new has been adduced in relation to that matter, the court is satisfied, having reviewed the papers and the various decisions made in this case by a number of officials, that the principles of European law set out above were properly considered in the challenged decision and that the applicants have no stateable case upon which the refusal to revoke the deportation order could be challenged. […]
55. There is nothing to suggest that the best interests of the children in this case were not a primary consideration in the decision made, nor is there any evidence to suggest that the State has denied direct contact or a personal relationship between the European Union children and

their father. In that regard, the maintenance of personal relationships and contact is not always dependent on the presence of the parent within the home or the State.
56. I am also satisfied that, having regard to the similarities of the matters to be considered under Articles 7 and 24 of the Charter and the TFEU respectively and the matters to be considered, both under the Constitution and the European Convention on Human Rights, there is no stateable ground upon which to seek leave to apply for judicial review."

- **High Court (Ireland), decision 14.05.2012, No. 2012 402 JR, *Gilani & anor. v. Minister for Justice and Equality***

"20. No evidence has been presented on this application which brings this case within that criterion. The second named applicant is an Irish citizen who resides with and is cared for by her Union citizen mother. No suggestion whatsoever is made that the child is at any risk of having to leave the country. It is suggested that the daughter is 'dependent' upon her father but that is only in the sense that she sees him twice or three times a week and that he contributes some unquantified sum for clothes and her playschool. This does not constitute evidence of the type or level of dependence envisaged in the above cases, namely one which compels the EU citizen to leave the territory of the Union if the parent is removed."

Casesheet No. 4 – The effect of a criminal record of a third-country national parent on his derived residence right

Reference case

- CJEU (Grand Chamber), judgement of 13 September 2016, *Rendón Marin*, case C-165/14
- CJEU (Grand Chamber), judgement of 13 September 2016, *CS*, case C-304/14

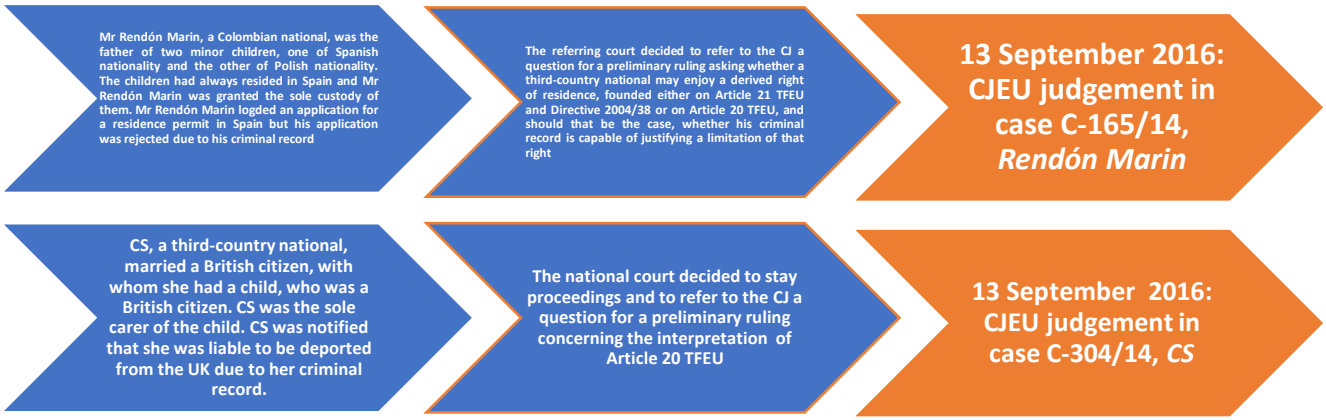
1. Core issues

Once it had been determined whether the situation at issue is covered by the scope of application of Article 20 or Article 21 TFEU, the CJ was called to verify in which situations the derived right of residence of the third-country national parent could be limited.
Article 21 TFEU and Directive 2004/38 preclude national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record when he is the parent of a minor child who is a Union citizen and who is dependent and resides with him in the host Member State.
Article 20 precludes national legislation which requires a third-country national who is a parent of minor EU children in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the EU.
The assessment between public policy or public security and the right to respect for private and family life, as laid down in Article 7 of the CFR, read in conjunction with the obligation to take into consideration the child's best interest recognised in Article 24(2) CFR, requires taking into account, in particular, the personal conduct of the individual concerned, the length and legality of his residence in the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation.
It is for the referring court to take into account the child's best interests when weighing up the interests involved. Particular attention must be paid to his age, his situation in the Member State concerned and the extent to which he is dependent on the parent.

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Spain (Rendòn Marin) • United Kingdom (CS)	• Immigration Law • Freedom of Movement of EU citizens and their family members	• Article 20 TFEU	• Tribunal Supremo (Supreme Court, Spain) (Rendón Marin) • the Upper Tribunal (Immigration and Asylum Chamber - United Kingdom) (CS) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU	• *Rendón Marin*: , Article 20 and 21 TFEU precludes national legislation which requires a third-country national who is a parent of minor EU children in his sole care to be automatically refused a grant of a residence permit on the sole ground that he has a criminal record. • *CS*: it is for the referring court to assess whether the derived right of residence could be limited on the grounds of public policy or public security.

3. Timeline



4. Description

a. Facts

- ***Rendón Marin***

Mr Rendón Marin, a Colombian national, was the father of two minor children, one of Spanish nationality and the other of Polish nationality. The children had always resided in Spain and Mr Rendón Marin was granted the sole custody of them. Mr Rendón Marin lodged an application for a residence permit in Spain but his application was rejected due to his criminal record. The referring court decided to stay the proceedings and to refer to the CJ a question for a preliminary ruling asking in essence whether a third-country national such as Mr Rendón Marin may enjoy a derived right of residence, founded either on Article 21 TFEU and Directive 2004/38 or on Article 20 TFEU, and should that be the case, whether his criminal record is capable of justifying a limitation of that right.

- ***CS***

CS, a third-country national, married a British citizen who was a British citizen, with whom she had a child. CS was the sole carer of the child.
In 2012 she was convicted of a criminal offence and given a prison sentence of 12 months. As a consequence, CS was notified that by reason of her conviction she was liable to be deported from the United Kingdom. She made an application for asylum in the United Kingdom, which was rejected by the competent authorities. The national court decided to stay proceedings and to refer to the CJ a question for a preliminary ruling asking in essence whether Article 20 TFEU precludes national legislation "*which requires a third-country national who has been convicted of a criminal offence of a certain gravity to be expelled from the territory of that Member State to a third country, notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the envisaged expulsion would require the child to leave the territory of the EU, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen*."

b. Reasoning of the CJEU

- ***Rendón Marin***

At the outset, the Court verified the existence of a derived right of residence founded on Article 21 TFEU and Directive 2004/38. The Court made a distinction between the two children of Mr Rendón Marin: the minor son of Spanish nationality had never made use of his right of freedom of movement and had always resided in the Member State of which he was a national. Therefore, this child was not covered by Directive 2004/38. On the other hand, there existed a cross-border element concerning the daughter of Polish nationality (she was a national of another Member State, residing in Spain). It followed that Article 21 TFEU may be in principle relied upon to confer a right to reside in Spain on Mr Rendón Marin's daughter and this right is subject to the conditions laid down in Directive 2004/38 (in particular, those concerning economic resources and health insurance).

However, a refusal to allow a third-country national parent who is the carer of a minor EU child to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a child who is a minor of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is the primary carer and the carer must be in a position to reside with the child in the host Member State. Therefore, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Directive 2004/38, the same provisions allow a parent who is that minor's primary carer to reside with him in the host Member State.

Concerning the effect of a criminal record on recognition of a derived right of residence, in the light of Directive 2004/38, the Court stated that an application for a residence permit cannot be refused automatically by national authorities. According to the CJ, account should be taken of several criteria, namely how long the individual concerned had resided in the territory of the host Member State, his age, his state of health, his family and economic situation, his social and cultural integration into the host Member State and the extent of his links with his country of origin. The degree of gravity of the offence must also be taken into consideration in the context of the principle of proportionality. Moreover, a deportation decision needed to take into account fundamental rights, in particular Article 7 CFR and the child's best interests (Article 24 CFR).

Therefore, Article 21 TFEU and Directive 2004/38 preclude national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record when he is the parent of a minor child who is a Union citizen and who is dependent and resides with him in the host Member State.

Concerning the situation of Mr Rendón Marin's son, who had always resided in the Member State of which he was a national, it should be examined whether a derived right of residence for Mr Rendón Marin may be founded on Article 20 TFEU.

In application of the Zambano judgement, it is for the referring court to verify if a refusal to grant a residence permit to Mr Rendón Marin has the consequence that his children would be compelled to go with him, the sole carer, and therefore have to leave the territory of the EU as a whole. Concerning this assessment, the Court should also take into account whether Mr Rendón Marin and his children could move to Poland, the Member State of which his daughter was a national. In this regard, it was for the referring court to check whether Mr Rendón Marin, as the parent who was the sole carer of his children, may in fact enjoy a derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the EU as a whole.

Concerning the possibility of limiting a derived right of residence under Article 20 TFEU, the Court stated that the assessment of the situation of Mr Rendón Marin must take account of the right to respect for private and family life, as laid down in Article 7 of the CFR, read in conjunction with the obligation to take into consideration the child's best interest recognised in Article 24(2) CFR.

Therefore, the Court held that where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such a refusal would be consistent with EU law. However, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result only from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights.
As a consequence, Article 20 precludes national legislation which requires a third-country national who is a parent of minor EU children in his sole care to be automatically refused a grant of a residence permit on the sole ground that he has a criminal record where that refusal has the consequence of requiring those children to leave the territory of the EU.

- ***CS***

At the outset, the Court noted that Directive 2004/38 was not applicable to the situation at issue, as the Union citizen concerned had never made use of his right of freedom of movement and had always resided in the Member State of which he was a national. Second, according to Article 20 TFEU, the CJ held that the situation at issue could not be assimilated to a purely internal situation. As stated in the *Zambrano* judgement, Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens. In the case at stake, the expulsion of the third-country national mother, who was the primary carer of the minor EU child, could result in a restriction of the rights conferred by the status of Union citizen, as he may be compelled, *de facto*, to go with her and therefore to leave the territory of the EU as a whole. In this sense, the expulsion of the child's mother would deprive him of the genuine enjoyment of the substance of his rights.
Once it had been determined whether the situation at issue was covered by the scope of application of Article 20 TFEU, the CJ was called to verify in which situations that derived right could be limited. According to the Court, Member States could in principle derogate to Article 20 TFEU upholding the requirements of public policy and safeguarding public security. However, since CS's situation fell within the scope of EU law, assessment of her situation must take account of the right to respect for private and family life, as laid down in Article 7 CFR, read in conjunction with the obligation to take into consideration the child's best interest recognised in Article 24 CFR.
Furthermore, as a justification for derogating from the right of residence of Union citizens or members of their family, the concepts of 'public policy' and 'public security' must be interpreted strictly. Indeed, where the expulsion decision is founded on the existence of a genuine serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, that decision could be consistent with EU law.
On the contrary, the conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. This assessment requires taking into account, in particular, the personal conduct of the individual concerned, the length and legality of his residence in the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation.
In conclusion, it was for the referring court to assess the extent to which CS's criminal conduct was a danger to society and any consequences which such conduct might have for the requirements of public policy or public security of the Member State concerned. In carrying out the balancing exercise required of it, the referring court must also take account of the fundamental rights. In the case at stake, account was to be taken of the child's best interests

when weighing up the interests involved. Particular attention must be paid to his age, his situation in the Member State concerned and the extent to which he was dependent on the parent.

c. Outcome at the national level

Not available.

5. Analysis

a. Role of the Charter

The Charter comes into play once it has been determined that the situation falls within the scope of application of EU law. In these judgements, the Court found that the circumstances at stake fell within the scope of EU law and so the Charter applied. In its reasoning, the Court referred to the EU Charter and stressed the fact that an expulsion decision adopted by national authorities needs to take account of Article 7 and Article 24(2) of the Charter. Indeed, in a case where an expulsion decision is taken against a third-country national, national courts must undertake a specific assessment of all the relevant circumstances of the case, in the light of the child's best interests and of the fundamental rights the observance of which the Court ensures. Once again, the Court referred to the child's best interests and a series of elements which have to be taken into account such as the age of the child, his situation in the Member State and the extent to which he is dependent on the parent.

b. Judicial dialogue

Direct vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

In these judgements, the protection against expulsion under Article 20 and 21 TFEU appears to be equivalent to that of EU citizens and their family members who move to another Member State (in accordance with Directive 2004/38 and the relevant case law).

Indeed, according to the Court, Member States could in principle derogate to Article 20 and 21 TFEU upholding the requirements of public policy and safeguarding public security to limit the right of residence of a third-country national. However, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 CFR, read in conjunction with the obligation to take into consideration the child's best interest recognised in Article 24 CFR. The Court outlined a very stringent test that national authorities have to apply when determining if the right of residence could be limited.

Only in exceptional circumstances "where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such refusal would be consistent with EU law and the EU child could be forced to leave the EU territory." However, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result only from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights.

d. Additional relevant cases

ECtHR, 3 October 2014, *Jeunesse v. the Netherlands*, CE:ECHR:2014:1003JUD001273819, §118.

Casesheet No. 5 – Family reunification with an EU static child when the third-country national parent is subject to an entry ban

Reference case

- CJ (Grand Chamber), judgment of 8 May 2018, case C-86/16, *K. A. and others*

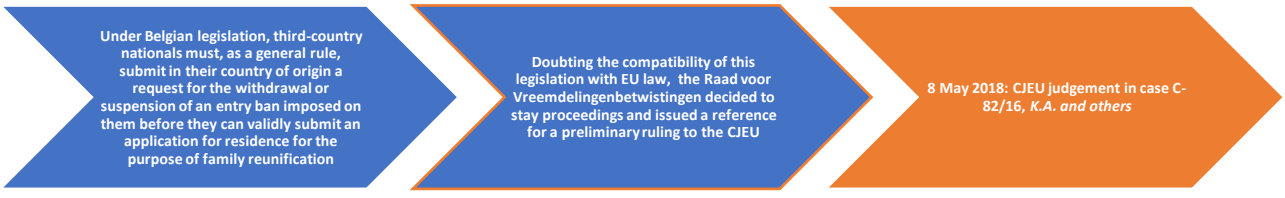
1. Core issues

National authorities cannot refuse to examine an application made by a third-country national for a right of residence for the purpose of family reunification with a static Union citizen solely on the ground that the third-country national is the subject of a ban on entering that Member State.
It is the duty of national authorities to examine applications and to assess on a case-by-case basis whether there is a relationship of dependency between the third-country national and the EU citizen which may compel the latter to leave the territory of the EU to accompany the third-country national parent and therefore deprive the child of the genuine enjoyment of the substance of rights conferred by the status as EU citizen. The existence of such a relationship of dependency must be based on consideration, in the best interests of the child pursuant to Articles 7 and 24 CFR, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both with the EU citizen parent and the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.
Before adopting a return decision with respect to a third-country national, national authorities must always consider the details of the third-country national's family life, and in particular the interests of a minor child of that third-country national, unless such details could have been provided earlier by the person concerned.

2. At a glance

Country	Area of Law	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Belgium	• Immigration Law	• Article 20 TFEU, • Articles 7 and 24 CFR • Articles 5 and 11 of Directive 2011/115/EC on common standards and procedures in MS for returning illegally staying third-country nationals	• Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings – Belgium) • CJEU	• Vertical: Request for a preliminary ruling ex article 267 TFEU from the Council for asylum and immigration proceedings (Belgium) concerning the interpretation of Articles 5 and 11 of the Directive, Article 20 TFEU read in the light of Articles 7 and 24 CFR	• The CJ found that the national practice at issue was in contrast with EU law, read in the light of Articles 7 and 24 CFR.

3. Timeline



4. Description

a. Facts

The case submitted to the Court concerned seven third-country nationals residing in Belgium who were family members of Belgian citizens who had not exercised their rights of freedom of movement or establishment. They were all ordered to leave the Member State concerned with a return decision, that decision being accompanied by an 'entry ban.' However, under national law that ban cannot, as a general rule, be extinguished or temporarily suspended unless an application for its withdrawal or suspension is lodged outside Belgium. The third-country nationals thereafter lodged an application for a residence permit in Belgium on the basis of their status as either dependant relatives in the descending line of a Belgian citizen, parents of a minor Belgian child or lawfully cohabiting partners in a stable relationship with a Belgian citizen. These applications were not examined by the competent national authority in application of national law on the ground that the third-country family members were persons who were subject to an entry ban.
Doubting the compatibility of national law with Article 20 TFEU as interpreted in the *Zambrano* judgement of 8 March 2011 and the Return Directive (2008/115/EC) read in the light of Articles 7 and 24 of the CFR, the referring court decided to stay the proceedings and refer several questions to the Court for a preliminary ruling:

1. Must Directive 2011/115 or Article 20 TFEU read in the light of Articles 7 and 24 CFR be interpreted as precluding a practice of a Member State that consists in not examining an application for residence for the purpose of family reunification that is submitted in the territory of that Member State by a third-country national who is the subject of an entry ban, in particular without taking into account the relationship of dependency between the third-country national and an EU family member?

2. What factors should be taken into account in order to assess whether there is a relationship of dependency capable of justifying a derived right of residence under Article 20 TFEU?

3. Is it relevant that the relationship of dependency came into being after the imposition on the third-country national parent of an entry ban or the entry ban became final when the application for residence was submitted?

4. Is it relevant that the entry ban imposed on a third-country national who has submitted an application for residence for the purpose of family reunification is justified by a failure to comply with his obligation to return or on public policy grounds?

b. Reasoning of the CJEU

At the outset, the CJEU took into account the scope of application of Directive 2008/115 and stated that it is not designed to harmonize Member State rules on the stay of foreign nationals in their entirety since the common standards and procedures established by the Directive only concern the application and implementation of return decisions. Therefore, Directive 2011/115 does not contain provisions that lay down rules concerning how to deal with an application for residence for the purposes of family reunification after the application of a return decision accompanied by an entry ban.
Then, the CJ recalled that in accordance with the *Zambrano* jurisprudence Article 20 TFEU confers EU citizenship on every individual who is a national of a Member State. EU citizenship is intended to be the fundamental status of nationals of Member States. For this reason, Article 20 TFEU precludes national measures which have the effect of depriving an EU citizen of the genuine enjoyment of the substance of the rights conferred by virtue of this status, including decisions refusing a right of residence to the family members of a static Union citizen. Therefore, even if the Union citizen has not made use of his freedom of movement and

secondary law on the right of residence of third-country nationals does not apply (Directive 2004/38/EC), the situation at issue falls within the scope of Article 20 TFEU as interpreted in the relevant CJ case law.
In this case, the consequence of the national practice at issue was that before an application for residence for the purposes of family reunification is examined and before any derived right of residence under Article 20 TFEU may be granted, the third-country national concerned is obliged to first leave the territory of the EU in order to submit a request for the withdrawal or suspension of the entry ban. This obligation imposed on the third-country national is liable to undermine the effectiveness of Article 20 TFEU if compliance with it has the consequence that a Union citizen is in practice compelled to accompany the third-country national and therefore to also leave the territory of the EU for a period of time that is indefinite because of the existence of a relationship of dependency between the third-country national and his EU family member, .
Therefore, national authorities cannot refuse to examine an application made by a third-country national for a right of residence for the purpose of family reunification with a static Union citizen solely on the ground that the third-country national is the subject of a ban on entering that Member State. It is the duty of national authorities to examine such applications and to assess whether there exists between the third-country national and the EU citizen a relationship of dependency. In such circumstances, the Member State concerned must withdraw, or at least suspend, the return decision and the entry ban to which the third-country national is subject.
The CJEU secondly examined the circumstances in which a relationship of dependency exists. The CJ made a distinction between whether the EU citizen is an adult or a minor. Regarding the latter case, the Court recalled its case law and underlined that factors of relevance include the question of who has the custody of the child and whether the child is legally, financially or emotionally dependent on the third-country national. More particularly, according to the Court it is important to determine in each case which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national. In addition, whether the other parent, where that parent is a Union citizen, is able – and willing – to assume sole responsibility for the primary day-to day care of the child is a relevant factor, but it is not in itself a sufficient ground to conclude that there is not a relationship of dependency. In the best interests of the child concerned and in the light of Articles 7 and 24 CFR, account must be taken of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both with the Union citizen parent and the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.
Whether the third-country national parent lives with the minor child who is a Union citizen is one of the relevant factors to be taken into account, but cohabitation is not necessary to establish a relationship of dependency. The existence of economic reasons or a family link, whether natural or legal, between the minor Union citizen and his third-country-national parent cannot be sufficient grounds to justify a grant of a derived residence right under article 20 TFEU.
According to the Court, neither whether the relationship of dependency came into being after the imposition of the entry ban on the third-country national or the circumstance that the entry ban became final when the application for residence was submitted are relevant.
Finally, as regards the grounds for the entry ban, the CJEU provided guidance on the interpretation of Article 5 of the Return Directive. The Court made a distinction between non-compliance with the obligation to return and a public policy or public security ground. In the first case, the Court stated that it is immaterial whether the entry ban has been imposed on the sole ground that the third-country national was staying illegally in a Member State. According to the Court, the right of residence stems directly from Article 20 TFEU and does not presuppose that the third-country national already has some other right of residence in the

EU. Indeed, from the moment when the relationship of dependency came into being, the third-country national family member can no longer be considered to be staying illegally in the territory of the Member State concerned.
If the entry ban is due to public policy grounds, according to the Court the competent authorities must assess the situation of the applicants in the light of, on the one hand, the right to respect for private and family life as laid down in Article 7 CFR read in conjunction with the obligation to take into consideration the child's best interests recognised in Article 24 CFR and, on the other hand, public policy reasons. Hence, if the refusal of a right of residence is founded on the existence of a genuine present sufficiently serious threat to the requirements of public policy or of public security in view of, *inter alia*, criminal offences committed by the third-country national, such a refusal is compatible with EU law even if its effect is that a Union citizen who is a family member is compelled to leave the territory of the EU. However, this conclusion cannot be reached automatically on the sole basis of the criminal record of the person concerned. It can only be reached after a specific assessment by the national court of all the relevant circumstances of the case in the light of the principles of proportionality and of the child's best interests and of the fundamental rights whose observance the Court ensures. The assessment must therefore take account in particular of the personal conduct of the individual concerned, the length and legality of his residence in the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of any children at issue, their state of health and their economic and family situation.

c. Outcome at the national level

Not available.

5. Analysis

a. Role of the Charter

The Charter is applicable because the case concerned an application for residence for the purpose of family reunification with an EU citizen that was submitted in the territory of the Member State of the EU citizen's nationality by a third-country national who was subject to an entry ban. According to the CJEU, even if there is no provision in Directive 2008/115/EC (the Return Directive) that lays down rules concerning how to deal with an application for residence after the application of a return decision accompanied by an entry ban, Article 20 TFEU and the Z*ambrano* jurisprudence were applicable to the case. Although the Union citizen had not made use of his freedom of movement and secondary law on the right of residence of third-country nationals did not apply, the situation at issue fell within the scope of Article 20 TFEU as interpreted in the relevant CJ case law.
In its reasoning, the CJEU referred to the principle of the best interests of the child and in particular to Article 7 and 24 CFR. The Court did not provide a definition of the "best interests of the child" but it gave a long list of factors related to that notion to be assessed by national authorities when determining whether a relationship of dependency exists between a third-country national parent and an EU minor child.

b. Judicial interaction

Direct vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

The K.A. judgement provides further clarification regarding the legal status of EU minors and their third-country family members. In the line of the *Zambrano* jurisprudence, the CJEU added that a Member State cannot refuse a request for family reunification by a third-country national who is a parent of a static EU child when the former is subject to an entry ban. National authorities must assess whether there is a relation of dependency between the third-country-national parent and the EU minor which may compel the EU citizen to leave the territory of the EU to accompany him/her.

The Court did not leave this assessment to the discretion of the Member States. On the contrary, the CJEU gave a long list of criteria which must be taken into account "in the best interests of the child." Although several times the Court recalled Articles 7 and 24 of the Charter, which recognise the obligation to take into consideration the child's best interests, it did not give a clear definition of this notion.

Moreover, when national authorities apply a return decision with respect to a third-country national who has previously been the subject of a return decision accompanied with an entry ban, they must take into account his or her family life, and in particular the interests of his or her minor child.

Casesheet No. 6 – The right to respect for family life and the best interests of the child apply when Member States make use of their margin of discretion under Directive 2003/86/EC

Reference case

- CJEU (Grand Chamber), judgement of 27 June 2006, *European Parliament v. Council*, case C-540/03

1. Core issues

Read in conjunction with Article 24 EUCFR, Article 8 ECHR and Article 7 EUCFR stress the importance of family life to a child and recommend that States have regard for children's interests but they do not create an individual right for the members of a family to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification. Hence, the fact that a Directive gives a certain margin of discretion to Member States in this regard is not in contrast with fundamental rights.

However, the Directive cannot be interpreted as expressly or implicitly authorising the Member States to adopt implementing provisions that would be contrary to the right to respect for family life. Thus, the Directive preserves the margin of appreciation left to the Member States in observance, in particular, of the right to respect for family life and the best interests of the child.

2. At a glance

Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Right to family reunification • Immigration law	• Directive 2003/86/EC • Articles 7, 21(2), 24(2) and (3) of the Charter	• European Parliament • Council • CJEU	• Action for annulment under Article 263 TFEU (Article 230 TEC) brought by the European Parliament concerning Directive 2003/86/EC • Horizontal: the Court relied on the ECtHR's case law on the right to respect for family life	• The CJ dismissed the action

3. Timeline

4. Description

a. Facts

Directive 2003/86/EC determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of Member States. According to the European Parliament, Article 4(1) and (6) and Article 8 did not respect

fundamental rights, in particular the right to family life, the principle of the best interests of the child and the right to non-discrimination.
First, the EU Parliament contended that since one of the most important means of successfully integrating a minor child is reunification with his or her family, it was incongruous to impose under Article 4(1) of the Directive a condition of integration before a child aged over 12 years who is a member of the sponsor's family could join the sponsor. This rendered family reunification unachievable and negated this right. The Parliament further submitted that since the concept of integration is not defined in the Directive the Member States were authorised to appreciably restrict the right to family reunification, in violation of Article 8(2) of the ECHR. Furthermore, the Directive established discrimination founded exclusively on the child's age, which was not objectively justified and was contrary to Article 14 of the ECHR.

Concerning Article 4(6) of the Directive, the EU Parliament submitted that this provision, which permitted Member States to require applications for family reunification of minor children to be submitted before the age of 15, also infringed the right to respect for family life and the prohibition on discrimination on grounds of age.

Finally, the Parliament observed that the periods of two and three years provided for in Article 8 of the Directive significantly restricted the right to family reunification. This article, which did not require applications to be considered on a case-by-case basis, authorised the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests. The Parliament further held that the derogation authorised in the second paragraph of Article 8 of the Directive could well give rise to different treatment in similar cases, depending on whether or not the Member State concerned has legislation which takes its reception capacity into account. In this case, a criterion founded on the Member State's reception capacity is equivalent to a quota system, which is incompatible with Article 8 of the ECHR.

b. Reasoning of the CJEU

At the outset, the CJEU recalled the different sources of protection of fundamental rights in the light of which the legality of the Directive may be reviewed. It must be underlined that this judgement was rendered in 2006, before the Charter became a legally binding instrument under Article 6(1) TEU.

Concerning Article 4(1) of the Directive, the Court of Justice first evoked the various international and EU instruments that stress the importance of family life to a child. According to the Court, the right to respect for family life within the meaning of Article 8 of the ECHR is among the fundamental rights which are protected in Community law. The Court recalled the relevant jurisprudence of the ECtHR concerning the principles applicable to family reunification, and quoted it as stating that "*a fair balance has to be struck between the competing interests of the individual and of the community as a whole and in both contexts the State enjoys a margin of appreciation*" (*Gül v. Switzerland*, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174, § 38, and *Ahmut v. the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030, § 63).

The EU Court then took into account other sources, such as the Convention on the Rights of the Child, which also recognise the principle of respect for family life. In particular, the Convention is founded on the recognition that for the full and harmonious development of their personalities children should grow up in a family environment.

Finally, the EUCFR recognised in Article 7 the right to respect for private or family life. This provision had to be read in conjunction with the obligation to have regard for the child's best

interests, which is recognised in Article 24(2) EUCFR, and took account of the need expressed in Article 24(3) for a child to maintain a personal relationship with both of his or her parents on a regular basis. According to the Court, although these sources recommend that States must have regard for the child's interests, they do not create an individual right for the members of a family to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification. In this framework, in strictly defined circumstances, namely when a child aged over 12 arrives independently from the rest of the family, Article 4(1) of the Directive has the effect of partially preserving the margin of appreciation of Member States by permitting them to verify whether he or she meets a condition for integration provided for in national legislation in force on the date of implementation of the Directive before authorising entry and residence of the child under the Directive,

Accordingly, the Member States preserve a limited margin of appreciation, which is not different from that accorded to them by the ECtHR in the case law relating to that right, in weighing in each factual situation the competing interests. When balancing these interests, as required by the Directive, Member States must have due regard for the best interests of minor children and other relevant circumstances, such as the child's age, whether the child arrived independently from his or her family, the nature and solidity of the person's family relationships, the duration of his residence in the Member State and the existence of family, cultural and social ties with his country of origin.

Concerning conditions for integration, according to the Court it does not appear that such a condition is in itself contrary to the right to respect for family life set out in Article 8 of the ECHR. Article 4(1) preserves the margin of appreciation left to the Member States in observance, in particular, of the principle of the best interests of the child. In fact, the fact that the concept of integration is not defined in the Directive cannot be interpreted as authorising Member States to employ the concept in a manner contrary to general principles of Community law, in particular to fundamental rights.

Furthermore, the Court held that it did not appear that the Community legislature failed to pay sufficient attention to children's interests. The content of Article 4(1) of the Directive attests that children's best interests were a consideration of prime importance when that provision was adopted and it did not appear that this provision failed to have sufficient regard for those interests or authorised Member States which choose to apply an integration condition not to have regard for them.

In addition, the choice of the age of 12 did not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when he or she has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to be more difficult.

According to the Court, it followed from its reasoning that Article 4(1) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard for the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or by expressly or implicitly authorising Member States to act in such a way.

Concerning Article 4(6) of the Directive, the Court verified whether this provision expressly or implicitly authorised Member States to not observe fundamental principles – in particular the right to respect for family life, the obligation to have regard for the best interests of children

and the principle of non-discrimination on grounds of age – in that it allows them to formulate a requirement with reference to the age of a minor child for whom application is made for entry into and residence in national territory in the context of family reunification.

It did not appear to the Court that the contested provision infringed, *a priori*, the right to respect for family life set out in Article 8 of the ECHR as interpreted by the ECtHR. In fact, Article 4(6) of the Directive gives Member States the option of only applying the conditions for family reunification which are prescribed in the Directive to applications submitted before children have reached 15 years of age. This provision could not, however, be interpreted as prohibiting Member States from taking account of an application relating to a child over 15 years of age or as authorising them not to do so.
The Court stated that Article 4(6) of the Directive must, moreover, be read in the light of the principles set out in the Directive, which require Member States to have due regard for the best interests of minor children, and also for a number of factors, one of which is a child's family relationships. Therefore, while Article 4(6) of the Directive has the effect of authorising a Member State not to apply the general conditions in Article 4(1) of the Directive to applications submitted by minor children over 15 years of age, the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life.

Following the same reasoning adopted for Article 4(1), the Court stated that it did not appear, *a fortiori*, that the choice of the age of 15 years constituted a criterion contrary to the principle of non-discrimination on grounds of age.

Finally, concerning Article 8 of the Directive, the Court recognised that this provision, like the others contested, authorised the Member States to derogate from the rules governing family reunification laid down by the Directive. However, the Court found that the provision does not therefore have the effect of precluding any family reunification but preserved a limited margin of appreciation for Member States by permitting them to make sure that family reunification will take place in favourable conditions after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, for a Member State to take these factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in Article 8 of the ECHR as interpreted by the European Court of Human Rights.

However, the duration of residence in the Member State is only one of the factors which must be taken into account by Member States when considering an application. When carrying out the analysis, Member States must have due regard for the best interests of minor children. In the final analysis, while the Directive left the Member States a margin of appreciation, it was sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights

5. Analysis

a. Role of the Charter

It is worth stressing that this judgement was rendered before the entry into force of the Lisbon Treaty and therefore before the Charter acquired the same legal status as the EU Treaties (Article 6 par. 1 TEU).
The Court first analysed the system of protection of fundamental rights in the EU existing at the time it rendered the judgement.

Fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. To identify fundamental rights, the Court drew inspiration from the constitutional traditions common to the Member States and from the guidelines provided by international instruments for the protection of human rights, in particular the ECHR. In addition, Article 6(2) of the TEU (in the version in force before the entry into force of the Lisbon Treaty) stated that "the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

In this framework, the Court provided an overview of the different sources affording protection to the rights of the child, which would later be recalled in its reasoning, in particular Article 8 of the ECHR (right to respect for private and family life) and Articles 7 (respect for private and family life) and 24 (the rights of the child) of the Charter. In fact, the Court stated that while (at the time of the decision) the Charter was not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating in the second recital in the preamble to the Directive that the Directive observed the principles recognised not only in Article 8 of the ECHR but also in the Charter.

After having identified the relevant provisions in the light of which the legality of the Directive may be reviewed, the Court found that these provisions – in particular Article 8 ECHR and Article 7 EUCFR read in conjunction with Article 24 EUCFR – stress "the importance to a child of family life and recommend that States have regard for the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification". Hence, the fact that the Directive gives a certain margin of discretion to Member States is not in contrast with fundamental rights.

However, the Directive could not be interpreted as expressly or implicitly authorising Member States to adopt implementing provisions that would be contrary to the right to respect for family life. Therefore, the Directive preserved the margin of appreciation left to the Member States in observance of the right to respect for family life and the principle of the best interests of the child. For this reason, the Charter would apply even if a margin of discretion is left to Member States by EU law.

b. Judicial dialogue

The case dealt with an action for annulment under Article 263 TFEU (Article 230 TEC) brought by the European Parliament against the Council concerning Directive 2003/86/EC. It involved (indirect) horizontal interaction between the CJEU and the ECtHR, whose case law on the right to respect for family life the judgement extensively relied on.

c. Impact of the CJEU decision

First, this judgement made it clear that if the provisions of a Directive afford Member States a certain margin of appreciation and allow them to apply national legislation derogating from the basic rules imposed by the Directive in certain circumstances, it cannot have the effect of excluding those provisions from review of their legality by the Court as envisaged in Article 263 TFEU.

Second, the right to family life and the child's best interests cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification. Therefore, it is not in contrast with fundamental rights that in strictly defined circumstances, namely when a child aged over 12 arrives independently from the rest of the family, the

Directive has the effect of partially preserving the margin of appreciation of Member States by permitting them to verify whether a child meets a condition for integration provided for by national legislation in force on the date of implementation of the Directive before authorising his or her entry and residence under the Directive.

However, the fact that the concept of integration is not defined in the Directive cannot be interpreted as authorising Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. If Member States make use of their margin of discretion, they must in any case respect fundamental rights, in particular the right to respect for family life and the best interest of the child.

For the same reasons, the fact that the Directive gives Member States the option of applying the conditions for family reunification which are only prescribed in the EU act to applications submitted before children have reached 15 years of age is not in contrast with the right to respect for family life. The Directive cannot, however, be interpreted as authorising Member States to adopt national measures in contrast with fundamental rights. In fact, Member States are still obliged to examine the application in the interests of the child and with a view to promoting family life.

Finally, the possibility the Directive allows to Member States to derogate from the rules governing family reunification and require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members does not run counter to the right to respect for family life. Even in this case, Member States must "have due regard for the best interests of minor children."

d. Additional relevant cases

ECtHR:

- *Sen v. the Netherlands*, No. 31465/96, 21 December 2001 (Article 8 of the ECHR)
- *Gül v. Switzerland,* No. 23218/94, 19 February 1996 (Article 8 of the ECHR)
- *Ahmut v. The Netherlands,* No. 21702/93, 28 November 1996 (Article 8 ECHR)

Case Study 1 – The relevance of EU law in family unity cases involving 'static' Union citizens

- **Facts**

Consider the following facts. A third-country national is the father of two minor children, a girl (Maria) and a boy (José), both born in Spain. The girl has Italian nationality while the boy has Spanish nationality. The children have always resided in Spain and the father was granted sole care and custody of them. The whereabouts of the mother, an Italian national, are unknown. In 2015, the father was dismissed from the handbag shop where he was employed and as a consequence shortly afterwards he lost his work residence permit.

In order to regularize his position, in 2017 the father decided to lodge an application for a residence permit in Spain but his application was automatically rejected by the national authorities due to his having a criminal record. In fact, in 2016 the father was sentenced in Spain for some minor criminal offences and according to the applicable national legislation without any possibility of derogation a residence permit cannot be granted when the applicant has a criminal record in the Member State concerned. Accordingly, the competent national authority issued an order that he should leave Spain, allowing him a period for a voluntary departure.

The father decided to appeal against the order before the *Audiencia National* (Spanish National High Court), claiming he had a right to reside in Spain as he was the father of two minor EU children. The appeal was dismissed and the father decided to bring an appeal against that judgement before the *Tribunal Supremo* (Supreme Court).

- **Questions**

You are a judge from the *Tribunal Supremo* in Spain and must handle the appeal brought by the father of Maria and José. Below you will find a set of questions that will assist you in framing your reasoning.

1. Concerning the relationship between the third-country-national father and Maria, the Italian child:

- *Is it possible to ground a derived residence right in Spain for Maria's father on Article 21 TFEU and Directive 2004/38/EC?*
  - *Is it possible to argue that Spain is a host Member State in relation to Maria?*
  - *If so, does Maria satisfy the conditions foreseen in Directive 2004/38/EC, in particular the "sufficient economic resources," also to meet the family member's needs, that the Union citizen has to demonstrate?*
- *If the conditions are satisfied, the right of the family member of the EU citizen to reside in the Member State may be subject to limits, particularly on grounds of public policy. Do you think that relying on public policy in the case at issue can justify the return order against him?*
  - *Is there any limit deriving from the Directive or from the CJEU's case law that is not respected by the return decision?*
  - *Do you see any role for considerations relating to Maria's best interests? How would you balance the best interests of the child with the public policy reasons?*

2. Concerning the relationship between the third-country-national father and José, the Spanish child:

- *Is it possible to qualify the case of the third-country-national father as a "very specific situation" in which the family member of a Union citizen who has not exercised his free movement right can be derived directly from Article 20 TFEU?*
- *If so, how would you balance the right to reside based on Article 20 TFEU and public policy reasons?*
- *Do you see any role for considerations related to the best interests of the child?*

- **Explanation of the case**

The proposed case study aims to analyse the special protection that EU law offers to children who are Union citizens and reside in a Member State with their third-country-national family members. In a nutshell, the facts are the following. A third-country-national residing in Spain is the father of two children, a girl (Maria) with Italian nationality and a boy (José) with Spanish nationality, both born in Spain. The children have always resided in Spain with the father, who has sole care and custody of them. The father lodges an application for a residence permit, which is automatically rejected by the national authorities due to his criminal record and accordingly an order to leave Spain is issued against him.

This case study is modelled on the ***Rendón Marín*** judgment, which was decided by the CJEU in 2016. The main question was whether and on what legal basis a **derived right of residence** could be granted to a third-country national who was the **sole carer** of his two **children,** who were Union citizens and were both born in Spain, where they had always resided together. In this case, one of the children was a Spanish national and the other had Polish nationality. There thus existed some sort of transnational element in relation to the situation of the child with Polish nationality, whereas the child with Spanish nationality was a 'static minor child' for the purpose of EU law. Furthermore, the *Rendón Marín* case dealt with the possibility of limiting the derived right of residence on grounds of **public policy**.

Two sets of questions must be addressed. First, does the legal situation of a 'static minor Union child' differ from that of a Union child who has the nationality of a Member State other than that of the EU State where he was born and has always resided? If the answer is in the affirmative, which are the relevant EU law provisions that can be relied on in these different situations to claim a derived right of residence for the third-country-national parent?

Second, is it possible to limit the derived right of residence of the family member of the EU citizen on grounds of public policy? Which elements should be taken into account by the national authorities when balancing the public policy reasons with the right to respect for private and family life and the child's best interests?

The Spanish courts involved in this case had different opinions. The National High Court dismissed the appeal brought by the third-country national against the decision of the national authorities rejecting his application for a residence permit. By contrast, the Supreme Court decided to stay the proceedings and to address a preliminary reference to the CJEU asking, in essence, whether the national legislation at issue, which laid down a prohibition on the grant of a residence permit when the applicant had a criminal record in Spain, was consistent with EU Law.

For the sake of clarity, recall that under EU citizenship and free movement law third-country nationals who are family members of EU citizens may only enjoy rights derived from their family member who is a Union citizen. They **are not granted autonomous rights** to move or reside in the EU. Therefore, first of all attention must be paid to the situation of the Union citizen in order to establish whether he or she can claim a primary right to move or reside based on EU law.

At the outset of its reasoning, the CJEU investigated whether a parent could claim a derived right of residence in Spain based on **Article 21 TFEU in combination with Directive 2004/38**. In this regard, the Court made a distinction between Mr Rendón Marín's two children. On the one hand, the Court said that the situation of the son with Spanish nationality fell outside the scope of Directive 2004/38 because he had never exercised his right of freedom of movement

under EU law. On the other hand, the Court stated that the situation of the daughter with Polish nationality could not be assimilated to a **purely internal situation**, despite the fact she had never exercised the right to freedom of movement under EU law. In this case, according to the Court, a **cross-border element** existed. Therefore, she could rely on Article 21 TFEU to claim a primary right to reside in Spain as a Union citizen. However, the enjoyment of this right is subject to the conditions laid down in Directive 2004/38, in particular those concerning economic resources and health insurance. Note that it is not required that the sufficient economic resources are owned by the Union citizen. They may also be provided by the third-country national who is a family member of the Union citizen. The referring court has the task of establishing whether the EU minor child has sufficient resources and health insurance cover, either himself or through his parent.

Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Directive 2004/38. Consequently, the same provisions may allow a parent who is that minor's primary carer to reside with him in the host Member State.

As a next step, the Court of Justice examined the **effect of a criminal record** on the recognition of a derived right of residence. Based on Directive 2004/38 and the Court's case law, national authorities cannot refuse an application for a residence permit automatically because of the existence of criminal record. They must instead take into account the personal conduct of the offender in order to establish whether the person represents a **real and actual danger** to public policy. Amongst others, the following criteria should be taken into account: the length of the person's stay in the territory of the host Member State, his age, state of health, family and economic situation, degree of social and cultural integration in the host Member State and the extent of his links with his country of origin. The gravity of the offence must also be taken into consideration. Importantly, a deportation decision must comply with the requirements stemming from the protection of the fundamental rights granted by EU law, in particular **Article 7** of the Charter concerning the **right to respect for private and family life** and the **child's best interests** laid down in Article 24 of the Charter.

When Directive 2004/38 is not applicable because there is no cross-border element (not even of the kind just discussed), in exceptional situations a Union citizen can claim a **right of residence in his own Member State of nationality based on Article 20 TFEU**. In these cases, third-country nationals who are family members of the Union citizen may derive a residence right from this provision as well. The Court of Justice affirmed this in the *Ruiz Zambrano* case of 2011 and subsequently confirmed it in other judgments, amongst which *Réndon Marin*. The rationale behind this case law is that if the family member could not remain in the Member State the Union citizen who is dependent on him would be **obliged in practice to leave** the territory of the European Union. Therefore, he would be deprived of the **genuine enjoyment** of the substance of the rights conferred by virtue of his status as a Union citizen.

Again, it was for the referring court to verify if a refusal to grant a residence permit to Mr Rendon Marin would have the consequence that his children, who are Union citizens, would be compelled to go with him, the sole carer, and therefore have to leave the territory of the European Union as a whole. Concerning the possibility of **limiting a derived right of residence** under Article 20 TFEU, the Court stated that the assessment of the situation of Mr Rendon Marin must take account of the right to respect for private and family life, read in conjunction with the obligation to take into consideration the child's best interest recognised in Article 24 CFR.

A refusal of the right of residence founded on the existence of a **genuine, present and sufficiently serious threat to the requirements of public policy** or of public security would be consistent with EU law. However, that conclusion **could not be drawn automatically** on the sole basis of the criminal record of the person concerned. It could only result from a specific assessment by the referring court of all the current and relevant circumstances of the case, in particular in the light of the **child's best interests**.

Part III – Child Protection in the Context of Migration and Asylum Law

1. Introduction

The prime aim of this part is to situate the protection of the child in the context of migration and asylum law. Accordingly, the following sections provide an overview of both applicable EU legislation and the interpretative techniques used by European judges to unleash the potential of the EUCFR in protecting third-country national minors entering the European Union from a third country and moving across its Member States' internal borders. Afterwards, this part offers a 'zoom in' on the specific challenges and legal gaps faced by European judges when dealing with cases concerning third-country nationals who are unaccompanied minors.

At the outset, it is important to stress that **most of the provisions of the EUCFR can also be invoked by third-country nationals** when their situation falls within the scope of EU law. This is especially the case for children who are third-country nationals involved in a process of voluntary or involuntary migration from a third country to the European Union and captured within the scope of EU legislation on matters having cross-border implications.

Compared to Part II of this Handbook, the **focus** here is shifted from the derivative rights of third-country nationals who are parents of minor EU citizens to the **rights of third-country nationals who are minor asylum seekers, refugees or migrants**. These children are therefore 'on the move' by definition. Notably, the 'move' can be understood as a first unauthorised entry or an unauthorised secondary movement within the EU. The transnational element involved in all situations is connected to the application of EU immigration and asylum secondary legislation aimed at managing flows. The following table summarizes the relevant EU secondary legislation.

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 (hereafter, Dublin III Regulation),[18] formerly Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (so-called Dublin II Regulation);[19] and Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereafter, Dublin Implementing Regulation).[20]
Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for comparison with Eurodac data by Member State law enforcement authorities and Europol for law enforcement purposes, and amending

[18] OJ L 180, 29.6.2013, p. 31–59.
[19] OJ L 50, 25.2.2003, p. 1–10.
[20] OJ L 222, 5.9.2003, p. 3–23.

Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (so-called EURODAC Regulation),[21] implicitly repealed by Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No. 1077/2011 (the so-called eu-LISA Regulation).[22]
Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereafter, Recast Reception Conditions Directive),[23] formerly Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the so-called Reception Conditions Directive).[24]
Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter, the Return Directive).[25]
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereafter, the Family Reunification Directive).[26]

2. The Best Interests of the Child in Cases Concerning Family Unity and Family Reunion under the Dublin II Regulation

As a general rule, in the absence of common provisions regulating the matter, safeguarding the rights that individuals derive from EU law is left to the Member States (principle of procedural autonomy). However, the procedural autonomy enjoyed by the Member States is tempered by two general principles: the principle of equivalence and the principle of effectiveness. The former requires national procedural rules protecting rights that individuals derive from EU law to be no less favourable than those governing similar domestic situations. The latter ensures that national laws do not render the exercise of rights conferred by EU law virtually impossible or excessively difficult.[27]

With regard to the protection of the family life and family unity of third-country-national children, the Member States' procedural autonomy is limited by the provisions of EU instruments regulating the **allocation of responsibility for status determination procedures, reception conditions and family reunification**. In addition, the **principle of the best interests of the child enshrined in Art. 24(2) EU Charter** applies to national measures implementing EU law. It functions as an overarching rule of interpretation and encapsulates the procedural side of the right to care and protection set out in Art. 24(1) EU Charter. This rule helps secure the effectiveness of EU law conferring rights to third-country national minors by compelling

[21] OJ L 180, 29.6.2013, p. 1–30.
[22] OJ L 295, 21.11.2018, p. 99–137.
[23] OJ L 180, 29.6.2013, p. 96–116.
[24] OJ L 31, 6.2.2003, p. 18–25.
[25] OJ L 348, 24.12.2008, p. 98–107.
[26] OJ L 251, 3.10.2003, p. 12–18.
[27] See, for instance, the preliminary reference in joined cases C-222/05 to C-225/05 *J. van der Weerd and others*, §28.

national authorities to engage: (a) in a preliminary 'best interests assessment' (BIA) for each third-country-national minor within their jurisdiction; and (b) in a 'best interests determination' (BID) for each decision to be taken which affects a child. Key to these best interest procedures is respect for the right to be heard, which, alongside the right to an effective remedy, ensures that the protection of the minor is 'effective' in practice.

Further insights on how acknowledgement of the best interests of the child as a primary consideration in all matters involving or affecting third-country-national minors impacts Member States' procedural autonomy can be drawn from the CJEU case law on the Dublin Regulation. For instance, in the preliminary reference in case C-245/11 *K v. Bundesasylamt*, the Court was asked to interpret the expression 'another relative' used in the discretionary 'humanitarian clause' in Art. 15(2) Dublin II Regulation.

Art. 15(1-2) Dublin II Regulation

"(1) Any Member State, even where it is not responsible under the criteria set out in this Regulation, **may bring together family members**, as well as **other dependent relatives**, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

(2) In cases in which the person concerned is **dependent on the assistance of the other on account of pregnancy or a new-born child**, serious illness, severe handicap or old age, Member States **shall normally keep or bring together the asylum seeker with another relative** present in the territory of one of the Member States, provided that family ties existed in the country of origin."

With a view to fully respecting the best interests of the child, the Court broadened the personal scope of the expression 'another relative' to cover the grandmother of a minor refugee. Although the notion of 'family member' in Art. 2(i) Dublin II Regulation was limited to the asylum seeker's spouse and minor children or to the asylum seeker's guardian (for unaccompanied minors), the Court emphasized the relationship of dependency of a daughter-in-law and the minor grandson of an asylum seeker in order to derive a duty to keep, or bring together, a minor refugee with 'another relative' (namely his grandmother) seeking asylum in that Member State after having lodged another application in the Member State of first entry.

The Court held that the existence of discretion on the part of national authorities entails a duty to exercise this discretion in a way compatible with attainment of the effective application of EU law, and therefore "*in cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, […], Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of the Member States, provided that family ties existed in the country of origin*" (§ 47).

By imposing on Member States a mandatory use of the discretionary clause in Art. 15(2) Dublin II Regulation – with a view to protecting the best interests of the child – the CJEU relied on a widely-experimented judicial technique aimed at enhancing the impact of EU law. This result required the application of the following interpretative tools to Art. 15(2) Dublin II Regulation:

a) a teleological reading of the adverb 'normally';
b) a cumulative reading of the verbs 'keep' and 'bring';

c) a broad interpretation of the notion of 'dependency' (as a 2-way dependency), including both the situation in which the asylum seeker is dependent upon refugee relatives who are legally residing in the Member State which is obliged to take responsibility and that in which the refugee relatives are dependent on the asylum applicant (as in the case at instance);
d) a broad interpretation of the notion of 'family,' including both 'family members' under Art. 2(i) and 'other relatives' (e.g. uncle/aunt, grandparents, siblings), "provided that family ties existed in the country of origin" and that they are able and willing to assist (as required by Art. 11(4) Dublin Implementing Regulation).

3. The Best Interests of the Child in Cases Concerning Family Unity and Family Reunion under the Dublin III Regulation and National Case Law

The principle of family unity and the connected duty of family reunion, the scope and content of which was clarified by the CJEU in its judgment in case C-245/11 *K v. Bundesasylamt*, were crystallized in the recast Dublin III Regulation, namely in its Recital 16 and Arts. 8-11, 16-17. More precisely, while the discretionary 'humanitarian clause' is now foreseen in Art. 17(2) Dublin III Regulation, the duty to keep and bring dependent asylum seekers with their family, pending procedures, was transformed into a binding criterion for the allocation of responsibility in Art. 16(1) Dublin III Regulation. This duty covers the positive obligations on Member States:

a. to trace minor asylum seekers' family members;
b. to bring them together by requesting/allowing transfer from/to the Member State in which they are physically present; and
c. to keep the family together by assuming responsibility for all its components.

Art. 16(1) Dublin III Regulation

"(1) Where, on account of pregnancy, a **new-born child**, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her **child, sibling or parent** legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States **shall normally keep or bring together** the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned express their desire in writing."

Art. 17(2) Dublin III Regulation

"(2) The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, **may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations on humanitarian grounds** based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Arts. 8 to 11 and 16. The persons concerned must express their consent in writing."

Art. 20(3) Dublin III Regulation

"For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests. The same treatment shall be applied to children born after the applicant arrives in the territory of the Member States without the need to initiate a new procedure for taking charge of them."

National judges reacted to this jurisprudence by further investigating the nature and scope of the discretionary powers conferred on national authorities by EU law. For instance, in a judgment of the UK Upper Tribunal,[28] the mandatory recourse to the humanitarian clause set forth in Art. 17(2) Dublin III Regulation was advocated in a case concerning the rejection through accelerated procedures of a request for family reunion with relatives regularly residing in the UK lodged by minors trapped in the so-called 'jungle of Calais.' The denial of family reunion resulted from national implementing rules: (i) allowing a restrictive interpretation of the notion of 'family member'; and (ii) rendering the demonstration of the motherhood link extremely cumbersome. The UK Upper Tribunal interpreted Art. 17(2) Dublin III Regulation in compliance with Arts. 7 and 24 EU Charter and Art. 8 ECHR, concluding for a mandatory use of the humanitarian clause to preserve the effectiveness of EU law.

Another interesting case concerns the over-zealous use of EURODAC hits to deny responsibility for a family (including minors dependents on their grandparents due to incapacity of the mother). The German Administrative Court of Hannover clarified that the discretionary clause in Art. 17(2) Dublin III Regulation has to be interpreted as a 'rule of flexibility' aimed at providing ultimate protection of fundamental rights when there are no other legal means to halt a transfer of asylum seekers that is detrimental to the best interests of a minor.[29]

Finally, it is worth mentioning the preliminary ruling in case C-661/17 *M.A, S.A. and A.Z v International Protection Appeals Tribunal and Others*, recently rendered by the CJEU on a reference made by the High Court of Ireland.[30] The case – which was decided on 23 January 2019 – focuses on the interpretation to be given to a discretionary clause in Art. 17(1) Dublin III Regulation (the so-called 'sovereignty clause') when the best interests of a child recognised in Art. 6 of the same Regulation is at stake. In addition, the ruling touches on the implications of the process of the UK's withdrawal from the EU for the Dublin System, since the case concerned the transfer of asylum seekers from Ireland to the UK, this being the competent Member State on the basis of the Dublin criteria.

With a view to putting forward the cogency of Dublin III Regulation for the UK – in the aftermath of the notice of its intention to withdraw from the EU – the CJEU stressed the absolute nature of Member States' discretion under the discretionary clause of the Regulation. Therefore, it denied that the circumstances at stake in the case (i.e. the fact that the Member State that is competent for the asylum request under the Dublin Regulation is in the process of withdrawal from the EU) impose a mandatory use of the discretionary clause by Ireland (§§ 58-59). The CJEU also added that it cannot be inferred from the Dublin Regulation that the best interests

[28] UK Upper Tribunal, *R (on the application of ZAT and Others) v Secretary of State for the Home Department*, [IJR [2016] UKUT 61].
[29] German Administrative Court of Hannover, decision of 7 March 2016, case no. 1 B5946/15.
[30] High Court of Ireland, *M.A. (a minor) v The International Protection Appeals Tribunal* [2017] IEHC 677.

of the child is – in itself – the legal source of duty of mandatory use of the discretionary clause by the Member State in which the accompanied minor is present when that State is not competent to examine his/her asylum request under the Dublin Regulation (§ 71). However, it conceded that the Dublin Regulation establishes a presumption that it is in the best interests of the child to treat the minor's situation as strictly related to that of his/her parents (§§87-90).

4. The Best Interests of the Child in Cases Concerning Family Life and Family Reunification under the Family Reunification Directive

The protection of family life and the promotion of family reunification are also prime goals within the remit of the Family Reunification Directive (i.e. Directive 2003/86/EC).[31] In its case law on this Directive the CJEU recognised that family reunification is a substantive right of a minor refugee which cannot be subject to discretionary application by national authorities. Due to the declaratory nature of refugee status, a formal decision on the refugee's status cannot be configured as a legal prerequisite to apply for family reunification under EU law and neither can national authorities use the reference time for the request for family reunification as a migration tool – thus, for different purposes from family reunification. In other words, national authorities hold a duty of particular diligence when examining the family reunification requests of minor refugees, which is linked to the double vulnerability of those concerned.[32]

As regards third-country nationals who are not refugees, the Directive allows the exercise of discretionary powers by Member States. It foresees 'optional clauses' regarding situations falling within the scope of the Directive but for the regulation of which Member States are granted a wide margin of discretion. Optional clauses include integration clauses, reception conditions and the age limits for family reunification. In these cases, the CJEU has required Member States' discretion to be exercised in compliance with the EU Charter and the best interests of the child, impeding national provisions making the exercise of fundamental rights excessively difficult. In addition, it has reiterated that interference with the right to family life must be in accordance with the law, necessary in a democratic society and proportional for the attainment of a legitimate goal.[33]

In a case concerning the family reunification of beneficiaries of subsidiary protection – i.e. a situation falling beyond the scope of the Directive – the Court has recently stated that domestic law making a **direct and unconditional *renvoi*** to the Directive triggers the application of the EU Charter and the ECHR, as it falls within the jurisdiction of the CJEU.[34]

National case law concerning minors' right to family life and applying the Family Reunification Directive generally conforms to the standards envisaged by the CJEU and further extends the scope of the protection granted to minors. This is because – in the words of the UK Upper Tribunal – "*no other material consideration can be treated as inherently more significant than the best interests of any affected child […] 'It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.'*"[35] As a consequence, when national courts cannot rely on the Directive to derive positive obligations of family reunification (e.g. because the Directive does not apply to a certain Member State due to a differentiated integration regime or because

[31] On this directive, see also Part II.
[32] Cf. CJEU, case C-550/16 *A. S. v. Staatssecretaris van Veiligheid*, § 43.
[33] Cf. CJEU, case C-540/03 *European Parliament v. Council* and case C-338/13 *Noorzia v. Bundesministerin für Inneres*. See more extensively Part II.
[34] See CJEU C-380/17 *K and B*.
[35] UK Upper Tribunal, *AT and another*, [2016] UKUT 227 (IAC), §28.

the specific case at stake does not fit into the scope of the Directive) they recur to Art. 8 ECHR to ensure protection.[36]

Interestingly, the Constitutional Court of the Republic of Slovenia has declared that even if there is no obligation under EU law to extend the definition of family members in the Family Reunification Directive, the absence of a clause in domestic law allowing – in exceptional cases – such an extension is in contrast with the international obligations assumed by Slovenia and therefore with the Constitutional principle of non-discrimination, disproportionally impacting the right to family life.[37]

5. Conditions for the Reception of Third-Country National Children

The '**double vulnerability**' of minor asylum seekers, refugees and migrants – linked to both their age and migratory status – is a key element in best interests procedures. At the same time, it affects the standards of material reception of minor asylum seekers under Art. 2(j) of the Reception Conditions Directive.

The vulnerability of asylum seekers as a group was clearly established by the ECtHR in its landmark decision in the *M.S.S. v. Belgium and Greece* case [app. no. 30696/09, §§ 249-251]. The 'double vulnerability' of minor asylum seekers – further limiting Member States' discretion in the determination of the nature, type and duration of material reception conditions – was acknowledged by the same Court in *Tarakhel v. Switzerland* [app. no. 29217/12, §§ 115-118]. There, the ECtHR ruled that a transfer of an Afghan family with minor children to Italy – in application of the Dublin Regulation – would be contrary to the prohibition of degrading treatment in Art. 3 ECHR due to the unsuitableness of the reception conditions for minors in the Italian reception centre.

The double vulnerability of minors is, therefore, capable of lowering the threshold of gravity of a certain conduct that is necessary to integrate the definition of '**degrading treatment**' under Art. 3 ECHR. This means that – in cases concerning minors – the duty of particular diligence of the Member States triggers: (a) an obligation to ask for and obtain assurances on the availability, duration and adequateness of reception conditions from the Member State of destination; and (b) a mandatory use of discretionary clauses to avoid transfer when those assurances are lacking or insufficient.

In this respect, the CJEU has established a number of cumulative parameters to be taken into account in the assessment of the adequateness of material reception conditions for asylum seekers (in general) and for minors (in particular):

- *Respect for the right to family life and family unity (Art. 17 of the Directive), and its enforcement in the light of the best interests of the child (Art. 41 of the Directive). The combined reading of the two provisions will lead to the general conclusion that minors must be housed with their parents [C-79/13 Selver Saciri, § 45].*
- *The principle of accessible, effective, continuous and non-discriminatory reception (during Dublin transfers) [C-179/11 Cimade and GISTI].*
- *Respect for human dignity (Art. 1 EU Charter), so that the quantum of material reception conditions must ensure a dignified standard of living which is adequate for the health of applicants and capable of ensuring their subsistence [C-179/11*

[36] See, e.g., Irish High Court, [2013] IEHC 25 *Casha Digale Ducale & Anor*; Austrian Administrative High Court, *N. v. Federal Asylum Review Board*, 2010/21/0494.
[37] Constitutional Court of the Republic of Slovenia, judgement of 14 January 2015, UI-309/13, Up-981/13.

Cimade and GISTI, §§ 35-40]. In addition, Member States must consider the 'specific needs' of minors in the light of Art. 17 of the Directive.

In the light of this judicial dialogue, the Federal Constitutional Court of Germany has maintained that Dublin transfers must be halted in cases where: (a) the assurances provided by the Member State of destination of asylum seekers with minor children do not comply with the Directive's minimum standards, requiring German authorities to check the reception suitability to authorise the transfer; (b) the minor to be transferred would suffer from health traumas in the case of transfer; (c) the transfer would impair his/her enjoyment of the right to family unity; and (d) the transfer would be in contrast with the best interests of the child.[38]

This jurisprudence is certainly commendable, since it elevates the threshold for the protection of minors. At the same time, by requiring the national authorities of the Member State in which the minor is physically present to perform intrusive checks of the effectiveness of the assurances provided by the Member State of destination, this reasoning impacts the **principle of mutual trust**, which is the cornerstone of Member State cooperation within the Area of Freedom, Security and Justice.

6. Conditions of Detention of Third Country National Children

Another thorny issue that has been dealt with by European Courts is the detention of third-country national minors and/or their family members, which mostly happens when there is a risk of absconding:

a) pending status determination procedures for asylum seekers (due to the interplay between the Dublin Regulation and the Reception Conditions Directive);
b) pending removal of failed asylum seekers and irregular migrants (in application of the Return Directive).

A first line of case law concerns the application of Art. 8 Recast Reception Conditions Directive allowing national authorities to detain asylum seekers on a list of grounds, with a view to performing a Dublin transfer. In two recent cases, the EU Court has offered a very narrow reading of Member States' discretion regarding the recourse to detention for asylum seekers, stating that – in the light of Arts. 6 and 52(1) and (3) EU Charter – Art. 8 provides the same level of protection as the second limb of Art. 5(1)(f) ECHR, thus requiring integral respect for the principle of proportionality and swift access to appeal procedures.

This is a restrictive interpretation of Member States' discretion regarding the recourse to detention for asylum seekers (in general) and there is a lack of case law specifically dealing with the detention of minors. We can nonetheless infer from the case law of the EU Court of Justice some guiding principles that seem applicable in cases concerning the detention of members of the family of minor asylum seekers due to the risk of absconding. In these cases, the best interest determination should include an evaluation of whether the minor is dependent on the person to be placed in detention and, if this is positive, a search for alternative means to reach the same legitimate aim of avoiding absconding, in compliance with the goal of "bring[ing] and keep[ing] the family together."[39]

The detention of minors themselves should in any case be excluded when they are unaccompanied, since the EU Court has *in principle* ruled out the Dublin transfer of

[38] German Constitutional Court, decision of 17 September 2014, 2 BvR 1795/14.

[39] Cf. CJEU, case C-245/11 *K v. Bundesasylamt*.

unaccompanied minors, so that detention to effectively execute the transfer could not be a legitimate aim.[40] Regarding the detention of minor asylum seekers with their families, the specific safeguards detailed by the Court in its case law on reception conditions would apply, drastically limiting Member States' discretion as to the detention option.

The configuration of detention as an *ultima ratio* has been confirmed and buttressed by the ECtHR. In *S.F. and Others v. Bulgaria* [app. no. 8138/16], the Court ruled that a 32-hour detention of a family with minor children constituted a violation of Art. 3 ECHR due to the particular vulnerability of the minors. In *Bistieva and Others v. Poland* [app. no. 75157/14], the Court ruled on the legitimacy of a 6-month detention of a failed asylum seeker with three minor children, which was justified by national authorities on the basis of an evident risk of absconding. This is a case in which the interplay between the Return Directive and the best interests of the child was at stake. In fact, the Court focused on the latter to maintain that the assessment of the impact of the detention on the minors had miscarried since possible alternatives should have been more carefully evaluated. Therefore, it concluded for a violation of Art. 8 ECHR on the part of the national authorities.

In a very similar vein, the Swiss Federal Supreme Court ruled that the detention of a family of asylum seekers, which included the separation of the mother from her three minor children and the placement of the children in a child house, violated Art. 8 ECHR by (even temporarily) transforming 'accompanied' minors into 'unaccompanied minors' – a situation that seems in contrast with any interpretation of the principle of the best interests of the child.[41]

[40] Cf. CJEU, case C-648/11 *MA, BT, DA*.
[41] Swiss Federal Supreme Court, decision of 26 April 2017, 2C-1052/2016, 2C-1053/2016.

7. Zoom in: Protecting Third Country Nationals Who Are Unaccompanied Minors. Legal Gaps and Challenges

Compared to the previous sections, the focus now shifts from the investigation of cases in which third-country national children 'on the move' have family members and/or relatives in the territory of the EU to cases in which they are unaccompanied. Therefore, the core of the analysis will be the particular vulnerability of minor children who are third-country nationals with no family member legally present in any Member State.

The specificity of the protection of unaccompanied minors 'on the move' will be tested departing from the case law of the EU Court of Justice on the application of the Dublin Regulation and the Family Reunification Directive to them. These are pieces of EU legislation that have already been outlined in the previous sections of Part II.

Since the notions of *best interests determination* (**BID**) and *best interests assessment* (**BIA**) will be key to the analysis of the procedural challenges in the protection of unaccompanied minors, it is worth recalling their meaning and function.

- The **BID** is intended to decide which immediate actions need to be taken in the best interest of the child within the framework of asylum procedures, family reunification procedures and return procedures. It is part of an ongoing holistic assessment in which each specific need and characteristic of the child have to be taken into account (e.g. age, gender, sexual orientation, maturity, personal experiences, ethnicity, level of education, physical or mental impairments, vulnerabilities).
- The **BIA** is the ongoing holistic assessment resulting from the sum of reports and BIDs carried out by a range of professionals who are specialized in different areas (e.g. legal guardians, social workers, psychologists, educators, etc.). The BIA helps make fundamental decisions for the minor concerning schooling, guardianship, integration, etc. It should allow the participation of the involved minor in the decision-making process that may be relevant to his/her life and enable the minor to influence the decisions taken in his/her regard, in accordance with the child's age and maturity.

a. Assessing the Best Interests of Unaccompanied Minor Asylum Seekers under the Dublin II Regulation

The so-called Dublin II Regulation provided a system of cooperation among EU Member States which was mainly aimed at the containment of two phenomena:

a. secondary movements: i.e. the unauthorised movement of third-country nationals from the Member State of first irregular entry to another EU Member State;
b. asylum shopping: i.e. the presentation of multiple asylum requests in different Member States, with the aim of obtaining the best reception and asylum conditions.

The correct implementation of the Dublin II Regulation by the Member States implied respect for the hierarchical criteria set forth within it which aim at punishing unauthorised secondary movements and asylum shopping [Art. 5(2) Dublin II]. When criteria relating to family and residence links are inapplicable, the Regulation gave the responsibility for status determination to the Member State of first irregular entry [Art. 10(1) Dublin II] or where the application for asylum was first lodged [Art.13].

However, for unaccompanied minors with no family member legally present in any Member State, the Dublin II Regulation required the responsibility for their asylum request to be allocated to the Member State where the minor lodged his/her asylum request.

Art. 6 Dublin II Regulation

"Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

The vague formulation of Art. 6(2) Dublin II Regulation left it open to discretion whether or not to interpret this criterion in the light of Arts. 5(2) and 13 of the same Regulation in the case of multiple requests. As a matter of practice, many EU Member States did so by discharging the responsibility for unaccompanied minors who had lodged multiple asylum requests in different EU Member States to the Member State of 'first request.' Taking into account the lack of clarity in the formulation of Art. 6(2) Dublin II Regulation, the Court of Appeal (England and Wales) (Civil Division) asked the EU Court to interpret the abovementioned provision within the framework of a preliminary reference.

Interpreting this provision in case C-648/11 *MA, BT, DA*, the EU Court of Justice first excluded that responsibility could be placed with the Member State of 'first application'. Should that be the case, Art. 6(2) should have stated it expressly, as in Arts. 5(2) and 13 Dublin II Regulation (§§ 51-53). Second, the EU Court looked at the objective of the Regulation, which was (according to the EU Court) "*to guarantee effective access to an assessment of the applicant's refugee status*" (§ 54). Third, the EU Court took into account the **particular vulnerability** of unaccompanied minors seeking asylum to deduce a prohibition on sending them back to the Member State of 'first application' with a view to not "*prolong[ing] more than is strictly necessary the procedure for determining the Member State responsible*" (§ 55). At that point, the Court buttressed its reasoning by expressly referring to **Art. 24(2) EU Charter** and to the **best interests of the child** as requiring, in principle, Art. 6(2) Dublin II Regulation to be interpreted as entrenching the responsibility with "*the Member State in which the minor is present after having lodged an application there*" (§§ 58-60).

Hence, it derived from the **principle of the child's best interests codified in the EU Charter**, coupled with the objective **vulnerability** of unaccompanied minors seeking asylum, not only a prohibition of transfers of unaccompanied asylum seekers back to the Member State of 'first application' but also a twofold procedural **duty** of the Member State in which an unaccompanied minor is present after having lodged an asylum application:

a. to avoid unnecessarily prolonging the procedure for determining the Member State responsible for examining his/her asylum application; and
b. to ensure prompt access to status determination procedures.

The ruling is particularly relevant because it deals with cases in which minor applicants have filed multiple applications for asylum in different EU Member States, thus contravening both the prohibition on secondary movements and that of asylum shopping. In consequence, interpreting Art. 6(2) Dublin II Regulation as requiring their transfer to the Member State of 'first application' would be in line with the foundational goals of the Regulation. Therefore, a

sacrifice of the child's best interests could be *in principle* justifiable in the light of these foundational goals and having regard to the automaticity of Dublin transfers.

However, the EU Court made it clear that such a method of determining the Member State responsible for examining an asylum application lodged by an unaccompanied minor with no member of his family present in the territory of a Member State would be contrary to the objective criterion of the child's best interests (§§59-62). In other words, the latter is conceived of as **an interpretative tool to determine the competent Member State under the Dublin II Regulation** when the international protection of unaccompanied minors is at stake.

At the same time, it framed a '**rule of procedure**' determining the type, duration and specificity of the status determination procedures by imposing a **duty of particular diligence**, consisting in:

- the prohibition of unnecessary transfers,
- swift access to procedures,
- rapidity and promptness of assessment,
- the effectiveness of judicial remedies.

It is worth underlining that the issue at stake in this case was not the scope of EU Member States' discretionary choice to assume responsibility for an asylum claim in derogation to Dublin criteria.[42] Neither was it about the mandatory recourse to the so-called 'sovereignty clause' when it was necessary to halt the transfer of vulnerable asylum seekers in the light of 'systemic flaws' in the reception and asylum system in the Member State responsible.[43] It was instead an interpretation of the criterion concerning the responsibility for minor asylum seekers with no member of their family legally present in the territory of a Member State in the light of the principle of the best interests of the child.

Finally, the EU Court excluded that the ruling in the case at stake would hinder the **principle of mutual trust**, which lies at the very foundation of Dublin cooperation. According to this principle, EU Member States recognize the extra-territorial application of asylum decisions made by other EU Member States. In consequence, an asylum seeker whose application for asylum is **substantively rejected** in one Member State cannot subsequently compel another Member State to re-examine his/her asylum request. Similarly, if the competent Member State deems an asylum application **inadmissible**, a subsequent application lodged with another Member State will be declared inadmissible **provided that it is identical to the first one**.

b. Assessing the Best Interests of Unaccompanied Minor Asylum Seekers under the Dublin III Regulation

The best interests of the child as a primary consideration is expressly foreseen in several recitals of the Dublin III Regulation (13, 16, 24, 35). In addition, relevant provisions on unaccompanied minor asylum seekers are set out in Art. 6 on guarantees for minors and in Art. 8 on the criteria for responsibility allocation in the case of minors.

[42] CJEU, Case C-661/17 *M.A, S.A. and A.Z v International Protection Appeals Tribunal and Others*.
[43] Compare the ECtHR's ruling in *M.S.S. v. Belgium and Greece* to the CJEU's ruling in C-411/10 and C-493/10, *N.S. and M.E. and Others*.

Art. 6 Dublin III Regulation

"(1) The **best interests of the child** shall be a **primary consideration** for Member States with respect to **all procedures provided for in this Regulation**.

(2) Member States shall ensure that a **representative** represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the **best interests of the minor** are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file, including the specific leaflet for unaccompanied minors. This paragraph shall be without prejudice to the relevant provisions in **Article 25 of Directive 2013/32/EU** [on specific guarantees for unaccompanied minors].

(3) In **assessing the best interests of the child**, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;
(b) the minor's well-being and social development;
(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
(d) the views of the minor, in accordance with his or her age and maturity.

(4) For the purpose of applying **Article 8**, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to **identify the family members, siblings or relatives** of the unaccompanied minor in the territory of Member States whilst protecting the **best interests of the child**. […]."

Art. 8 Dublin III Regulation

"(1) Where the applicant is an **unaccompanied minor**, the Member State responsible shall be that **where a family member or a sibling of the unaccompanied minor is legally present**, provided that it is in the **best interests of the minor**. Where the applicant is a married minor whose spouse is not legally present in the territory of the Member States, the Member State responsible shall be the Member State **where the father, mother or other adult responsible for the minor**, whether by law or by the practice of that Member State, **or sibling is legally present**.

(2) Where the applicant is an **unaccompanied minor who has a relative who is legally present in another Member State** and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall **unite the minor with his or her relative** and shall be the Member State responsible, provided that it is in the best interests of the minor.

(3) Where **family members, siblings or relatives** as referred to in paragraphs 1 and 2 stay **in more than one Member State**, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.

(4) **In the absence of a family member, a sibling or a relative** as referred to in paragraphs 1 and 2, the Member State responsible shall be that **where the unaccompanied minor has lodged his or her application for international protection**, provided that it is in the **best interests of the minor**."

As can be seen from the above, the criterion determining the Member State responsible for an asylum request lodged by an unaccompanied minor with no family member legally present in any Member State is foreseen in Art. 8(4) of the recast version of the Regulation.

Apart from the expanded personal scope of family tracing (now covering any relative, as defined in Art. 2(h) of the Regulation), this Article laconically restates the vague formulation of Art. 6(2) Dublin II Regulation, merely adding the final clause "*provided that it is in the **best interests of the minor.***"

To understand why the EU Legislator did not take into account the case law of the CJEU in case C-648/11 *MA, BT, DA*, it should be recalled that the case was pending when the Dublin III Regulation was adopted. However, on account of the probable judicial evolution, the EU Institutions involved in the legislative process agreed to revise Art. 8(4) Dublin III Regulation in the light of the judgement of the EU Court.

Statement by the Council, the European Parliament and the Commission (Dublin III Regulation)

"The Council and the European Parliament invite the Commission to consider, without prejudice to its right of initiative, a revision of **Article 8(4)** of the Recast of the Dublin Regulation once the Court of Justice rules on case **C-648/11 *MA and Others v. Secretary of State for the Home Department*** and at the latest by the time limits set in Article 46 of the Dublin Regulation. The European Parliament and the Council will then both exercise their legislative competences, taking into account the best interests of the child.

The Commission, in a spirit of compromise and in order to ensure the immediate adoption of the proposal, accepts to consider this invitation, which it understands as being limited to these specific circumstances and not creating a precedent."

As a consequence, in 2014 the Commission submitted a proposal for a reform of Art. (8(4) Dublin III Regulation [COM(2014) 382 final]. However, it was repealed by a new proposal [COM(2016) 270 final] presented by the Commission in 2016 in the framework of the so-called European Agenda on Migration [COM(2015) 240 final].

The Commission's proposal for a Dublin IV Regulation expressly allocates responsibility for status determination with the Member State where the unaccompanied minor **first** lodged his or her application for international protection unless it is demonstrated that this is not in the best interests of the minor (Art. 10(5)). The allocation of responsibility to the Member State in which the unaccompanied minor is present after having lodged different asylum requests in other Member States is turned into an exception to the rule. The proposed amendment would oblige the first Member State where the asylum claim is lodged to return the applicant to the first country of asylum, a safe third country or a safe country of origin, if applicable.

A more nuanced solution is proposed by the European Parliament in its Report on the Commission's
Proposal [A8-0345/2017, Amendment 110]. However, the transfer is not outlawed by the pre-eminence of the best interests of the child. Irrespective of this potential future development, EU Member States remain bound by the judgment of the CJEU in C-648/11 *MA, BT, DA*.

c. Assessing the Best Interests of Unaccompanied Minor Asylum Seekers in National Case Law

Pending the reform of the Dublin Regulation, domestic courts have widely referred to the case law of the CJEU in C-648/11 *MA, BT, DA* in cases concerning unaccompanied minors with no family members in any EU Member State.

Emblematic is a case decided in June 2013 by the Austrian Constitutional Court (VfGH) in which it held that – in order to comply with *MA, BT, DA* – Art. 8(4) Dublin III Regulation had to be interpreted as allocating the responsibility for status determination for unaccompanied asylum seekers who have lodged multiple requests to the Member State in which the minors are physically present [U1446-1448/2012]. The Austrian Court extended this reasoning to a case in which the minors had not formally lodged any asylum application in Austria yet, but intended to do so. Indeed, the best interests of the child entailed taking into due account the child's plan to stay in Austria and halting his transfer to Hungary, where he had formerly applied for asylum.

A subsequent decision of the German High Administrative Court of Saarland dated December 2014 [2 A 313/13] confirmed the centrality of the EU Court's decision in *MA, BT, DA*. The case concerned a minor Kurdish-Iraqi national who declared he was born in 1993, he had left Iraq in 2008 and he had lodged an asylum application in Germany in 2010 after having been denied asylum in both Belgium and Finland. In April 2011, the German Federal Office for Migration and Refugees filed a take-back request to Belgium, although it was aware that the minor's brother was legally residing in Germany and had accepted his guardianship in January 2011. This decision was justified by referring to the definition of 'family member' in Art. 2(i) Dublin II Regulation, which did not cover siblings. The minor appealed against the transfer decision seeking annulment and examination of his application under Section 42(1) of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO), and also requested the issue of interim measures pursuant to Section 80(5) VwGO. On appeal against the annulment of the transfer decision, the High Administrative Court affirmed that in the light of *MA, BT, DA* and taking into account the best interests of the child, the responsibility for the minor rested on Germany, although Belgium had accepted the take-back request. Importantly, it recalled that the rejection of an asylum request by a Member State does not preclude another Member State from examining a new asylum request by the same asylum seeker provided that the application is not identical in all its elements.

While in these cases the decisive element in the allocation of responsibility is the jurisprudence of the EU Court of Justice establishing the criterion of the presence of the minor in the territory of the Member States, other domestic courts emphasized the detrimental consequences of a transfer on the minor's well-being and social development as decisive elements substantiating the responsibility of the Member State in which he/she was present. This is the case of the Luxembourg Administrative Tribunal, which in a decision of April 2017 maintained that the fact that a transfer from Luxembourg would impair the child's education prospects and opportunities was crucial in the best interests assessment [app. no. 39131]. In a subsequent decision of the Circle Administrative Court (*Tribunal Administrativo de Círculo*) of Lisbon in November 2017, an administrative decision to transfer an unaccompanied asylum seeker to Germany was invalidated because of its failure to take into due account the best interests of the child since the minor was under the care of the Portuguese Refugee Council and due consideration of the child's best interests would require assessing the impact of the transfer on the minor's well-being and social development [2334/17.5BELSB].

d. Assessing the Best Interests of Unaccompanied Minor Refugees under the Family Reunification Directive

In previous units, we have examined the case law of the EU Court of Justice and national courts relating to the best interests of unaccompanied minor **asylum seekers** within the framework of the **Dublin Regulation**. In addition, the case law of the EU Court offers insights on the assessment of the best interests of unaccompanied minor **refugees** within the framework of the **Family Reunification Directive.**

In preliminary ruling C-550/16 *A. S. v. Staatssecretaris van Veiligheid*, the CJEU was asked to interpret **Art. 2(f)** Family Reunification Directive and define the notion of 'unaccompanied minor' for purposes of family reunification. More precisely, the remitting judge asked the EU Court whether, in matters relating to family reunification for refugees, the term 'unaccompanied minor' extended to third-country nationals who arrived unaccompanied and below the age of 18 but who – having attained the age of majority pending asylum procedures and being granted asylum with retroactive effect to the date of the application – subsequently applied for family reunification with their first-degree relatives in the direct ascending line. The question was relevant because **Art. 10(3)(a)** Family Reunification Directive provides a facilitated regime for the family reunification of unaccompanied minors with their parents, obliging Member States to authorise their entry and stay without applying the conditions laid down in **Art. 4(2)(a)**.

Art. 2(f) Family Reunification Directive

"(f) 'unaccompanied minor' means third-country nationals or stateless persons below the age of eighteen, who arrive in the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States."

Art. 4(2) Family Reunification Directive

"(2) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health."

Art. 10(3) Family Reunification Directive

"(3) If the refugee is an unaccompanied minor, the Member States:

(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);

(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced."

The EU Court had to depart from very different stances by the actors involved in the proceedings:

- the remitting court maintained that the reference date had to be that of the **day of entry of the person concerned into the territory of the Member State**;
- the European Commission interpreted Art. 2(f) as applying from the **day of submission of the application for family reunification**;
- the intervening governments emphasized Member States' discretion and interpreted Art. 2(f) as applying from the **day of the final decision on the application for family reunification**.

The CJ held that Art. 2(f) must be given an **autonomous and uniform interpretation** in the light of the general purpose and objective of the Directive, which is the promotion of family reunification of third-country nationals legally residing in EU Member States. It followed that **national differences in the reference date** at which the condition of being "below the age of 18" must be satisfied would undermine the **uniform application of EU law**.

In addition, it recognized that alongside the above-mentioned general goal, the Family Reunification
Directive also pursues the goal of ensuring **additional protection to minors,** including **specific protection of those who are unaccompanied** by an adult who is responsible for them by law or custom. This is made clear in Art. 10(3)(a) Family Reunification Directive, from which the Court derived a precise **positive obligation on Member States** to which a **subjective right corresponds**, so that **any margin of discretion** is left to them as to whether to accord family reunification to refugees who are unaccompanied minors. Such a conclusion is buttressed by the very nature of the decision qualifying a third-country national as a refugee, which is a **merely declaratory act**, mirroring the fact that whoever fulfils the material conditions laid down in the Qualification Directive has a subjective right to be recognized as having international protection status, the formal decision lacking any constitutive relevance.

As a consequence, the right to family reunification cannot be made dependent on the moment in which national authorities adopt the final decision asserting the status of the person concerned without violating the **principles of equal treatment, legal certainty and effectiveness of EU law**. Indeed, such an interpretation would allow differences in the enjoyment of the right to family reunification by unaccompanied minors of the same age who submitted an asylum application at the same time depending on the duration of the status determination procedures in their respective cases.

The EU Court pointed out that making family reunification dependent on the moment in which national authorities adopt the final decision on the status of the person concerned would allow Member States to **use the discretion afforded by the Directive to slow or accelerate the procedures with a view to meeting political aims** or to curb the enjoyment of the right to family reunification during migratory surges. This would hamper the uniform application of EU law and the principle of equal treatment by **subjecting the success of an application for family reunification to the length of time required by national authorities to decide** on the applicant's protection status. Furthermore, it would create legal uncertainty over the possibility for the refugee minor to have his/her right to family reunification with his/her parents recognized.

On the contrary, the duty of particular diligence deriving from the vulnerability of unaccompanied minors required a swift examination of their applications for international protection and family reunification, as is expressly foreseen in Art. 31(7)(b) Asylum Procedures Directive (§ 43). Therefore, adopting as a reference date for family reunification that in which national authorities adopt the final decision on the status of the minor would frustrate "***the objective pursued both by that directive and by the Family Reunification Directive (recital 2 and article 5(5)) and the Qualification Directive (recitals 18-19) of ensuring that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interest of the child is in practice a primary consideration for Member States in the application of those directives***" (§ 58).

In conclusion, the reference date to assess the age of a refugee minor who is unaccompanied is that of the **day on which the applicant lodged the application for international protection**. The EU Court explained that the date in which the minor enters the territory of a Member State cannot be claimed to be the reference date, since **requests for international protection and family reunification are tightly interlinked so that the former is a pre-requisite for the attainment of the latter**. In addition, it required the application for family reunification to be submitted within a reasonable time, which it considered to be a period of **three months departing from the recognition of refugee status**.

Casesheet No. 7 – The responsibility for status determination of unaccompanied minors with no family member legally present in any Member State under the Dublin Regulation

Reference case

- CJEU (Fourth Chamber), judgement of 6 June 2013, *The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department*, Case C-648/11

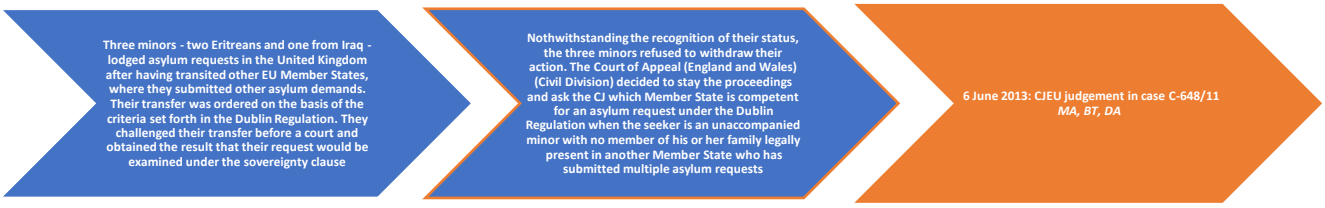
1. Core issues

For the first time, the CJ held that Article 6(2) of the so-called 'Dublin II Regulation' ought to be interpreted as precluding the Member State in which an unaccompanied minor is present – after having lodged an application there – from transferring him/her to another Member State in which the unaccompanied minor has lodged his/her 'first application.' From the best interests of the child the CJ derived a duty to avoid unnecessarily prolonging the procedure for determining the Member State responsible (negative obligation) and to ensure that unaccompanied minors have prompt access to status determination procedures (positive obligation).

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• United Kingdom • Italy • The Netherlands	• Area of Freedom, Security and Justice • Common European Asylum System • Dublin Regulation	• Article 67 TFEU • Article 78 TFEU • Article 24 CFREU • Article 6(2) Regulation (EC) No 343/2003	• Court of Appeal (England and Wales) (Civil Division) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Court of Appeal (England and Wales) concerning the interpretation of one of the criteria in the Dublin Regulation	• The CJ ruled that the provision at stake cannot be interpreted in such a way that it disregards the fundamental right of the child's best interests.

3. Timeline



4. Description

a. Facts

Two minors of Eritrean nationality, MA and BT, and a minor of Iraqi nationality, DA, lodged asylum requests in the United Kingdom while being physically present in that Member State. The British authorities could not find any member of their families legally present in another Member State. However, it was established that they had already lodged applications for asylum in other Member States: MA and BT in Italy and DA in the Netherlands. Therefore, these Member States were identified as responsible for their asylum applications under the

so-called 'Dublin II Regulation'[44] and transfer of the minor asylum seekers was ordered by the British authorities.

BT was transferred to Italy in 2009, but successfully challenged the legality of her transfer before the High Court of Justice of England and Wales. Consequently, she was returned to the United Kingdom and granted refugee status. MA and DA were not transferred because, after proceedings before the High Court of Justice, the Secretary of State agreed to use the 'sovereignty clause' in Article 3(2) of the Dublin II Regulation in order to take charge of their asylum claims.[45] All the applicants were invited to withdraw their action but declined to do so.

The three cases were heard together before the national court. The decision of the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) to dismiss the claims was appealed before the Court of Appeal (England and Wales) (Civil Division). Taking into account the lack of clarity in the formulation of the relevant provision in Article 6(2) of the Dublin II Regulation, the Court of Appeal decided to stay the main proceedings and to refer the following question to the CJ for a preliminary ruling:

> '*In Regulation [No 343/2003], where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another Member State has lodged claims for asylum in more than one Member State, which Member State does the second paragraph of Article 6 make responsible for determining the application for asylum?*'

It is worth underlining that the issue at stake in this case was not the scope of the sovereignty clause, *i.e.* the remit of the discretionary power of EU Member States to assume responsibility for an asylum claim in derogation to the Dublin criteria for the allocation of responsibility.[46] Neither was it about the existence and scope of a duty to recur to the sovereignty clause when necessary to provide effective protection to a vulnerable asylum seeker in cases in which the national authorities knew or ought to have known that the seeker had no guarantee of effective access to protection in the responsible Member State according to the Dublin criteria (the so-called 'implied knowledge doctrine'). Instead, the issue was the interpretation of the criterion concerning the responsibility for minor asylum seekers with no member of their family legally present in the territory of a Member State in the light of the principle of the best interests of the child.

b. Reasoning of the CJEU

Article 6 of the Dublin II Regulation allocates the responsibility for examining the application of a minor asylum seeker to the Member State where a member of his/her family is legally present, provided that this is in the best interest of the minor (para. 1). If there is no member

[44] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1). This Regulation lists the criteria for determining the Member State responsible for examining an asylum application lodged in the EU so that the Member State identified according to the Dublin criteria holds exclusive competence for a certain asylum application. Where a third-country national claims asylum in a Member State other than that identified as responsible, the Regulation requires the transfer of the asylum applicant to the Member State responsible. Member States can avoid this transfer by recurring to the 'sovereignty clause' to assume responsibility for an asylum seeker.

[45] Under the sovereignty clause, each Member State may examine an application for asylum even if such examination is not its responsibility under the criteria laid down in the regulation.

[46] See, *e.g.*, ECtHR, Judgment [GC] of 21 January 2011, *M.S.S. v. Belgium and Greece*, No. 30696/09, paras. 339-340. See also CJEU, Judgment [GC] of 21 December 2011, *N.S. v. Secretary of State for the Home Department (United Kingdom)* and *M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C493/10, para. 99, on the relative nature of the presumption of equivalent protection of fundamental rights among EU Member States.

of the minor's family legally present in any Member State, the Member State responsible for examining the application is that in which the minor has lodged his/her application for asylum (para. 2).

However, the Regulation does not specify which rule has to be followed in the case of multiple asylum requests and in particular whether the responsibility for status determination goes to the Member State of 'first application' or that of 'last application.'

In reaching its conclusion, the Court departed from the context and objective of the Dublin Regulation, which seeks to guarantee effective access to an assessment of the asylum applicant's refugee status. It added to this considerations concerning the 'particular vulnerability' of unaccompanied minors and the requirement to effectively guarantee that – in all actions relating to children, whether taken by public authorities or private institutions – the best interests of the child are a primary consideration.

The principle of the best interests of the child plays a key role in balancing the effectiveness of Dublin cooperation with the protection of the fundamental rights of the child. It requires the Member State in which the minor is present to: (i) halt the automatic transfer of the minor to the Member State in which he/she first lodged his/her application; (ii) assume responsibility for the minor asylum seeker's status determination.

In order to understand the relevance of the best interests of the child in the Court's assessment, it is worth recalling that the founding *raison d'être* of the Dublin Regulation was to establish an intergovernmental cooperation mechanism aimed at limiting asylum shopping by allocating the default responsibility for status determination to the Member State in which the applicant first lodged his/her request. Therefore, although the provision in Article 6(2) of the Dublin II Regulation does not put it straightforwardly, the CJ could infer by analogy that the competent Member State was that in which the minor first lodged his/her request (see Article 5(2) of the Dublin II Regulation).

The CJ ensured the compatibility of its balancing exercise with the *raison d'être* of the Dublin Regulation by reiterating that the duty to assume responsibility for the status determination of unaccompanied minor asylum seekers who are present and have lodged an application in a Member State does not impinge on 'negative' mutual recognition of Dublin decisions. As a result, an unaccompanied minor – whose application for asylum is substantively rejected or declared inadmissible in one Member State – cannot subsequently lodge an application that is identical in another Member State and have it assessed by the latter.[47]

5. Analysis

a. Role of the Charter

In principle, the situation in which a minor asylum seeker with no family member legally present in any Member State lodges multiple asylum requests in different EU Member States is not expressly regulated by Article 6(2) of the Dublin II Regulation. In addition, express mention of the best interest of the minor is only made in the first paragraph of this Article. However, unaccompanied minors form a category of particularly vulnerable persons that, as a rule, should not be transferred from one Member State to another for purposes of status determination (para. 55). This consideration is inferred from the fact that the Dublin Regulation falls within the scope of EU law and therefore the Charter applies (para. 56). It follows from the obligation to respect the fundamental rights and principles enshrined in the Charter that

[47] The CJ interprets the notion of "identical applications" for purposes of inadmissibility, *ex* Article 25(2)(f) of the Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326; 13 December 2005, pp. 13-34).

Member States must respect the principle set out in Article 24(2) of the Charter when enforcing the Dublin Regulation.

As the Advocate General stated:

> *"an all-inclusive interpretation of Article 6 should be attempted, whereby the scheme of Regulation No 343/2003 is integrated with the principles derived, in particular, from the Charter, thereby expressly reflecting the child's best interests in Article 24(2) of the Charter […] In this regard, the minor's best interests, referred to throughout the Regulation, must constitute the basis for interpreting Regulation No 343/2003 and, consequently, where a number of different applications for asylum overlap, this should in principle be resolved in favour of the most recent application, assuming that this enables the minor's best interests to be established most effectively."*[48]

On the same wavelength, the CJ reiterated that in all actions relating to children, whether taken by public authorities or private institutions, the best interests of the child are to be a primary consideration (paras. 57-58). Hence, the CJ derived from Article 24(2) in conjunction with Article 51(1) of the Charter that the best interests of the child must also be a primary consideration in all decisions adopted by Member States on the basis of the second paragraph of Article 6 (para. 59).

According to the Court, taking into account the best interests of the child requires that the method of determining the Member State responsible for examining an asylum application lodged by an unaccompanied minor with no member of his family present in the territory of a Member State be based on an objective criterion with a twofold goal: (i) to not prolong unnecessarily the procedure for determining the Member State responsible; and (ii) to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status (paras. 60-62).

b. Judicial dialogue

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

The CJ's ruling in *MA, BT, DA* was pending during the negotiations for a recast of the Dublin II Regulation. As a consequence, the Dublin III Regulation reproduced the same content of Article 6(2) of the Dublin II Regulation in Article 8(4). In the meantime, the recast regulation included a statement inviting the Commission to revise the content of Article 8(4) according to the Court's decision. The text of the statement reads as follows:

> "*The Council and the European Parliament invite the Commission to consider, without prejudice to its right of initiative, a revision of Article 8(4) of the Recast of the Dublin Regulation once the Court of Justice rules on case C-648/11 MA and Others v. Secretary of State for the Home Department and at the latest by the time limits set in Article 46 of the Dublin Regulation. The European Parliament and the Council will then both exercise their legislative competences, taking into account the best interests of the child. The Commission, in a spirit of compromise and in order to ensure the immediate adoption of*

[48] Opinion of Advocate General Cruz Villalón delivered on 21 February 2013, Case C-648/11, *MA, BT, DA v. Secretary of State for the Home Department*, paras. 66-67.

the proposal, accepts to consider this invitation, which it understands as being limited to these specific circumstances and not creating a precedent."[49]

Disregarding this statement, the Commission's proposal for the recast of the Dublin III Regulation[50] expressly allocated responsibility for status determination to the Member State where the unaccompanied minor first lodged his or her application for international protection, unless it is demonstrated that this is not in the best interests of the minor (Article 10(5)).

The allocation of responsibility to the Member State in which the unaccompanied minor is present after having lodged different asylum requests in other Member States was turned into an exception to the rule. The proposed amendment would oblige the first Member State where the asylum claim is lodged to return the applicant to the first country of asylum, a safe third country or a safe country of origin, if applicable.

A more nuanced solution was proposed by the European Parliament in its Report on the Commission's proposal.[51] However, the transfer is not outlawed by the pre-eminence of the best interests of the child.[52] Irrespective of this potential future development, EU Member States remain bound by the judgment of the Court in the *MA, BT, DA* case.

d. Additional relevant cases

CJEU

- judgment of the Court (First Chamber) of 15 September 2011, *Unió de Pagesos de Catalunya v. Administración del Estado*, C-197/10
- judgment of the Court (Grand Chamber) of 12 October 2010, *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. mbH*, C-45/09
- judgment of the Court (Third Chamber) of 5 October 2010, *J. McB. v. L. E.*, C-400/10
- judgment of the Court (Third Chamber) of 23 December 2009, *Deticek*, C-403/09 PPU
- judgment of the Court (Fourth Chamber) of 29 January 2009, *Migrationsverket v. Edgar Petrosian and Others (UP)*, C-19/08
- judgment of the Court (Second Chamber) of 20 January 2005, *Rosa García Blanco v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, C-225/02
- judgment of the Court (Sixth Chamber) of 12 March 1998, *Ourdia Djabali v. Caisse d'allocations familiales de l'Essonne*, C-314/96

[49] 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, OJ L 180, 29.6.2013, p. 31–59, p. 59.

[50] Proposal for a Regulation of the European Parliament and of the Council 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 (recast), COM(2016) 270 final, 4.5.2016 2016/0133(COD), Article 3(3).

[51] Report on the proposal for a regulation of the European Parliament and of the Council 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 (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Cecilia Wikström, A8-0345/2017, 6.11.2017.

[52] *Ibid.*, Amendment 110: "In the absence of a family member or a relative as referred to in paragraphs 2 and 3, and if no other criteria set out in Chapters III and IV, in particular Article 19, apply, the Member State responsible shall be determined by the allocation mechanism set out in Chapter VII, provided that the minor is always granted the choice among the Member States of allocation in accordance with Article 36(1c). Any decision on the Member State responsible should be preceded by a multidisciplinary assessment of the best interests of the minor, including in the case of allocation."

National decisions

A) Interpretation of Article 8(4) of the Dublin III Regulation (procedural impact of the best interests of the child)

- **Austrian Federal Administrative Court, Decision of 5 May 2017, W242 2138529-1**

The Court held that in order to comply with the ruling of the CJEU in *MA, BT, DA*, Article 8(4) of the Dublin III Regulation must be interpreted as allocating the responsibility for status determination for unaccompanied asylum seekers who have lodged multiple requests to the Member State in which the minor is physically present. The Austrian Court maintained that this is also the case also when the minor has not lodged any asylum application in Austria yet, since the decisive criterion to comply with the principle of the best interests of the child is that responsibility must be allocated to the Member State in which the minor is. This excluded the transfer of the child to Hungary where he had applied for asylum since it was not in the best interests of unaccompanied children to be sent back to Hungary under the Dublin Regulation.

- **Austrian Federal Administrative Court, Decision of 21 July 2017, W153 2162325-1**

The case concerned two siblings, an adult and a minor, who applied for asylum together in Austria after having transited via Portugal. According to Article 2(j) of the Dublin III Regulation, it is for national legislation to define who the legal representatives of an 'unaccompanied minor' are for Dublin purposes. In Austrian law, the legal representatives are by rule parents or guardians, while for siblings to act as legal representatives a court order is required. In the case at stake, this order was lacking and therefore the minor was qualified as an unaccompanied minor with no family member legally present in any Member State. This qualification brought the case of the minor within the scope of Article 8(4) of the Dublin III Regulation, allocating to Austria the responsibility for his asylum request. On the contrary, the minor's adult sibling should have been transferred to Portugal in the light of the Dublin criteria. However, the Austrian Federal Administrative Court considered that such a transfer would disproportionally impact the minor's right to private and family life enshrined in Article 8 ECHR. Therefore, the Austrian authorities were required to act under the discretionary clause in Article 17(1) of the Dublin III Regulation to take charge of the application by the minor's adult sibling and refrain from transferring the latter to Portugal. As a consequence, the Court quashed the Austrian authorities' decision to send the minor's adult sibling back to Portugal and – by virtue of Article 11 of the Dublin III Regulation – to deflect to the same Member State of first entry the responsibility for the minor.

- **Austrian Constitutional Court (VfGH), decision of 29 June 2013, U1446-1448/2012**

The case concerned three third-country nationals, an adult brother and his two minor sisters, who lodged a first asylum application in Hungary and subsequently a new one in Austria, maintaining that the two minors had been separated from the adult brother in Hungary. In consultations between Austria and Hungary ex Article16(1)(c) of the Dublin II Regulation, the latter accepted to take back the applicants and to keep them together. Their asylum application was therefore rejected by the Austrian authorities, which issued a transfer decision to Hungary following an Austrian District Court decision declaring that the full age brother was the person entitled to custody of his minor sisters. On failure in appeal against the transfer decision to the Asylum Court, the applicants brought the case to the Austrian Constitutional Court. The latter reverted the decision of the Asylum Court on the ground that the judgment of the CJEU in case

C-648/11 (MA and others) required responsibility for asylum applications by unaccompanied minor refugees to be allocated to the Member State in which they are physically present after having lodged an asylum application and therefore the responsibility for the minor sisters was clearly Austria's. In addition, respect for the duty to protect family life *ex* Article 8 ECHR would require the Austrian authorities to recur to the discretionary clauses in Dublin II Regulation to also assume responsibility for the adult brother, thus filling the gap in the definition of 'family member' in Article 2(i) of the Dublin II Regulation, which did not cover siblings. Only in this way could the Austrian decision be compatible with the substantive right to family life and the best interests of the child.

- **German High Administrative Court of Saarland, decision of 9 December 2014, case no. 2 A 313/13**

The case concerned a minor Kurdish-Iraqi national whose declared date of birth was 1993, who claimed to have left Iraq in 2008 and to have lodged an asylum application in Germany in 2010 after having been denied asylum in both Belgium and Finland. In April 2011, the German Federal Office for Migration and Refugees filed a take-back request to Belgium, although it was aware that the minor's brother was legally residing in Germany and had accepted his guardianship in January 2011. The minor appealed against the transfer decision and sought annulment and examination of his application under Section 42(1) of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO) and also requested the issue of interim measures pursuant to Section 80(5) VwGO. On appeal against the annulment of the transfer decision, the High Administrative Court affirmed that in the light of the CJ's judgment of 06.06.2013 in case C-648/11 and the best interests of the child the responsibility for the minor rested on Germany, although Belgium had accepted the take-back request. It added that the rejection of an asylum request by a Member State does not preclude another Member State from examining a new asylum request by the same asylum seeker provided that the application is not identical in all its elements.

B) Substantive content of the best interests of the child within the remit of the Dublin procedures

- **Luxembourg Administrative Tribunal, Application no. 39131, 21 April 2017**

The Tribunal maintained that the Member State responsible for an asylum application by an unaccompanied child is that where the minor is present after having lodged an application for international protection. Among the reasons accounting for the assessment of what is in the best interests of the child, the Tribunal paid great attention to the fact that a transfer from Luxembourg would impair children's education prospects and opportunities.

- **Circle Administrative Court (Tribunal Administrativo de Círculo, TAC) of Lisbon (Portugal), Decision of 24 November 2017, 2334/17.5BELSB**

The Court invalidated an administrative decision to transfer an unaccompanied asylum seeker to Germany for failure to take into due account the best interests of the child. The minor was under the care of the Portuguese Refugee Council and due consideration of the best interests of the child would require assessing the impact of the transfer on the minor's well-being and social development.

Casesheet No. 8 – The relationship of dependency of Minor Refugees with family members legally present in a Member State on Relatives who are asylum seekers under the Dublin Regulation

Reference case

- CJEU (Grand Chamber), Judgement of 6 November 2012, *K v. Bundesasylamt*, C-245/11

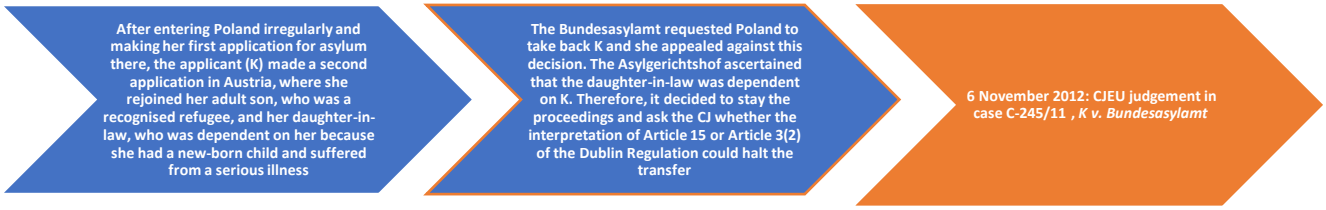
1. Core issues

For the first time, the CJ interpreted the words 'another relative' in the so-called 'humanitarian clause' in Article 15(2) of the Dublin II Regulation as extending *ratione personarum* to the daughter-in-law and the minor grandchildren of an asylum seeker. Such an interpretation is broader than the notion of 'family member' in Article 2(i) of the Dublin II Regulation, which covers the spouse of the asylum seeker or his/her unmarried partner in a stable relationship, the asylum seeker's minor children, if unmarried and dependent, and the asylum seeker's guardian when he/she is minor and unmarried.

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Austria • Poland	• Area of Freedom, Security and Justice • Common European Asylum System • Dublin Regulation	• Article 67 TFEU • Article 78 TFEU • Article 24 CFREU • Article 15(2) Regulation (EC) No. 343/2003	• Bundesasylamt (Austrian Federal Asylum Office) • Asylgerichtshof (Austrian Asylum Court) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Asylgerichtshof, concerning interpretation of the humanitarian clause in the Dublin Regulation	• The CJ found that the national practice at issue was in contrast with Article 15(2) of the Dublin II Regulation.

3. Timeline



4. Description

a. Facts

The applicant, K, was an asylum seeker who made an unauthorised crossing of the Polish border and lodged her first asylum request in Poland. Then, she made a secondary movement to Austria in order to reach one of her adult sons who had obtained recognition of his refugee status there along with his spouse and their minor children. In Austria, K made another asylum claim, but the Austrian Federal Asylum Office (the Bundesasylamt) rejected it on the grounds that the Member State responsible for examining that application was the Republic of Poland. K appealed against this decision before the Austrian Asylum Court (the Asylgerichtshof). The Asylgerichtshof acknowledged that K's daughter-in-law and grandchildren were dependent on

the applicant. This was also due to an illness of his son's spouse, which was linked to a serious and traumatic event that occurred in a third country and that had to be kept secret from male members of the family to preserve the victim from violent reactions on account of cultural traditions seeking to re-establish family honour. In addition, K was recognised as having appropriate professional skills to support her daughter-in-law and grandchildren and to be willing to do so. Having said that, the Asylgerichtshof held that the responsible Member State for K's application was in principle Poland, in the light of the criteria set forth in the Dublin Regulation.[53] However, it pointed out that in the circumstances of the case at stake application of the discretionary clauses in Articles 15[54] and Article 3(2)[55] should be carefully considered. In particular, the Austrian Asylum Court framed the so-called 'humanitarian clause' in Article 15(2) as a *lex specialis* taking precedence over general rules on responsibility for minors and family applications in Articles 6 to 14 of the Dublin II Regulation. In addition, it structured the so-called 'sovereignty clause' in Article 3(2) of Regulation No 343/2003 as subsidiary to the result of the humanitarian clause, inferring from the latter an obligation on Member States to retain responsibility on humanitarian grounds in cases such as that at stake.
With a view to obtaining the correct interpretation of the discretionary clauses in the principal case, the Asylum Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 15 of Regulation No 343/2003 be interpreted as meaning that a Member State prima facie not responsible for examining the asylum claim of a person in accordance with the rules of Articles 6 to 14 of that regulation becomes automatically responsible if in that country the asylum seeker has a daughter-in-law who is seriously ill and, on account of cultural factors, at risk or has grandchildren below the age of majority who, as a result of the daughter-in-law's illness, are in need of care and the asylum seeker is both willing and able to support her daughter-in-law and grandchildren? Does the same apply even if the Member State prima facie responsible has not made a request in accordance with the second sentence of Article 15(1) of Regulation No 343/2003?

(2) Must Article 3(2) of Regulation No 343/2003 be interpreted as meaning that in the circumstances mentioned in Question 1 the Member State prima facie not responsible becomes automatically responsible if the responsibility otherwise provided for by Regulation No 343/2003 will result in an infringement of Article 3 or Article 8 of the [ECHR] (Article 4 or Article 7 of the [CFR])? In that case, in the accessory interpretation

[53] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1). This Regulation lists the criteria for determining the Member State responsible for examining an asylum application lodged in the EU, so that the Member State identified according to Dublin criteria holds the exclusive competence for a certain asylum application. Where a third-country national claims asylum in a Member State other than that identified as responsible, the Regulation requires the transfer of the asylum applicant to the Member State responsible. Member States can avoid this transfer by recurring to the 'sovereignty clause' to assume responsibility for an asylum seeker.
[54] According to this article, "(1) Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent. (2) In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin. […] (4) Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it."
[55] According to this article, "each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

and application of Article 3 or Article 8 of [that Convention] (Article 4 or Article 7 of the [Charter]), may more extensive notions of "inhuman treatment" or "family," at variance with the interpretation developed by the European Court of Human Rights, be applied?'

b. *Reasoning of the CJEU*

In *K,* the CJ was asked to clarify the nature and functioning of the discretionary clauses contained in the Dublin II Regulation with reference to the state of dependency of a minor and his refugee mother on an in-law relative whose asylum request fell under the responsibility of a Member State which was different from that where the dependent relatives were legally residing.
The Court held that when a person enjoying asylum in a Member State is affected by serious illness or handicap or has children below the age of majority – and those conditions make him/her dependent on a relative whose asylum application would fall in principle within the responsibility of another Member State – the Member State in which the asylum seeker is present to assist his/her relatives "*is obliged [under Article 15(2) of the Dublin II Regulation] to take charge of an asylum seeker, becom[ing] the Member State responsible for the examination of the application for asylum*" (para. 47). The Court derived the existence of an obligation to exercise Member States' discretionary right to take responsibility for an asylum seeker for purposes of family unity from a teleological reading of the adverb 'normally' in Article 15(2).
The Court also inferred from the so-defined duty to take responsibility for an asylum seeker who has reunited with his/her refugee relatives by unauthorised secondary movement that the same Member State is responsible to inform the Member State previously responsible that it is doing so, even where the latter Member State has not made a request to that effect in accordance with the second sentence of Article 15(1).

The Court provided a broad interpretation of the notions of 'dependency' and 'family' within the remit of Article 15(2) of the Regulation. First, contrary to the Advocate General's opinion,[56] it included within the scope of this article both the situation in which the asylum seeker is dependent on the refugee relatives who are legally residing in the Member State which is obliged to take responsibility and that in which the refugee relatives are dependent on the asylum applicant (as in the case at instance). This was because Article 15 of the Regulation has the purpose of bringing families together regardless of the direction the dependency takes.

Second, by reading Article 15(2) together with Articles 6-8 of the Regulation, the CJ included within the scope of Article 15(2) two different situations: (i) that in which the state of dependency regards a 'family member' within the meaning of Article 2(i) of the Dublin II Regulation; and (ii) that in which the state of dependency concerns a person who, not being a 'family member' within the meaning of Article 2(i) of that Regulation, has family ties with the asylum seeker and is a person to whom the asylum seeker can actually provide assistance in accordance with Article 11(4) of Commission Regulation No 1560/2003.[57]

5. Analysis

a. Role of the Charter

[56] Opinion of Advocate General Trstenjak, delivered on 27 June 2012, Case C-245/11, *K*, para. 52.
[57] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Regulation No 343/2003 (OJ 2003 L 222, p. 3), Article 11(4): "The application of Article 15(2) of Regulation (EC) No. 343/2003 shall, in any event, be subject to the assurance that the asylum seeker or relative will actually provide the assistance needed."

The CJ observed that the Dublin Regulation must be interpreted in compliance with the rights, freedoms and principles which are acknowledged in the CFR and in particular with its Articles 1 and 18. However, it declined to answer the referring Court's second question regarding the existence of a duty of automatic assumption of responsibility under Article 3(2) of the Regulation when the transfer of an asylum seeker to the competent Member State (according to the Dublin criteria) is at risk of violating Articles 4 CFR (prohibition on inhuman or degrading treatment) and 7 CFR (protection of private and family life).
On the contrary, this question was addressed by Advocate General Trstenjak in her Opinion in the case at instance. As in her Opinion in *N.S. and Others*,[58] AG Trstenjak recalled that Article 3(2) of the Dublin II Regulation "*is to be regarded, for the purposes of Article 51(1) of the Charter, as a national implementing measure for Regulation No 343/2003, so that in taking such a decision the Member States must comply with the requirements of the Charter"* (para. 63). She then extended this reasoning to the humanitarian clause in Article 15 of the Dublin II Regulation, deriving from the need to comply with the Charter that "*in particular circumstances the Member States may be obliged to exercise their right to examine an asylum application on humanitarian grounds […] if otherwise there would be a serious risk of an unjustified limitation of the asylum seeker's fundamental rights as enshrined in the Charter*" (para. 65).

Although silent on the second question from the referring court, the CJ *de facto* presupposed the same reasoning as that of the AG to reach a twofold conclusion: (a) the discretion afforded to Member States under the humanitarian clause shall be mandatorily used when it is necessary to grant the compatibility of the Dublin Regulation with the CFR; and (b) the effectiveness of fundamental rights in the light of the CFR requires Member States to ensure that families are 'brought' together but also that they are 'kept' together under Article 15 of the Dublin II Regulation.

b. Judicial dialogue

Vertical interaction between national courts and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

The CJ's ruling in *K negatively* affected the recast of the Dublin II Regulation. Indeed, the scope of the clause on dependency in Article 15(2) of the Dublin II Regulation was narrowed down *ratione personarum* to just parent, child or sibling in Article 16(1) of the Dublin III Regulation.[59] However, since Article 16(1) reiterates the aim to '*normally keep or bring together*' dependent family members with the rest of the family – as in Article 15(2) of the Dublin II Regulation – the broad interpretation of the notion of 'dependency' in *K* can still apply to Article 16(1) of the Dublin III Regulation, thus making it irrelevant whether the dependent person is the asylum seeker or the recognised refugee. The same applies to the positive obligations of Member States, which are obliged – in the situations to which the provision applies – not only to bring family members together but also to act in a way that keeps them together.

[58] Opinion of 22 September 2011 in Case C-411/10 *N. S. and Others* [2011] ECR I-13905, paragraph 69 *et seq*.
[59] 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, OJ L 180, 29.6.2013, p. 31–59. It should be noted that Article 16(1) is not a transposition of the humanitarian clause, which is instead reproduced in Article 17(2) of the Dublin III Regulation. It is turned into a binding criterion for the allocation of responsibility based on the right to family unity and family reunion, along with Articles 8-11.

Apart from narrowing the scope of the provision on dependent persons, the Dublin III Regulation expands the notion of 'family member' applicable to Articles 8-11 (Article 2(g))[60] and that of 'relative' of unaccompanied minors (Article 2(h)).[61] The Regulation also extends the procedural guarantees safeguarding minors' right to family unity and family reunion during Dublin transfers. They include the right to have personal declarations on the presence of family members duly considered and the possibility of challenging the transfer decision if this is not the case.[62] They also include an obligation of the Member State in which the applicant is present to produce the evidence relating to the presence of family members, relatives or 'any other family relations'[63] in another Member State *before* the requested Member State accepts responsibility for the applicant.[64]

It is worth underlining that the right to family unity and family reunion are deemed primary considerations when assessing the best interests of the child (Article 6(3)(a)), in line with Article 24(3) of the Charter, according to which '*every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests.*' Similarly, Member States' obligation to identify family members is quite stringent for unaccompanied minors since it is intended to provide enhanced protection to a highly vulnerable category of third-country nationals (Article 6(4) and (5)).

d. Additional relevant cases

CJEU case law concerning the relationship of dependency between third-country national parents and their children who are EU citizens

- judgement of 6 December 2012, *O. and S*., joined cases C-356/11 and C-357/11
- judgement of 10 May 2017 (Grand Chamber), *Chavez-Vilchez*, C-133/15

CJEU case law concerning the assessment of asylum applications lodged by family members

- judgement of 28 June 2018, *Ahmedbekova*, case C-652/16

ECtHR case law concerning the application of Article 8 ECHR to aliens

- judgement of 13 October 2016, *B.A.C. v. Greece*, Application No. 11981/15
- judgement of 10 July 2014, *Mugenzi v. France*, Application No. 52701/09
- judgement of 6 October 2010, *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07
- judgement of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03

[60] This includes the spouse of the applicant or partner in a stable relationship and minor children of the applicant(s), provided they are unmarried. Where the applicant or beneficiary of international protection is a minor and unmarried, family members are defined as the father, mother or another adult responsible for the minor. This definition also applies to married minors without their spouse present in the territory of a Member State. In addition, under Article 11 siblings fall within the definition of family member if they submit applications for international protection in the same Member State simultaneously.

[61] Relatives are defined as an aunt, uncle or grandparent present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined in national law. Family reunion can also apply to a sibling of an unaccompanied minor under Article 8.

[62] Article 4(1)(d) and Article 27.

[63] Recital 17 and 18, Article 4(1)(c) and Article 5. Note that the term "any other family relations" is not defined in the Regulation and whilst it is referred to in Article 7(3) in respect of applying Articles 8, 10 and 16 its relevance only comes to bear in Article 17(2). In the light of the definitions of family member and relative, family relations presumably cover additional relationships, i.e. step relations, cousins, second cousins and in-laws etc.

[64] Article 7(3).

- judgement of 1 March 2006, *Tuquabo-Tekle and Others v. The Netherlands*, Application No. 60665/00
- judgement of 21 December 2001, *Sen v. the Netherlands*, Application No. 31465/96
- judgement of 26 March 1985, *X & Y v. the Netherlands*, Application No. 8978/80
- judgement of 13 June 1979, *Marckx v. Belgium*, Application No. 6833/74

National decisions

A) Right to family unity and family reunion in the light of the best interests of the child

- **UK Upper Tribunal, Immigration and Asylum Chamber, Judicial Review Decision Notice of 22 January 2016, *R (on the application of ZAT and Others) v. Secretary of State for the Home Department (Article 8 ECHR – Dublin Regulation – interface – proportionality)*, IJR [2016] UKUT 00061 (IAC)**

The case concerned four minor asylum seekers living in the 'jungle' of Calais and wishing to reunite with their siblings in the UK after having lodged an asylum application with the French authorities.

"(33) The contours of the applicants' challenge are susceptible to the following summary. First, their succinct riposte to the Secretary of State's refusal is that, in the circumstances prevailing, the Dublin Regulation procedures are quite inadequate to provide the practical, expeditious and effective protection which the first four applicants need. Second, the applicants contend that Article 8 ECHR gives rise to a positive obligation on the part of the United Kingdom to admit the first four applicants to its territory and, in this context, they also rely on its mirror provision in the EU Charter of Fundamental Rights, Article 7. Third, it is contended that the Secretary of State's refusal to act infringes the general public law duties of reasonableness and proportionality and, further, is incompatible with the domestic 'best interests' duty. Finally, the applicants contend that the Secretary of State's refusal is in breach of her published policy. We shall examine each of these grounds seriatim.

(34) The fundamental contention advanced is that the Secretary of State is under a present legal duty to admit each of the first four applicants to the United Kingdom. The applicants' pleaded case, as outlined above, has four distinct elements. However, Mr Fordham QC, representing all of the applicants, positioned the Article 8 ECHR challenge at the heart of their case. In doing so, while not expressly abandoning any of the other three grounds, he was disposed to acknowledge that if the Article 8 challenge does not succeed, realistically none of the other grounds will do so. Thus the question for this Tribunal becomes: does fulfilment of the right to respect for family life enjoyed by all seven applicants under Article 8 ECHR oblige the Secretary of State to admit the first four applicants to the United Kingdom now?

(35) Mr. Fordham reminded us of how what he termed the 'exit' human rights principle operates under the scheme of the Dublin Regulation. This is illustrated in *EM (Eritrea)* [2014] AC 1321. The context was a decision to remove the claimants, all third-country nationals, from the United Kingdom to Italy. The Supreme Court, allowing the claimants' appeals, stated, at [58], per Lord Kerr of Tonnaghmore JSC:

'*I consider that the Court of Appeal's conclusion that only systemic deficiencies in the listed countries asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in Soering v United Kingdom [1989] 11 EHRR 439. The removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown*

that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR.'

In thus deciding, the Supreme Court acknowledged one of the essential underpinnings of the Dublin Regulation, namely (per Lord Kerr) a "presumption that members of an alliance of states such as those which comprise the European Union will comply with their international obligations": see [40].

(41) Mr. Fordham sought to draw the parallel with the Secretary of State's insistence that the first four applicants can enter the United Kingdom via the Dublin Regulation process only, thereby subjecting them to a lengthy period of delay of uncertain proportions, continued exposure to the appalling conditions in 'the jungle' in the short term, persisting mental anguish having a further detrimental impact on their already significantly damaged mental states and, throughout most of the period, being accommodated in 'Reception Directive' conditions bearing no realistic comparison with the immediate family life which would be restored with their siblings if returned to the United Kingdom forthwith. On to this is grafted the contention that the United Kingdom siblings have refugee status in this country, all have residence cards and two are in gainful employment. The final limb of this discrete submission that if the first four applicants were compelled to remain in France and pursue Dublin Regulation applications there, they are very strong candidates for the making of a 'take charge' request by France to which the United Kingdom will eventually accede.

(42) The submissions of Mr. Manknell on behalf of the Secretary of State highlighted that the applicants' presence in France is unlawful, they are not asylum claimants, they do not have the status of refugees, they have made no application for entry clearance to the United Kingdom under a combination of Article 8 ECHR and the Secretary of State's reunification policy and they have chosen not to invoke the mechanisms of the Dublin Regulation. As a result, he argued, they have excluded themselves from enjoyment of the better living conditions which would materialise were they to do so.

(49) As we have already noted, in EM (Eritrea) the Supreme Court held that the systemic deficiencies threshold does not supplant or trump, but coexists with, the Soering principle. In short, the Dublin Regulation exists and operates alongside the ECHR and, in the United Kingdom, the Human Rights Act 1998. In passing, while the Supreme Court reached this decision by reference to the test formulated by the CJEU in *R (NS-Afghanistan) v. Secretary of State for the Home Department* (Joined Cases C-411/10 and C-493/10) [2013] QB 102, the consideration that the CJEU subsequently framed the applicable test in *Abdullahi* in slightly different terms is not an issue which we have to resolve in these proceedings.

(50) It is not suggested, correctly in our view, that either of these regimes has any inherent value or status giving one precedence over the other. They are not in competition with each other. However, as this litigation demonstrates, they may sometimes tug in different directions. Where this occurs full cohesion, or harmonisation, is unlikely to be achievable and some accommodation, or compromise, must be found.

(52) What is the correct approach to the Dublin Regulation in a case of this kind? We consider that the Dublin Regulation, with its rationale and overarching aims and principles, has the status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare.

(55) What are the ingredients and factors in the proportionality equation which are said to tip the balance in favour of the applicants? These are rehearsed in extenso in [8] – [23] above. Subject to the qualification that any attempted summary is likely to be inadequate, they are age, particularly as regards the first three applicants; mental disability, as regards the fourth applicant; accrued psychological damage, as regards all of the first four applicants; the clear likelihood of further psychological turmoil and disturbance, in the event of the best case scenario a Dublin Regulation process delay of almost one year materialising; the previous family life in their country of origin enjoyed by all seven applicants, in their various permutations; the pressing and urgent need for family reunification on the very special facts of these cases; the wholly inadequate substitute for family reunification which pursuit of the Dublin Regulation avenue would entail in the short to medium term; the absence of any parent or parental figure in the lives of the first four applicants; the potential for the re-establishment of the various combinations of family life to be realised very quickly indeed in the event of the first four applicants being permitted to enter the United Kingdom; the availability, willingness and capacity of the last three Applicants to provide meaningful care and support to the first four; and the avoidance of the mentally painful and debilitating fear, anxiety and uncertainty which the first four applicants will, predictably, suffer if swift entry to the United Kingdom cannot be achieved.

(56) Turning to the legitimate aim side of the scales, we reiterate our assessment that strict and full adherence to the Dublin Regulation regime forms a major component of the overarching public interest engaged, namely the State's entitlement to impose effective controls on the admission of aliens to the territory of the United Kingdom and, given the CEAS dimension and all of its characteristics, qualifies as a potent factor in the proportionality balancing exercise. The aim in play was formulated by Lord Bingham of Cornhill in *R (BAPIO Action Limited) v. Secretary of State for the Home Department* [2008] UKHL 27, at [4], in these terms: '*It is one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory, and to regulate and enforce the terms on which they may do so*.'

(57) […] While mindful of the operation of the margin of appreciation, or discretionary area of judgment, in every exercise of this kind, we note, as did Lord Wilson in Quila (supra), at [46], that the refusal decisions of the Secretary of State impugned in these proceedings are not imbued with any 'special sources of knowledge and advice.' Similarly, we take into account, as did the Court of Appeal recently in *R (Sehwerert) v Secretary of State for the Home Department* [2015] EWCA Civ 1141, at [46], that lesser weight is to be accorded to the Secretary of State's assessment of the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the Dublin Regulation embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case-by-case basis. As the pre-proceedings correspondence and the Secretary of State's pleaded defence make clear, the platform upon which the Secretary of State has contested these proceedings is quite unrelated to the individual circumstances, needs and merits of any of the seven applicants.

(58) We are satisfied that the Secretary of State's refusal to permit the swift admission to the United Kingdom of the first four applicants would interfere disproportionately with the right to respect for family life under Article 8 ECHR enjoyed by all seven applicants if the first four applicants could properly be seen as claimants to refugee status who, because of the operation of the Dublin Regulation, are able to have their claims determined in the United Kingdom where their siblings are. In their cases, the negative aspects of pursuing a full-blown Dublin Regulation claim in France would detrimentally affect all seven applicants in the manner set forth in [55] above. The sole difficulty then is that having as yet made no claim, the first four applicants' present status is not that of persons seeking asylum. Rather, they are family

members simpliciter. Having prepared the scales in the manner outlined above, our conclusion is that the balance tips in favour of the applicants provided that they are prepared to set in motion their asylum claims processes in France. The order we make achieves an accommodation between the two legal regimes in play. It strikes an appropriate balance by preserving the general structure of the CEAS and the Dublin Regulation principles in particular, while simultaneously ensuring that once a claim by any of the first four applicants has been made the administration of the CEAS will not be permitted to interfere disproportionately with the Article 8 rights of that applicant or his family member."

NB: This decision was successfully appealed before the UK Court of Appeal (Civil Division), judgement of 02 August 2016, [2016] EWCA Civ 810. The Court of Appeal's judgement clarified that the test elaborated by the Upper Tribunal in *ZAT and Others* was inconsistent with the fact that Article 8 ECHR applies in exceptional circumstances, and neither did it provide evidence of the systemic deficiencies of the French asylum system triggering the assumption of asylum responsibility for the applicants. However, since the Secretary of State was satisfied with the UK responsibility for the applicant, the Court of Appeal did not order the reopening of the case.

- **Upper Tribunal, Immigration and Asylum Chamber, Judicial Review Decision Notice of 29 April 2016, *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v. Secretary of State for the Home Department*, JR/2471/2016**

The case concerned two minors who were trapped in the 'jungle' of Calais and lodged an asylum request. The French authorities determined that the competent Member State under the Dublin criteria was the UK because their mother was regularly residing and holding an indefinite leave to remain in that Member State. However, the take-charge request was refused by the UK Home Office on the grounds that the alleged mother's interview back in 2010 did not confirm the link of motherhood with the minors. On provision of further evidence of the family relationship and further refusals from the UK Home Department without any proactive engagement in finding other ways to ascertain the relationship, an appeal was lodged before the Upper Tribunal for violation of Article 8 ECHR and Article 7 CFR. The Tribunal declared the Secretary of State's erroneous passiveness with regard to the collection of DNA evidence to be in breach of both the Dublin Regulation and the procedural dimension of Article 8 ECHR.

- **Upper Tribunal (Immigration and Asylum Chamber), Judicial Review Notice of Decision of 5 June 2017, *R (on the application of AM (a child by his litigation friend OA and OA) v. Secretary of State for the Home Department (Dublin – Unaccompanied Children – Procedural Safeguards)*, [2017] UKUT 00262 (IAC)**

The case concerned an unaccompanied minor transferred from the 'jungle' of Calais to reception centres across France and denied family reunion with an uncle legally residing in the UK as a refugee on account of inconsistencies in the description of the family relationship between the applicant and his uncle provided during summary expedited procedures by the UK Home Department. The Upper Tribunal ruled that these expedited procedures fell within the scope of the Dublin Regulation and declared the Home Department's failure to act under Article 17 of the Regulation to be in contrast with the procedural rights of the applicant. In addition, it determined the best interests of the child and the ensuing procedural rights with reference to international law sources, the case law on Article 8 ECHR and Article 7 and 24 of the EUCFR and the common law.

"(63) [The UN Committee on the Rights of the Child's General Comment 14 – GC14] is of extensive reach. *Inter alia* it: (i) confirms the central importance of a child's right to family unity including in situations where children are separated from family members as a result of

migration [58], [59], [60] and [66]; (ii) states that where children are defending their interest in court proceedings confirming family reunification, the courts must provide for the best interests to be considered in all situations and decisions, whether of a procedural or substantive nature and must demonstrate that they have done so [29]; (iii) recognises the particular vulnerability of asylum-seeking children, with the attendant requirement that their particular vulnerability informs the best interests assessment [75] – [76]. This recognition is consistent with the case law of the Grand Chamber of the Strasbourg court which has held that 'The requirement of "special protection" of asylum seekers is particularly important where the persons concerned are children, in view of their specific needs and their extreme vulnerability' and stressed the importance of ensuring that reception conditions for child asylum seekers must not "create... for them a situation of stress and anxiety, with particularly traumatic consequences"': see Tarakhel at [119]; (iv) confirms that where when a 'best interests determination' is made 'strict procedural safeguards' apply [46]; and (v) emphasises that facts and information relevant to a particular case must be obtained in order to draw up all elements necessary for a best interests assessment, an exercise which could include interviewing relevant persons [92].

(64) GC14 has been held to rank as authoritative guidance as to the content of that right: *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at [105] – [106], approved in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 at [39]. In *Mathieson* Lord Wilson (giving the judgment of the Court) adopted the threefold concept of best interests set out at [6] of GC14, at [39]: 'The first aspect of the concept is the child's substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a rule of procedure, described [in General Comment No. 14] as follows: whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned … Furthermore, the justification of a decision must show that the right has been explicitly taken into account …'

(114) Our conclusion on the correct legal characterisation of the Secretary of State's expedited process has the following consequences in particular: (i) By failing to give full effect to the Dublin Regulation and its sister measure, the Secretary of State acted unlawfully. (ii) AM was in consequence unlawfully deprived of a series of procedural safeguards and protections. (iii) AM's subsequent quest for admission to the United Kingdom under Article 8 ECHR cannot be defeated on the basis that he did not first attempt to secure the same outcome under the formal processes of the Dublin regime. It follows that the applicant has established the foundations for the grant of a remedy in these proceedings.

(115) As we shall explain infra, if we are wrong in our conclusion relating to the Dublin Regulation, the decision that the Secretary of State was acting in a procedurally irregular and unfair manner and, hence, unlawfully and the assessment that AM thereby has a basis for the grant of a remedy is made by either or both of two alternative legal routes, namely the procedural dimension of Article 8 ECHR and the common law. Thus, if this aspect of the decision of the Court of Appeal in ZT (Syria) is to be construed narrowly, confined to the straightjacket of the Dublin Regulation regime, AM can have resort to either or both of two alternative routes to the grant of a remedy."

NB: This decision was successfully appealed before the UK Court of Appeal (Civil Division), judgement of 31 July 2018, [2018] EWCA Civ 1815.

- **UK High Court of Justice (Family Division), judgement of 24 April 2017, *F v M and A (a child) and Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants (Interested Party)*, [2017] EWHC 949 (Fam)**

The case concerned a Pakistani mother and her minor son who sought refuge in the UK, escaping from a violent husband and father. After the Home Department had, separately, recognised refugee status, a Family Law Court ordered the minor to be returned to the home country to be reunited with his father contrary to his will, on the grounds that the father had convincingly denied the allegations of violence by the mother and his child upon which their asylum claims were based. On appeal before the High Court of Justice (Family Division), it was clarified that refugee status constitutes an absolute bar to a family court ordering the return of a recognised refugee. The best interest of the child had been a key element in the evaluation of the asylum claim by the Secretary of State for the Home Department, which is the sole public authority entrusted to deal with asylum matters and apply relevant international, European and domestic law.

- **German Administrative Court of Hannover, decision of 7 March 2016, case No. 1 B 5946/15**

The case concerned a Russian family – the mother and three minor children – which sought international protection in Germany due to fear of persecution for religious reasons, after having transited and being denied protection in France. They escaped with the husband/father, who was arrested for a criminal offence and was serving a prison term of nine years in Germany. Therefore, the applicants found themselves in a precarious situation and the mother had a mental breakdown. The minors were helped by their grandparents, who were German nationals. However, the Federal Office for Migration and Refugees found fingerprinting in EUROCAD demonstrating that France was responsible for their asylum application, asked and obtained France's take-back and issued the applicants a transfer decision under the Dublin Regulation. On appeal, the Administrative Court of Hannover held that the Federal Office had failed to give priority to the best interest of the child and the right to respect for family life in the process determining the competent Member State for the applicants' asylum request. It also added that the discretionary clause in Article 17 (1) of the Dublin III Regulation is intended not only to introduce an element of flexibility concerning relations between the Member States but also to provide an ultimate guarantee of fundamental rights protection when the application of Dublin criteria cannot lead to a solution in line with the CFR. Therefore, it must also be understood as a rule protecting subjective rights which shall apply when so required to preserve the best interests of the child and which can be enforced in a court.

- **The Hague Court (the Netherlands), decision of 9 June 2016, NL 16.1136 and NL 16.1138**

The case concerned the take-back of a child from the Netherlands to Germany, which was the competent Member State for his distant relatives, with whom the child stated he did not feel comfortable. The child had been physically separated from these distant relatives in the Netherlands and put into the care of a Dutch NGO. The Court decided that reuniting him with the distant relatives would be against the Dublin III Regulation because the Dutch authorities had not paid attention to the views of the child when evaluating his best interests, and in particular had failed to assess whether the relatives fell within the scope of Article 2(h) of the Regulation and to examine whether the use of the humanitarian clause in Article 17 would be appropriate in the case.

- **The Hague Court (the Netherlands), decision of 17 October 2017, NL17.9820**

The case concerned the relevance of a child's statements concerning his relations with a sibling in order to determine whether a transfer to the Member State in which the sibling was legally residing would be in his best interest. The minor's brother was legally residing in Switzerland and Article 8(1) of the Dublin III Regulation would be applicable. However, the minor was opposed to being transferred as he had no ties with his brother and no confidence that he would take care of him. The Court determined that the Dutch authorities had failed to undertake an assessment of the applicant's best interests, *inter alia* through its dismissal of the applicant's statements as irrelevant or insufficiently substantiated.

B) Interpretation of discretionary clauses

- **Council of State of the Netherlands, decision of 16 October 2017, 201609676/1/V3**

The case concerned an application for family reunion with a father's adult son by the father and his minor child residing in the Netherlands. The Council of State confirmed the legitimacy of the decision by the national authorities to refuse the reunion due to the lack of dependency between the adult child, his father and his younger brother. The Dublin Regulation cannot be used as a means to obtain residence with a family member on regular grounds since it merely applies in exceptional circumstances triggering the activation of Article 17 of the Dublin III Regulation.

- **High Court of Ireland, decision of 8 November 2017, *M.A. (a minor) v. The International Protection Appeals Tribunal & ors*.[65]**

The case, which was referred to the CJ and is pending, concerns the interaction between the principle of the best interests of the child (Article 6 of the Dublin III Regulation) and the discretionary clause (Article 17 of the Dublin III Regulation). More precisely, the High Court asked the CJ whether the obligation for States to consider the best interests of the child as the primary consideration in all procedures under the Regulation includes the exercise of discretion under Article 17. Other issues referred by the High Court are the following:

"*when dealing with the transfer of a protection applicant under regulation 604/2013 to the UK, is a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU?";*

"does the concept of an effective remedy apply to a first instance decision under art. 17 of regulation 604/2013 such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the regulation should be construed as encompassing an appeal against a decision under art. 17?";

"does art. 20(3) of regulation 604/2013 have the effect that in the absence of any evidence to displace a presumption that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, the national decision maker is not required to consider such best interests separately from the parents as a discrete issue or as a starting point for consideration of whether the transfer should take place?"

[65] Reference for a preliminary ruling from the High Court (Ireland) made on 27 November 2017 – *M.A., S.A., A.Z. v. The International Protection Appeals Tribunal, The Minister for Justice and Equality, Attorney General, Ireland* (Case C-661/17).

Casesheet No. 9 – The right to family life and family reunification of third-country national minors under Directive 2003/86/EC

Reference cases

- CJEU (Grand Chamber), judgement of 27 June 2006, *European Parliament v. Council of the European Union*, case C-540/03
- CJEU (Second Chamber), judgement of 17 July 2014, *Marjan Noorzia v. Bundesministerin für Inneres*, case C-338/13
- CJEU (Second Chamber), judgement of 12 April 2018, *A. S. v. Staatssecretaris van Veiligheid en Justitie*, case C-550/16
- CJEU (Third Chamber), judgement of 7 November 2018, *K. and B.*, case C-380/17

1. Core issues

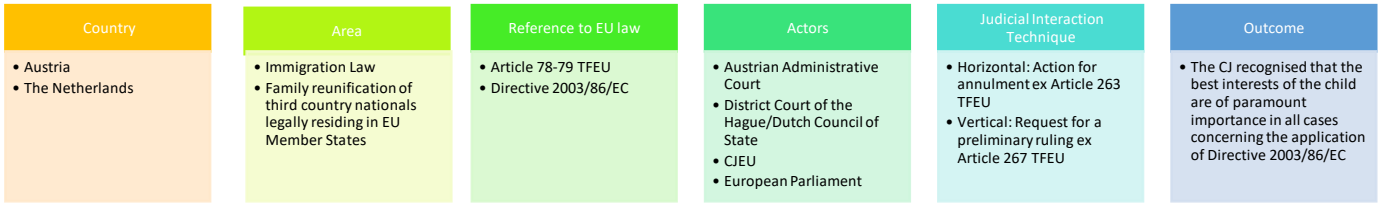
In these cases, the CJ clarified the scope of the so-called 'Family Reunification' Directive, determining the conditions for the exercise of the right to family reunification by a third-country national residing lawfully in the territory of the Member States and, in particular, the legitimate limitations of his/her right to be joined by his/her children.

These cases concerned the scope and content of Member States' discretion vis-à-vis the enjoyment of substantive and procedural rights of third-country nationals under the Family Reunification Directive.

They first delineated the extension of the CJ's jurisdiction over situations raised by national law which make direct and unconditional application of the provisions of the Directive to situations fall beyond its scope. Second, they provided an authentic interpretation of optional clauses and provisions in the Family Reunification Directive providing Member States with a margin of appreciation.

They framed the authorisation of family reunification as the general rule, while interpreting optional clauses strictly to preserve the *effet utile* of the Directive, which is to promote family reunification and the best interests of the child.

2. At a glance



3. Timeline

4. Description

a. Facts

- **<u>European Parliament v. Council of the European Union</u>**

Directive 2003/86/EC (the so-called 'Family Reunification Directive')[66] adopted by the Council imposes precise positive obligations on the Member States which correspond to a defined individual right to family reunification of third-country nationals lawfully living in the Member States. This right is ancillary to the protection of three fundamental rights: the respect for family life, the best interests of children and the prohibition of discrimination on grounds of age.

In cases determined by the directive, the obligation of family reunification of the sponsor's family does not leave any margin of appreciation to Member States, which are compelled to

[66] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, p. 12).

authorise it. However, there are three cases expressly regulated by the directive in which a certain discretion is left to EU Member States as a matter of derogation from the rule.

The first case regards the possibility of verifying whether a child aged over 12 who arrives independently of the rest of his/her family meets a condition for integration (final sub-paragraph of Article 4(1)).

The second case concerns the possibility of limiting the personal scope of family reunification for children to requests submitted before the child reaches the age of 15 (Article 4(6)).

The third case refers to the possibility of delaying the authorisation of family reunification up to three years when the relevant legislation of a Member State in force at the time of adoption of the Family Reunification Directive takes into account the State's reception capacity (Article 8).

According to the European Parliament, these are contrary to fundamental rights – in particular the right to family life and the right to non-discrimination – as guaranteed by the ECHR and resulting from constitutional traditions common to the Member States. Although at the time the Charter was not binding, the Parliament widely referred to it, in particular to its Articles 7, 21(1) and 24(2) and (3).

For these reasons, the European Parliament sought the annulment of the provisions establishing the abovementioned derogations.

- **Marjan Noorzia v. Bundesministerin für Inneres**

Mrs Noorzia was an Afghan national who lodged an application for family reunification with her husband – an Afghan national living in Austria – at the Austrian embassy in Islamabad (Pakistan). The application was rejected because it was submitted before the husband turned 21.

This decision was compliant with one of the conditions set in the Family Reunification Directive for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. This condition is provided in Article 4(5), according to which:

> "*In order to ensure better integration and to prevent forced marriages, Member States may require the sponsor and his/her spouse to be of a minimum age, at maximum 21 years, before the spouse is able to join him/her*".

This provision leaves a margin of appreciation to the national legislator as to whether to require the couple that intends to apply for family reunification to be above the age of 21 and in fact Austrian law requires both the sponsor and spouse to be 21 at the time the application for reunification is submitted.

However, in the case at instance, the husband had turned 21 before the rejection decision was made, i.e. in the lapse of time between the submission and the decision. As a consequence, Mrs Noorzia appealed against the rejection decision and the Austrian Administrative Court (Verwaltungsgerichtshof) considered that it was not clear from the wording of the provision in Article 4(5) that the discretion of Member States extended to cases in which the sponsor had in fact turned the required age pending a decision.

In these circumstances, the Administrative Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

"*Is Article 4(5) of Directive [2003/86] to be interpreted as precluding a provision [of national law] under which spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to family reunification is lodged?*"

- **A. S. v. Staatssecretaris van Veiligheid en Justitie**

The case concerned the right to family reunification of an Eritrean unaccompanied minor who applied for asylum in the Netherlands as a minor but reached the age of majority before the decision on her asylum application.

The applicant was granted refugee status and a residence permit valid for five years with effect from the date on which her application was submitted. Subsequently, she applied for family reunification with her parents (A. and S.) and her three minor brothers. However, the application was rejected on the ground that she was no longer a minor at the date on which the application for family reunification was submitted.

The applicant brought an appeal before the District Court of the Hague, which interpreted Article 2(f) on the definition of 'unaccompanied minor' within the remit of the Family Reunification Directive as in principle extending to all persons who are below the age of 18 at the moment of entry. However, the Dutch Council of State had previously held that the coming of age of a minor in the lapse of time between the entry and the grant of a residence permit should be taken into account when assessing his/her right to family reunification.

Due to the lack of consolidated case law on whether the status of 'unaccompanied minor' for the purposes of the Family Reunification Directive must be determined with reference to the moment in which the applicant enters the territory of the Member State or to that in which the applicant is granted a residence title, the District Court of the Hague decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> "*In matters relating to family reunification for refugees, must the term 'unaccompanied minor' within the meaning of Article 2(f) of [Directive 2003/86] also cover a third-country national or stateless person below the age of 18 who arrives in the territory of a Member State unaccompanied by an adult responsible by law or custom who:*
>
> *– applies for asylum,*
>
> *– during the asylum procedure, attains the age of 18 in the territory of the Member State,*
>
> *– is granted asylum with retroactive effect to the date of the application, and*
>
> *– subsequently applies for family reunification?*"

- **K. and B.**

The case concerned a request for family reunification filed by an Eritrean national (FG) who was legally residing in The Netherlands after having obtained a residence permit for subsidiary protection.

The request referred to his spouse and minor daughter ('K and B' or 'the appellants') and was submitted under national legislation extending the substantive scope of application of the Family Reunification Directive to subsidiary protection. However, it was filed after the three-month term foreseen in the Directive (and national law) for a request for a visa for a stay of more than three months for the purposes of family reunification (Article 12(1)). Therefore, it was rejected by the State Secretary, on account of it having been submitted outside the

prescribed period and the delay could not be considered justifiable under national legislation. On appeal, the court of first instance (District Court, The Hague, sitting in Amsterdam) dismissed the claim by K and B as unfounded.

Therefore, the appellants lodged an appeal against the judgment of the court of first instance before the Dutch Council of State (Raad van State). They claimed, *inter alia*, that The Hague District Court had failed to conduct an assessment of whether the sponsor's delay in the presentation of the family reunification request could be justified in the light of the objective and rationale of the provision in Article 12(1) of Directive 2003/86.

In addition, they maintained that the court of first instance had interpreted this provision as a ground for exclusion from family reunification, denying any *effet utile* of the Directive. Finally, they pointed out that the original assessment by the State Secretary failed to respect the principle of proportionality and to factor in the best interests of the child, as required by Article 5(5) and Article 17 of Directive 2003/86.

The Dutch Council of State raised the question of whether the extension of the scope of the Family Reunification Directive by national legislation based on the more favourable provisions in Chapter V of that Directive implies that a question regarding the application of the national legislation is excluded from the preliminary jurisdiction of the ECJ or it may be in the interest of the EU to ensure that provisions of national law transposing an act of the Union and making it applicable beyond the scope of that act are interpreted uniformly. In addition, it maintained that a more precise interpretation of Article 12(1) of the Directive was necessary in order to assess the complaints of appellants K and B.

Therefore, it decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"*Having regard to Article 3(2)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) and to the judgment of 18 October 2012 in Nolan (Case C-583/10, EU:C:2012:638), does the Court of Justice have jurisdiction to answer questions referred for a preliminary ruling by courts in the Netherlands on the interpretation of provisions in that directive in proceedings concerning the right of residence of a member of the family of a person with subsidiary protection status, if that directive has, under Netherlands law, been declared directly and unconditionally applicable to persons with subsidiary protection status?*

Does the system provided for by Council Directive 2003/86/EC […] preclude a national rule, such as that at issue in the main proceedings, under which an application for consideration for family reunification on the basis of the more favourable provisions in Chapter V of that directive can be rejected for the sole reason that it was not submitted within the period laid down in the third subparagraph of Article 12(1)? For the purpose of answering this question, does any relevance attach to the fact that it is possible, in the event of the aforementioned period being exceeded, to submit an application for family reunification, whether or not after a rejection, in which an assessment is made as to whether the requirements laid down in Article 7 of the Directive 2003/86/EC have been met and in which the interests and circumstances indicated in Articles 5(5) and 17 of that directive are taken into account?"

b. Reasoning of the CJEU

- **The European Parliament v. Council of the European Union**

The action for annulment concerned three derogations from the principle that third-country nationals residing lawfully in the territory of the Member States are entitled to be joined by their

children by way of family reunification. The European Parliament contended that these derogations were contrary to fundamental rights, in particular the right to family life and the right to non-discrimination.

The CJ recalled that fundamental rights are an integral part of EU general principles, with reference to which the legality of the Directive must be assessed. The Court emphasised the relevance of a number of 'external parameters' of the legality of EU legislation: the ECHR, as mentioned in Article 6(2) TEU, and two United Nations conventions: the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.[67] In addition, the CJ noted the relevance of the Charter of Fundamental Rights of the European Union, at the time still a non-binding instrument. It was the first time the Court made an express reference to these instruments.

The CJ underlined that its review is not precluded by a directive permitting Member States to apply derogations, since by means of these derogations Member States may end up impacting fundamental rights that are protected under Community law. On the basis of the jurisprudence of the ECtHR, the CJ stressed the importance of respect for family life, resulting in both negative and positive obligations on State parties and even implying an obligation to grant an entry and residence permit.

The Court also pointed out that an individual right to enter and stay for family reunification purposes cannot be deduced from international law on human rights and that Member States enjoy a certain margin of appreciation when evaluating family reunification requests. However, the Directive imposes on Member States positive obligations, among which that of ensuring family reunification for children aged under twelve.

Within this framework, the effect of the derogations provided for by the Directive is to grant Member States a very limited margin of appreciation as to whether family reunification responds, in a certain case, to integration criteria established by national legislation. This margin of appreciation is also provided for in the case law of the ECtHR on Article 8 of the Convention.

The strict limitation of Member States' margin of appreciation implies that they are required to review each family reunification request on a case-by-case basis, taking into due consideration the duration of the applicant's link with the Member State, the solidity of his/her family relationships and the existence of family, cultural and social ties with his/her country of origin.

Therefore, although the Directive allows derogations by the Member States, it is broad enough to ensure respect for fundamental rights in all phases of the family reunification procedure. The derogations provided for cannot be understood as limiting the fundamental rights at stake, either expressly or implicitly.

The CJ confirmed that implementation of the Directive is subject to judicial scrutiny by national courts, which can overturn a decision rejecting an application for family reunification, review the weighing of competing interests and refer questions for a preliminary ruling to the CJ (in accordance with the then Article 234 of the Treaty).

- **Marjan Noorzia v. Bundesministerin für Inneres**

The case at stake concerned the limits to the discretion of Member States allowed by Article 4(5) of the Family Reunification Directive and in particular whether this provision could be

[67] The International Covenant on Civil and Political Rights was adopted on 19 December 1966 and entered into force on 23 March 1976; the Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990.

interpreted as allowing the national legislator to adopt domestic rules precluding family reunification when spouses or registered partners have not reached the age of 21 at the time of the request but have nonetheless reached the required age before the final decision.

The CJ first clarified that the open formulation of the provision in Article 4(5) should be interpreted as conferring on Member States a margin of discretion to be exercised by not affecting the effectiveness of EU law.

Then, it applied this test to the case at instance and noted that by requiring age 21 to be reached prior to lodging an application the Austrian law did not impair the exercise of the right to family reunification or render it excessively difficult. On the contrary, it was perfectly consistent with the general goal of the provision in the Directive, which is the prevention of forced marriage. This is a goal that, at least in principle, appeared by definition relevant to the protection of the best interests of the child.

In addition, by requesting the spouses to be 21 at the time of lodging the family reunification request, national law also respected the principles of equal treatment and legal certainty while ensuring that the length of time required by national authorities to make a final decision on a family reunification request did not impact the possibility of success of the application.

As a consequence, the CJ concluded that:

"*Article 4(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as meaning that that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged*."

The balancing of competing interests in this ruling differed from that suggested by Advocate General Mengozzi.[68] He argued that an overly formalistic reading of the Directive should be avoided. In addition, reaching the age of twenty-one was not a requirement to initiate a family reunification request in any provision of the Directive.

Furthermore, according to the Advocate General, a literal and teleological interpretation of Article 4(5) of the Family Reunification Directive would set the relevant time at which to consider the age of the applicant to be decided by the authorities, because this interpretation would ensure respect for the fundamental right to family life without frustrating the legitimate objective of preventing forced marriages.

Clearly, the balancing exercise of competing interests in this ruling does not match that in the rulings concerning the right to family reunification of EU citizens with their family members who are third-country nationals (see, e.g., *Ymeraga*[69] as analysed in ***Casesheet No. 1 – The scope of application of Zambrano jurisprudence: the criterion of the denial of the genuine enjoyment of the substance of the rights conferred to an EU citizen by virtue of EU citizen status***). In the latter, the CJ framed family reunification as the general rule and any limitation as an exception to be interpreted strictly. On the contrary, in the case of family reunification of third-country nationals with their family members who are likewise third-country nationals, the weighting of competing interests affords greater importance to Member States' discretion. This is consistent with the system of rules on the treatment of aliens under EU law.

However, it must also be noted that in certain cases the Court has interpreted the right to family reunification of third-country nationals as leaving a very limited discretion to Member

[68] Opinion of Advocate General Mengozzi delivered on 30 April 2014, *Marjan Noorzia*, Case C-338/13.
[69] CJEU, judgement of 8 May 2013, *Ymeraga*, Case C-87/12, para. 26.

States. For instance, in *Chakroun*[70] the CJ ruled that Member States cannot make any distinction between the notion of 'family reunification' and that of 'family formation' for purposes of family reunification, except when they apply the more favourable rules for family reunification in Chapter V.

- **A. S v. Staatssecretaris van Veiligheid en Justitie**

This case concerned the reference date at which the condition of being "*below the age of 18*" in Article 2(f) of the Family Reunification Directive must be satisfied for unaccompanied minors to enjoy the right to family reunification.

Since the provision was unclear, different interpretations emerged. The remitting court maintained that the reference date should be that of the entry of the person concerned into the territory of the Member State. The European Commission interpreted Article 2(f) as applying from the day of submission of an application for family reunification. The Dutch Government emphasised the discretion of Member States and the Polish Government interpreted Article 2(f) as applying from the day of the final decision on the application for family reunification.

The CJ held that Article 2(f) must be given an autonomous and uniform interpretation in the light of the general purpose and objective of the Directive, which is the promotion of family reunification of third-country nationals legally residing in EU Member States. It follows that national differences in the reference date on which the condition of being "*below the age of 18*" must be satisfied would undermine the uniform application of EU law.

In addition, it recognised that alongside the abovementioned general goal, the Family Reunification Directive also pursues the goal of ensuring additional protection to minors and – among them – specific protection to those who are unaccompanied by an adult who is responsible for them by law or custom.

This is made clear in Article 10(3)(a) of the Family Reunification Directive, from which the CJ derived a precise positive obligation on Member States to which a subjective right corresponds, so that no margin of discretion is left with regard to the right to family reunification of refugees who are unaccompanied minors.

This conclusion is buttressed by the very nature of the decision qualifying a third country national as a refugee, which is a merely declaratory act mirroring the fact that whoever fulfils the material conditions laid down in the Qualification Directive[71] has a subjective right to have a status of international protection recognised, even before the adoption of a formal decision.

As a consequence, the right to family reunification cannot be made dependent on the moment in which national authorities adopt the final decision asserting the status of the person concerned without violating the principles of equal treatment, legal certainty and the effectiveness of EU law.

Indeed, such an interpretation would allow differences in the enjoyment of the right to family reunification by unaccompanied minors of the same age who submitted an asylum application at the same time, depending on the duration of the status determination procedures in their respective cases.

[70] CJEU, judgement of 4 March 2010, *Chakroun*, Case C-578/08, paras. 43 and 47.

[71] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, p. 9).

The CJ pointed out that making family reunification dependent upon the moment in which national authorities adopt the final decision on the status of the person concerned would allow Member States to use the discretion afforded by the Directive to slow down or accelerate the procedure with a view to meeting political aims or to curbing the enjoyment of the right to family reunification during migratory surges.

This would hamper the uniform application of EU law and the principle of equal treatment by subjecting the success of an application for family reunification to the length of time required by national authorities to decide on the applicant's protection status. Furthermore, it would create legal uncertainty on the possibility of the refugee minor to have his/her right to family reunification with his/her parents recognised.

As a consequence, the CJ concluded that the reference date to assess the age of a refugee minor is the date on which the applicant lodged the application for international protection. It also added that the date on which the minor entered the territory of a Member State cannot be claimed to be the reference date since requests for international protection and family reunification are tightly interlinked so that the former is a pre-requisite for the latter. It also required the application for family reunification to be submitted within a reasonable timeframe, which it considered to be a period of three months departing from the recognition of refugee status.

Therefore, Article 2(f), read in conjunction with Article 10(3)(a) of the Family Reunification Directive, must be interpreted as meaning that an asylum seeker who is below the age of majority at the time of his/her entry into the territory of a Member State and of his/her asylum application but who in the course of the status determination procedure reaches the age of majority must be regarded as a 'minor' for the purposes of a request for family reunification submitted after recognition of the status.

- **K. and B.**

First the CJ maintained that the question submitted by the referring court fell within the scope of its jurisdiction *ex* Article 267 TFEU, although the application of the Family Reunification Directive to third-country nationals eligible for subsidiary protection expressly excludes them from its scope (Article 3(2)).

This was because "*the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall within the field of application of EU law directly, provisions of EU law have been rendered applicable by domestic law due to a renvoi made by that law to the content of those provisions*" (para. 34).

In these cases, a uniform interpretation is in the interest of the Union, according to the assessment put forward in *Nolan*[72] and *Jacob and Lassus*.[73] Thus, national courts may request interpretation by the CJ of provisions of EU law applied to situations not falling within the scope of EU law when national legislation makes these provisions of EU law directly and unconditionally applicable to situations which are not regulated under the abovementioned provisions. This is because of the necessity to ensure that these situations and those falling within the scope of EU law are treated in the same way.

This was exactly the situation in the case at instance, since the Dutch legislation extending the application of the provisions of the Family Reunification Directive to persons eligible for

[72] CJ, judgment of 18 October 2012, *Nolan*, C-583/10, para. 46.
[73] CJ, judgment of 22 March 2018, *Jacob and Lassus*, C-327/16 and C-421/16, para. 34.

subsidiary protection made the Directive directly and unconditionally applicable to such a situation under national law.

Having established its jurisdiction, the CJ went on to examine the question of whether Article 12(1) of the Family Reunification Directive allows national authorities to reject an application for family reunification on the basis of the applicant failing to comply with the three-month deadline.

In his opinion, Advocate General Mengozzi considered the purpose and wording of the relevant provision to rule out the possibility of qualifying a delay in the presentation of the family reunification request as an automatic ground for exclusion from protection following the inadmissibility of the request.[74]

He accepted, however, that failure to comply with the time limit in Article 12(1) may trigger other consequences, such as satisfaction of the criteria provided in Article 7(1) of the Family Reunification Directive.[75] Finally, he underlined that national authorities must assess family reunification requests individually and take into due account all the available information that may explain a delay and justify non-compliance with Article 12(1) of the Family Reunification Directive.

The CJ recalled that under the Family Reunification Directive Member States are "*free not to process applications for family reunification lodged by refugees under the more favourable rules set out in Article 12(1) of Directive 2003/86 but under the general rules for applications for family reunification where those applications are lodged after the time limit stipulated in the third subparagraph of Article 12(1) of that directive has elapsed.*"

Therefore, an unjustifiable failure to comply with the time limit in Article 12(1) for lodging an application for family reunification submitted on the basis of the more favourable rules set out in the same article cannot be reduced to one of the elements in the overall assessment of the merits of the application. It is instead an essential element in the evaluation of whether to apply the more favourable rules or the general rules for applications for family reunification. Therefore, it regards the type of procedure applied to examine an application for family reunification and not its merit (para. 50).

Neither the principle of the best interests of the child enshrined in Article 5(5) of the Directive nor the obligation to consider the specificities related to the sponsor's refugee status as required by Article 17 justify any other conclusion. Indeed, a decision by a Member State to examine an application for family reunification under the *general rules* of Article 7 of the Directive does not preclude a thorough assessment of the best interests of the child, together with evaluation of "*the nature and solidity of the person's family relationships, the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin*" (para. 52).

The CJ also remarked that – apart from requiring the criteria in Article 7(1) to be satisfied when a family reunification request is not lodged in time – the Directive does not clarify the procedure applicable to an application lodged under the more favourable rules in the first subparagraph

[74] Opinion of Advocate General Mengozzi delivered on 27 June 2018, *K and B*, case C-380/17.

[75] According to this provision: "*1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has: (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned; (b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family; (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources with reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.*"

of Article 12(1). It is therefore for the Member States to determine these procedural requirements in accordance with the principle of procedural autonomy, provided, however, that those requirements are in compliance with the principle of equivalence and the principle of effectiveness.[76]

In the case at instance, these principles appeared to have been satisfied since Dutch law does not preclude the enjoyment of the right to family reunification after a previous request lodged after the time limit is rejected but affords instead the possibility of lodging a fresh application under another set of rules.

To comply with the Directive, these rules must foresee that the late submission of an application for family reunification does not constitute an automatic ground for refusal and that a family reunification request lodged after three months from the recognition of status can be still examined under the more favourable conditions when the delay is objectively excusable.

In addition, national rules must provide full information to the applicants on the consequences of a decision rejecting their initial application and of the measures which they can take to assert their right to family reunification effectively.

5. Analysis

a. Role of the Charter

In these rulings, the CJ affirmed that the optional clauses contained in the Family Reunification Directive must be interpreted and applied in accordance with Union law, including the Charter of Fundamental Rights and Article 8 ECHR.

In para. 38 of *European Parliament v. Council of the European Union*, the CJ recognised that the Charter, although not legally binding, is taken into consideration in the preamble to the Family Reunification Directive (recital 2), stating that the Directive observes the principles enshrined not only in Article 8 ECHR, "*which the CJ has interpreted as also covering the right to family reunification (Carpenter, paragraph 42, and Case C-109/01 Akrich [2003] ECR I-9607, paragraph 59)*" (para. 31), but also in the EUCFR.

The latter sets out in its Article 7 the right to respect for private or family life. According to the CJ, this provision must be read in conjunction with the obligation to have regard for the best interests of the child which is contained in Article 24(2) of the Charter, taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both of his or her parents (para. 58).

The application of the principle of the best interests of the child to family reunification applications is also required by Article 5(5) of the Directive, imposing on Member States the duty to examine applications in compliance with the sponsor's best interest. The fact that national authorities are allowed a margin of appreciation to balance the right to family reunification and the possibility of integration cannot be understood *per se* as – directly or indirectly – impairing the best interests of the child, the right to respect for family life and the principle of non-discrimination on grounds of age (paras. 73-76).

The CJ also clarified that the Family Reunification Directive establishes a subjective right to family reunification and imposes a "*precise positive obligation, to which a clearly defined right corresponds*" (para. 43, *A, S*). As a consequence, provisions affording a margin of appreciation

[76] On which, see CJ, judgment of 22 February 2018, *INEOS Köln*, C-572/16, para. 42 and the case law cited.

to Member States must be interpreted and applied in a way that makes enjoyment of the right to family reunification effective.

In para. 58 of *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, the CJ recalled that instead of prompting national authorities to treat applications for international protection from unaccompanied minors urgently in order to take account of their particular vulnerability (as expressly foreseen in Article 31(7)(b) of the Asylum Procedures Directive), the adoption as the reference date for the evaluation of a family reunification request under Article 10(3)(a) of Directive 2003/86 of that in which the applicant's status is formally recognised could have the opposite effect.

Therefore, such a determination of the reference date for the enjoyment of the right to family reunification would frustrate "*the objective pursued both by that directive and by the Family Reunification Directive (recital 2 and article 5(5)) and the Qualification Directive (recitals 18-19) of ensuring that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interests of the child is in practice a primary consideration for Member States in the application of those directives.*"

This also means that rigid interpretations of the discretion conceded to Member States are only possible when they are *in principle* in the best interests of the child, such as in the case of the discretionary power of Member States to limit the right to family reunification for minors under 21 in order to prevent forced marriages (*Marjan Noorzia v. Bundesministerin für Inneres*).

In all other cases, optional clauses must not be interpreted rigidly, since Member States are required to apply them on a case-by-case basis, provided that their application is compatible with the principle of the best interests of the child and the personal situation of the family members (in the light of Articles 5(5) and 17 of the Directive) as they emerge from the individual assessment of the claim, and the curtailment of individual rights is proportional and does not undermine the effectiveness of the Directive (*K. and B*).

b. Judicial dialogue

- *European Parliament v. Council of the European Union*

Application for annulment by the European Parliament of an act of the Council.

- *Marjan Noorzia v. Bundesministerin für Inneres*

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

- *A. and S. v. Staatssecretaris van Veiligheid en Justitie*

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

- *K. and B*.

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decisions

These decisions are part of a twofold trend concerning on the one hand an extension of the scope of the right to family reunification to beneficiaries of subsidiary protection in national law

and on the other hand a consolidation of advanced standards of child protection in the jurisprudence of both the CJEU and the ECtHR.

- With reference to the first trend, the point of departure is that at the time when the Family Reunification Directive was adopted there was no definition of 'subsidiary protection' in EU law. The first Qualification Directive (2004/83) introduced subsidiary protection as a status embedded in the Common European Asylum System (CEAS).

  The recast Qualification Directive (2011/95) led to the adoption of a uniform status of protection applying to both refugees and beneficiaries of subsidiary protection, with slight differences concerning the duration of the residence permit and social assistance conditions. Under the CEAS, the right to family unity is firmly established and promotes the family reunion of refugees and beneficiaries of subsidiary protection with their family members who are already residing legally in a Member State. This right does not cover situations in which family members are third-country nationals residing in a third country (**see Casesheet No. 7**).

  In spite of the absence of a legal basis in EU law affording a right to family reunification to beneficiaries of subsidiary protection, back in 2008 the European Commission noted that at least nine Member States (Austria, the Czech Republic, Estonia, France, Finland, Luxembourg, the Netherlands, Portugal and Sweden) had extended the application of the Family Reunification Directive to third-country nationals eligible for subsidiary protection under national legislation.[77] In addition, Article 8 ECHR was influential in the development of this national legislation in Austria, Belgium, Bulgaria, Croatia, Greece, Finland, Italy, Luxembourg, the Netherlands and Poland.

  The Commission clarified in its 2014 Communication providing guidance for application of Directive 2003/86/EC on the right to family reunification[78] that "*even when a situation is not covered by European Union law, MSs are still obliged to respect Article 8 and 14 ECHR.*"[79]

  In its relevant case law on immigration, the ECtHR requires evidence of dependency "*involving more than the normal emotional ties*"[80] to qualify persons other than spouses, unmarried partners, parents and children as 'family members' (see, *mutatis mutandis*, **Casesheet No. 7**).

  In addition, Article 8 ECHR does not provide an absolute obligation to respect family life and neither does it grant a subjective right to family reunification[81] but it requires a reasonable and objective justification of differentiated treatment of groups of persons in a similar situation.[82] It therefore allows States a greater margin of discretion regarding decisions on the admission of third-country nationals for family reunification purposes.

[77] European Commission, Report from The Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final, 8.10.2008, p. 4-5.
[78] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, 3.4.2014.
[79] *Ibid*., at 25, which refers to the CJ judgement of 15 November 2011, *Dereci*, Case C-256/11, para. 72 and judgement of 25 July 2008, *Metock*, Case C-127/08, para. 79.
[80] ECtHR, judgment of 17 February 2009, *Onur v. the United Kingdom*, app. no. 27319/07, para. 45; judgment of 12 January 2010, *A.W. Khan v. the United Kingdom*, app. no. 47486/06, para. 32.
[81] ECtHR, judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, app. nos. 9214/80, 9473/81, 9474/81, para. 67; judgment of 6 November 2012, *Hode and Abdi v. the United Kingdom*, app. no. 22341/09, paras. 43, 54-55.
[82] ECtHR, judgement of 23 Feb 2016, *Pajić v. Croatia*, app. no. 68453/13, paras. 81-83; judgement of 30 June 2016, *Taddeuci v. Italy*, app. no. 51362/09, paras. 94-98.

However, this discretion must be exercised taking into due account that the best interests of the child are of primary consideration in balancing the particular circumstances of the individuals concerned and the State's interests which are at stake.[83]

- The second trend concerns the centrality acquired by the best interests of the child principle in the case law of the CJ and the ECtHR when balancing competing interests at stake in cases concerning the right to family life.[84] Having already emphasized the role played by the principle in the jurisprudence of the CJ (see above), it is worth recalling for completeness that, on the same footing, the ECtHR requires a set of procedural safeguards and substantive rights to be firmly entrenched in national legal systems for the principle of the best interests of the child to be satisfied.

  Regarding the procedural aspect, the determination of the best interests of the child goes hand in hand with the affirmation of a duty of 'particular diligence'[85] in cases concerning minors. Core principles substantiating this 'particular diligence' are rapidity and promptness in the assessment of applications and an effectiveness of judicial remedies.[86]

  Regarding the substantive aspect, the ECtHR has contended that when determining the best interests of a child in cases of expulsion of a parent, States must "advert to and assess evidence in respect of the practicality, feasibility and proportionality."[87]

  The threshold of protection is raised even further when the case concerns a refugee minor. States have no discretion as regards the recognition of and respect for the right to family life of people whose family's disruption has been caused by a well-founded fear of persecution leading to the recognition of international protection[88] and who face overwhelming obstacles to living in their country of origin.[89]

  The need for a more favourable procedure for the family reunification of refugees is recognised in the Family Reunification Directive, while Article 8 ECHR can be used as an interpretive parameter of national legislation extending the right to family reunification to beneficiaries of subsidiary protection.

d. Additional relevant cases

CJEU

[83] ECtHR, judgment of 1 February 1996, *Gül v. Switzerland*, app. no. 23218/94, para. 38; judgment of 31 January 2006, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, app. no. 50435/99, para. 39.

[84] ECtHR, judgement of 6 July 2010, *Neulinger and Shuruk v. Switzerland*, app. no. 41615/07, para. 135; judgement of 14 June 2011, *Osman v. Denmark*, app. no. 38058/09, para. 73; judgement of 28 June 2011, *Nuñez v. Norway*, app. no. 55597/09, para. 84, in which the applicant re-entered Norway with false documents after a first expulsion, then formed a family with children and afterwards was issued a second expulsion order. The ECtHR ruled that her expulsion would have violated Article 8 ECHR on account of the disproportionate impact on her children.

[85] ECtHR, judgement of 14 July 2010, *Senigo Longue and Others v. France*, app. no. 19113/09.

[86] ECtHR, judgement of 8 November 2016, *El Ghatet v. Switzerland*, app. no. 56971/10, para. 53.

[87] ECtHR, judgement of 3 October 2014, *Jeunesse v. the Netherlands*, app. no. 12738/10, para. 120. In this case, the ECtHR declared the refusal of a residence permit to a Surinamese woman who had been living irregularly in The Netherlands for sixteen years, during which she formed a family with a Dutch citizen and their three children, to be contrary to Article 8 ECHR.

[88] ECtHR, judgement of 12 October 2006, *Mayeka and Kaniki Mitunga v. Belgium*, appl. no. 13178/03, para. 75; *Mugenzi v. France*, judgement of 10 July 2014, appl. no. 52701/09.

[89] ECtHR, judgement of 10 October 2014, *Tanda-Muzinga v. France*, app. no. 2260/10, paras. 43-49, 73-74.

- judgment of 22 March 2018, *Jacob and Lassus*, Cases C-327/16 and C-421/16
- judgement of 26 July 2017, *Ouhrami*, Case C-225/16
- judgment of 21 April 2016, *Khachab*, Case C-558/14
- judgment of 9 July 2015, *K. and A*., Case C-153/14
- judgement of 24 June 2015, *H.T*., Case C-373/13
- judgment of 10 July 2014, *Dogan*, Case C-138/13
- judgment of 6 December 2012, *O., S. and L*., Cases C-356/11 and C-357/11
- judgment of 18 October 2012, *Nolan*, Case C-583/10
- judgement of 4 March 2010, *Chakroun*, Case C-578/08

National decisions

- **UK Upper Tribunal Immigration and Asylum Chamber, judgement of 25 April 2017, *R (on the application of Al-Anizy) v. Secretary of State for the Home Office (undocumented Bidoons - Home Office policy)*, [2017] UKUT 00197 (IAC)**

The case concerned a Kuwaiti stateless male who was a recognised refugee in the UK with his minor children and who submitted several applications for family reunification with his spouse and the couple's other children, who were asylum seekers registered with the UNHCR living in Iraq, having fled Kuwait. As a condition for the issuance of a visa for family reunification purposes, his relatives were asked to present a valid document in the form of a passport, even though the relevant authorities had been informed that they were stateless. On appeal before the Upper Tribunal, the failure of the Secretary of State for the Home Office to assess the applicants' claim was deemed contrary to family members' rights under Art. 8 ECHR and to the best interests of the child, requiring the reunification of the family in the UK.

- **UK Upper Tribunal Immigration and Asylum Chamber, judgement of 29 February 2016, *AT and another (Article 8 ECHR – Child Refugee – Family Reunification: Eritrea)*, [2016] UKUT 227 (IAC)**

The case concerned an Eritrean minor who was granted leave to remain in the UK as a refugee at the age of seventeen. His mother and brother had fled to Sudan and applied for family reunification with him but had their request rejected on the ground that the UK Immigration Rules do not cover family reunification for parents and siblings.

On appeal, the Upper Tribunal widely referred to the principle of the best interests of the child as enshrined in national, European and international instruments to conclude that applicants who cannot satisfy the requirements set forth in domestic legislation for family reunification must be allowed leave to enter in the light of the UK's international law obligations (e.g. on Article 8 ECHR grounds).

"28. Section 55 has been considered by the United Kingdom Supreme Court in *ZH (Tanzania) v SSHD* [2011] 2 AC 166 and *Zoumbas v SSHD* [2013] 1 WLR 3690. As these decisions make clear, no other material consideration can be treated as inherently more significant than the best interests of any affected child, albeit this can be outweighed by the cumulative effect of other considerations and it does not rank as the primary, or paramount, consideration. As Lord Kerr stated in *ZH (Tanzania)* at [46], 'It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them'."

- **Constitutional Court of the Republic of Slovenia, judgement of 14 January 2015, U-I-309/13, Up-981/13**

The case concerned a Somalian refugee seeking family reunification with her dependent minor sister residing in Ethiopia with no adult relative who could take care of her. The sponsor's request was rejected by a Ministry of Interior decision on the ground that siblings were not included within the scope of the notion of 'family member' for family reunification purposes under domestic legislation (Article 16b of the International Protection Act).

On appeal against the Ministry of Interior's decision, the applicant contended that the Ministry had not considered Article 8 ECHR, Article 10 of the Family Reunification Directive and the best interests of the child in the assessment of the request. In addition, the applicant argued that Article 16b of the International Protection Act was unconstitutional because it did not allow the consideration of specific and exceptional circumstances worthy of consideration when assessing a family reunification request coming from individuals who were not covered by its scope.

The Slovenian Constitutional Court agreed with this view and highlighted the fact that even though there is no obligation under EU law to extend the definition of family members in the Family Reunification Directive, the absence of a possibility to do so in the national legal order may be in contrast with Slovenia's international obligations, such as the duty to respect family life under Article 8 of the ECHR. The absence of a clause in domestic law allowing for the extension of the definition of family member in exceptional cases was therefore contrary to the Constitutional principle of non-discrimination and disproportionally impacted the right to respect for family life.

NB a former case concerning the same issue is Supreme Court of the Republic of Slovenia, judgement of 10 July 2013, I Up 250/2013. In this case, the Supreme Court agreed with the Ministry of Interior's statement that it was allowed no discretion under Article 16b of the International Protection Act to expand the personal scope of the notion of 'family member' for purposes of family reunification. The Supreme Court argued that a different conclusion was not possible having taken into due account domestic legislation, Council Directive 2003/86/EC, Directive 2011/95/EC and the CFR. Therefore, the applicant appealed to the Constitutional Court, but that time the appeal was dismissed.

- **Irish High Court, judgement of 22 January 2013, *Casha Digale Ducale & Anor v. Minister for Justice and Equality & Anor*, [2013] IEHC 25**

The case concerned a recognised refugee who unsuccessfully applied for family reunification with her niece and nephew, who she presented as her own children and dependent minors. The two minors were orphans, but she could not formally adopt them due to the absence of available procedures in their country of origin (Somalia) and in their country of habitual residence (Ethiopia).

The Minister for Justice and Equality refused family reunification on the account that the children were no longer 'financially' dependent since they had reached the age of majority prior to the final decision on the application (although they were minors at the time at which the application for family reunification had been lodged).

On appeal, the Irish High Court found that the Minister for Justice and Equality had carried out "no more than an arbitrary evaluation based on no identified criteria." The Court ruled that although Ireland is not party to Directive 2003/86/EC, it had to be acknowledged that under the Directive the concept of dependency is central to the discretionary powers of Member States, so that it contains no definition of the term.

Nonetheless, Member States must exercise their discretion in compliance with fundamental rights and their international obligations, so that in cases concerning minors who become adults pending procedures the notion of dependency must be given a broad interpretation, including an assessment of financial, social, personal, physical, emotional and cultural ties with the sponsor.

- **Austrian Administrative High Court, judgement of 17 November 2011, 2010/21/0494**

Based on the judgement of the ECtHR of 1 December 2005 in *Tuquabo-Tekle And Others v. the Netherlands*, app. no. 60665/00, the Austrian Administrative High Court concluded that in exceptional circumstances the right to family reunification of majority-age children can be derived from Article 8 ECHR, even if there is no legal provision in Austria granting such a right. Indeed, the right to private and family life in Art. 8 ECHR can in individual cases and by way of exception lead to recognising as eligible for family reunification individuals who are legally, financially, emotionally or materially dependent on the sponsor, such as major children with disabilities. In these cases, the private interest in family reunification outweighs public interests in maintaining compliance with migration regulations and competent authorities must exercise their discretion in a way that is compatible with this balancing act.

Casesheet No. 10 – Minimum standards for the reception of minor asylum seekers in Member States under Directive 2003/9/EC

Reference case

- CJEU (Fourth Chamber), judgement of 27 February 2014, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri,* case C-79/13

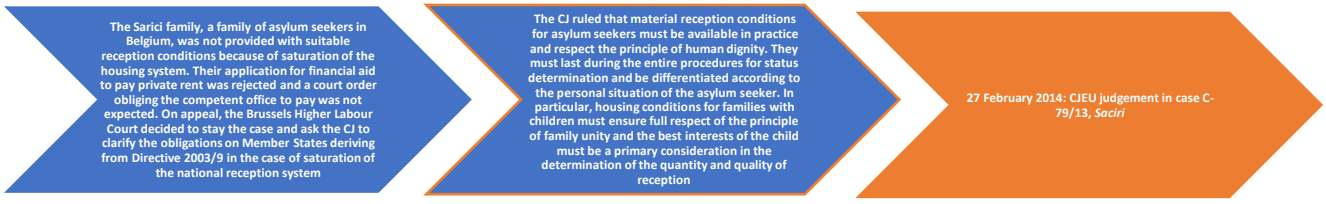
1. Core issues

For the first time, the CJ held that Member States' discretion concerning the methods with which they provide the material reception conditions for asylum seekers had a qualified limit in the necessity to ensure that these reception conditions enable minor children of asylum seekers to be housed with their parents, so that family unity is preserved and the best interests of the child is a primary consideration.

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Belgium	• Asylum Law	• Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers	• Arbeidshof te Brussel (Brussels Higher Labour Court) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Arbeidshof te Brussel concerning the interpretation of Article 13(5) of Council Directive 2003/9/EC	• The CJ clarified the scope of the Reception Conditions Directive *ratione temporis, loci, personae et materiae*

3. Timeline



4. Description

a. Facts

On 11 October 2010, the Saciri family lodged an asylum request in Belgium. On the very same day, the Federaal agentschap voor de opvang van asielzoekers ('Fedasil'), which is the authority responsible for reception issues, informed the applicants that it was unable to provide reception. Therefore, they had to provide for their housing in the private sector and applied to the Openbaar Centrum voor Maatschappelijk Welzijn van Diest (Diest public centre for social welfare; 'the OCMW') for financial aid to pay the rent.

Their application, however, was rejected on the ground that they ought to have stayed in a reception facility managed by Fedasil. On 21 January 2011, the Labour Court in Leuven ordered Fedasil to provide the Saciri family with housing and to reimburse a sum of almost €3000 for the three months during which they were left without any reception. However, Fedasil appealed against the order and the Saciri family lodged a cross-appeal and sought an order that Fedasil and the OCMW pay, jointly and severally, for the entire period during which the family had not been housed.

The Brussels Higher Labour Court (Arbeidshof te Brussel) ascertained that in the case of saturation of the domestic reception capacity there were no legal instruments that could be invoked in the national legal system to provide within a reasonable period housing conditions that were compatible with the standards laid down in Directive 2003/9/EC.[90] It also stated that – as a matter of practice – where Fedasil could not provide in kind, the amount that asylum seekers received as social assistance was insufficient to guarantee them even temporary housing.

In these circumstances, the Arbeidshof te Brussel decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> "*1. When a Member State elects, pursuant to Article 13(5) of Directive 2003/9 …, to provide the material support in the form of a financial allowance, does the Member State then still have any responsibility to ensure that the asylum seeker, in one way or another, enjoys the minimum protection measures of that Directive as contained in Articles 13(1), 13(2), 14(1), 14(3), 14(5) and 14(8) of the Directive?*
>
> *2. Should the financial allowance provided for in Article 13(5) of … Directive [2003/9] be granted from the date of the application for asylum and the reception request, or from the expiry of the period provided for in Article 5(1) of the Directive, or from another date? Should the financial allowance be of such a nature that it allows the asylum seeker, in the absence of material reception facilities provided by the Member State or by an institution designated by the Member State, to provide for his own accommodation at all times, if necessary in the form of hotel accommodation, until such time as he is offered permanent accommodation or as he is able to acquire more permanent accommodation himself?*
>
> *3. Is it compatible with … Directive [2003/9] that a Member State only grants the material reception facilities to the extent that the existing reception structures, as established by the State, are able to ensure that accommodation, and refers the asylum seeker who does not find place there for assistance which is available to all the residents of the State, without providing for the necessary statutory rules and structures so that institutions which have not been established by the State itself are effectively able to extend a dignified reception to the asylum applicants within a short period?*"

b. *Reasoning of the CJEU*

The first question concerned the duration of the reception obligations of a Member State that decides to grant reception conditions in the form of financial allowances (and not in kind). On this point the CJ made it crystal clear that the period during which the material reception conditions must be provided is to begin when the asylum seeker applies for asylum, as is apparent from the terms (para. 34), the purpose and the general scheme of the Directive (para. 35).

In addition, the CJ clarified that reception conditions must be materially available and compatible with the supreme value of human dignity. It therefore deduced that Article 1 of the Charter of Fundamental Rights of the European Union precludes "*the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that Directive*" (*ibid.*).

[90] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18-25).

In so doing, the CJ consolidated the **principles of continuous, effective and non-discriminatory assistance to asylum seekers**, which had already been affirmed in its previous case law on reception conditions for Dublin asylum seekers.[91]

The second question concerned the amount of financial allowance granted and whether Member States must ensure that this *quantum* is sufficient to enable asylum seekers to obtain accommodation. In this regard, the Court provided a very broad interpretation of the notion of "material reception conditions" ex Article 2(j) of the Directive, including not only housing but also food and clothing.

It stated that the *quantum* had to be determined by following the criteria in Article 13 of the Reception Conditions Directive.[92] From the second paragraph of this article, the CJ derived that the amount of financial allowance must be sufficient to ensure *"a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence*" (para. 40). This means that the Member State must adjust the reception conditions to the asylum seekers' specific needs in the light of Article 17 of the Directive in order, in particular, to preserve family unity and to take account of the best interests of the child as required by Article 18(1) of the Directive (para. 41).

As a consequence, it does not matter whether the State decides to provide assistance in kind or as financial allowances or in vouchers or a combination thereof. In any case, the reception conditions must enable minor children to be housed with their parents, if necessary in the private rental market (para. 45).

Finally, in the third question the referring court asked whether saturation of the national reception system may justify the involvement of private bodies. In this regard, the CJ stated that it is a possibility provided that these bodies are capable of ensuring respect for the minimum standards on reception conditions laid down in the Directive.

5. Analysis

a. Role of the Charter

Paragraph 35 of the CJ ruling in *Sarici* reads as follows:

[91] See CJ, judgement of 27 September 2012, *CIMADE, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, case C-179/11, paras. 39-61, where the CJ ruled out Member State practices denying reception conditions to Dublin asylum seekers after a take-charge request had been accepted by the competent Member State and before the transfer is materially executed.

[92] Council Directive 2003/9/EC, Article 13 – General rules on material reception conditions and health care: "*1. Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.* ***2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.*** *3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means* ***to have a standard of living adequate for their health and to enable their subsistence****. 4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision in paragraph 3 if the applicants have sufficient resources, for example if they have been working for a reasonable period of time. If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.* ***5. Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.***"

> "*the general scheme and purpose of Directive 2003/9 and the* ***observance of fundamental rights****, in particular the requirements of* ***Article 1 of the Charter of Fundamental Rights of the European Union*** *under which* ***human dignity*** *must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down in that directive.*"

Therefore, the Charter of Fundamental Rights is the major stumbling block in the protection of asylum seekers from the risk of curtailment of their reception conditions in cases of saturation of national reception systems. The CJ argued that this protection is first and foremost filtered through a respect for **human dignity**, which should orientate any **balanced decision** so the State's reception capacity on reaching a saturation point cannot become a justification to curtail the enjoyment of asylum seekers' legal entitlements in terms of material reception conditions.

The best interests of the child also play a prime function in the judgement, in conjunction with the right to family unity. As testified in para. 41 of the ruling, they are the legal parameters according to which the Member States are required to "***adjust the reception conditions to the situation of persons having specific needs.***" By referring to the Directive's provisions operationalising the best interests of the child and the right to family unity the CJ clarified *how* Member States must quantify and qualify the protection.

In so doing, this ruling is in perfect accord with that of the ECtHR (Grand Chamber) in the *M.S.S. v. Belgium and Greece* case, [93] in which the Strasbourg Court recalled that asylum seekers are a **vulnerable group** that should be afforded **specific protection** including **dignified reception conditions**, but admitted that the source of reception obligations on the Member States is EU law – and namely the Reception Conditions Directive – instead of Article 3 ECHR.[94]

This argument was further specified by the ECtHR with regard to the "**particular vulnerability**" of **minor asylum seekers** in the case *Tarakhel v. Switzerland* case,[95] where the Court of Strasbourg clarified that the vulnerability of minors is capable of sharply lowering the threshold of gravity that is necessary to qualify a mistreatment as a "degrading treatment" within the remit of Article 3 ECHR.[96] In this vein, the ECtHR excluded the suitability of reception conditions that can directly or indirectly cause the minor a state of stress or anxiety.[97]

As a consequence, **in the case of minors**, the ECtHR required Member States and associated countries to subject the execution of the transfer to specific verifications of the risks for the applicant. This implies, first, an obligation to **ask and obtain assurances** from the responsible State that the minor asylum applicant is provided with reception conditions that are adjusted to his/her specific needs, taking into due account his/her minor age – **an obligation that must also be satisfied where the asylum and reception systems of the responsible Member State do not present "systemic flaws,"** and, second, a duty to **make use of the discretionary clauses** in the Dublin Regulation **to halt the transfer and take responsibility** for an asylum applicant where they know or should know that the particular vulnerability of the latter cannot be addressed – regarding the minimum standard required by

[93] ECtHR (Grand Chamber), judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, app. no. 30696/09.
[94] *Ibid.*, paras. 249-251.
[95] ECtHR (Grand Chamber), judgement of 4 November 2014, *Tarakhel v. Switzerland*, app. no. 29217/12.
[96] *Ibid.*, paras. 93 ff.; para. 115; para. 118.
[97] *Ibid.*, para. 119.

the Reception Conditions Directive – by the responsible Member State under the national reception system.

b. Judicial dialogue

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

The recast Reception Conditions Directive (Directive 2013/33/EU)[98] reproduces in its Article 17(5)[99] the provision in Article 13(5) of Directive 2003/9/EC. It introduces some of the concepts and principles to which the CJ referred in the *Saciri* case, which was ruled following its adoption even though it still referred to the former Directive 2003/9/EC. In particular, Directive 2013/33/EU consolidated the principle of accessibility on an equal footing[100] with reception conditions in all the places in which the asylum seeker can lodge an application, including transit zones, borders and territorial waters.[101] In addition, it makes express reference to vulnerability[102] and to the need to protect both the physical and mental health of asylum seekers in the modality of the determination of the type, quantity and quality of reception conditions ex Article 17(5).

The European Commission's proposal for a recast of the 2013 Reception Conditions Directive[103] took a number of steps backwards with reference to the general rules on material reception conditions (Article 16), in potential contrast with the CJ's case law. The criticism concentrates on two main points: first, the elimination of the reference to health care from both the heading of the provision and the following paragraphs; second, the notion of vulnerable persons is removed from the formulation in para. 2 of Article 16. On the other hand, the new paragraph 5 of the proposed text seems to underscore a positive impact of the CJ's case law.

[98] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013, p. 96-116).

[99] *Ibid.*, Article 17 – General rules on material reception conditions and health care: "*1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection. 2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence* ***and protects their physical and mental health. Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.*** *3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence. 4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time. If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.* ***5. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or in practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s) applied for nationals aim to ensure a standard of living higher than that prescribed for applicants under this Directive***."

[100] *Ibid.*, recital 8 of the Preamble.

[101] *Ibid.*, Article 3(1).

[102] *Ibid.*, Article 21.

[103] European Commission, Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, 2016/0222 (COD), 13.7.2016.

Indeed, it makes express reference to the principle of human dignity as a parameter to assess the resources of the applicant. It reads as follows:

> "*When assessing the resources of an applicant, when requiring an applicant to cover or contribute to the cost of the material reception conditions or when asking an applicant for a refund in accordance with paragraph 4, Member States shall observe the principle of proportionality. Member States shall also take into account the individual circumstances of the applicant and the need to respect his or her dignity or personal integrity, including the applicant's special reception needs. Member States shall in all circumstances ensure that the applicant is provided with a standard of living which guarantees his or her subsistence and protects his or her physical and mental health*."

d. Additional relevant cases

CJEU

- judgement of 27 September 2012, *CIMADE, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, case C-179/11

ECtHR

- judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, app. no. 30696/09
- judgement of 4 November 2014, *Tarakhel v. Switzerland*, app. no. 29217/12

National decisions

- **German Federal Constitutional Court, decision of 17 September 2014, 2 BvR 1795/14**

The case concerned an Ethiopian mother and her infant child who arrived in Germany in January 2014 and applied for asylum. The Federal Office for Migration and Refugees (BAMF) checked EURODAC and discovered that they had already sought asylum in Italy and obtained subsidiary protection. On 16 June 2014, the BAMF issued a transfer decision to Italy. An appeal against this decision before the Administrative Court of Kassel failed since the Court found that the reception conditions in Italy did not show systemic deficiencies. The only exception to the transfer, linked to the age of the minor, could have been in the case in which the woman had to travel and stay in Italy as a single parent, but this was not the case since the partner of the female applicant similarly had to leave Germany for Italy. The applicants claimed against this decision before the German Federal Constitutional Court (FCC) that their return to Italy would expose them to degrading treatment such as living on the street and having no access to health care and nutrition.

The FCC rejected the application on the ground that the applicants did not sufficiently substantiate their allegations of the risk of living on the street on return to Italy. The court could therefore avoid an exam of whether Italian reception conditions showed systemic deficiencies.

Grounded in its own jurisprudence and that of the German Administrative Courts concerning Dublin transfers, the FCC declared that the competent German authority had the duty to contact the competent authority of the receiving country before the transfer in order to clarify the facts and seek suitable guarantees that the applicant would be provided with adequate

reception conditions and health care. It also had the duty to avoid executing the transfer where, considering the entire transfer process including the journey and the capacity of the receiving reception system, there was a risk of non-compliance with the required reception standards or of the transfer aggravating the health conditions of the asylum seeker (where these risks could not be addressed with special arrangements).

In addition, the transfer had to be evaluated more carefully if it could negatively impact respect for family unity and the best interests of the child, as is the case for families with infants of up to three years. In these cases, the competent authorities must be satisfied with the type of accommodation the family will be provided with in the destination Member State before executing the transfer.

In the light of the foregoing, the FCC ordered the BAMF to request and obtain suitable guarantees from the Italian authorities to ensure the well-being of the infant applicant when returned to Italy.

Casesheet No. 11 – Limits to the detention of Minor Asylum Seekers and their Family Members

Reference cases

- CJEU (Fourth Chamber), judgement of 6 June 2013, *The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department*, Case C-648/11
- CJEU (Grand Chamber), Judgement of 6 November 2012, *K v. Bundesasylamt*, C-245/11

1. Core issues

In the first case, the CJ held that Article 6(2) of the so-called 'Dublin II Regulation' ought to be interpreted as precluding the Member State in which an unaccompanied minor is present – after having lodged an application there – from transferring him/her to another Member State in which the unaccompanied minor has lodged his/her 'first application.' From the best interests of the child the CJ derived a duty to avoid unnecessarily prolonging the procedure for determining the Member State responsible (negative obligation), while ensuring that unaccompanied minors have prompt access to status determination procedures (positive obligation) (***see Casesheet No. 6***).

In the second case, the CJ interpreted the words 'another relative' in the so-called 'humanitarian clause' in Article 15(2) of the Dublin II Regulation as extending *ratione personarum* to the daughter-in-law and the minor grandchildren of an asylum seeker. Such an interpretation is broader than the notion of 'family member' in Article 2(i) of the Dublin II Regulation, which covers the spouse of the asylum seeker or his/her unmarried partner in a stable relationship, the asylum seeker's minor children, if unmarried and dependent, and the asylum seeker's guardian when he/she is minor and unmarried (***see Casesheet No. 7***).

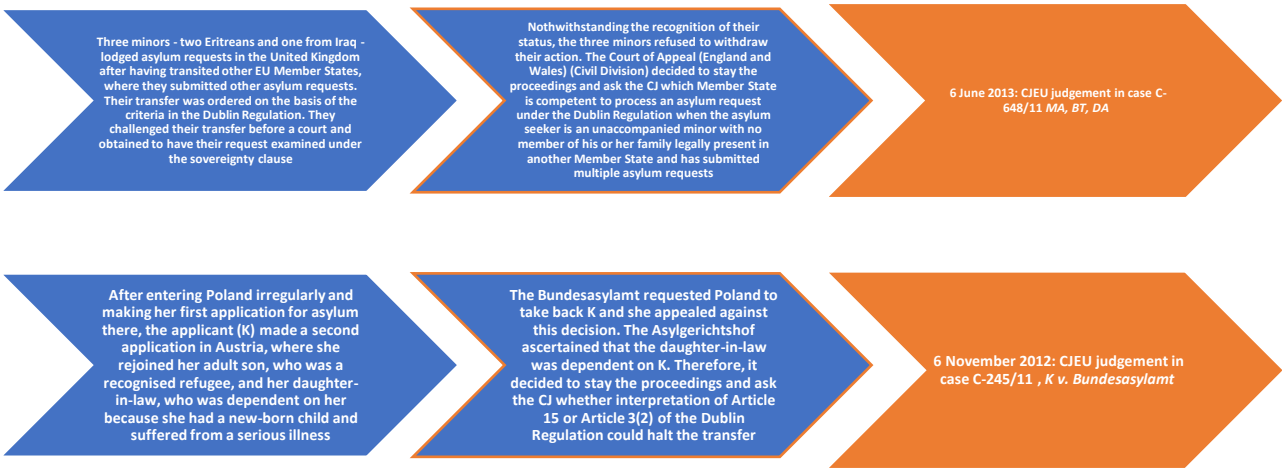
A systemic interpretation of these rulings provides grounds to outlaw the detention option for unaccompanied minor asylum seekers and for their relatives who are asylum seekers seeking family reunion.

2. At a glance

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• United Kingdom • Italy • The Netherlands	• Area of Freedom, Security and Justice • Common European Asylum System • Dublin Regulation	• Article 67 TFEU • Article 78 TFEU • Article 24 CFREU • Article 6(2) Regulation (EC) No 343/2003	• Court of Appeal (England and Wales) (Civil Division) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Court of Appeal (England and Wales), concerning the interpretation of one of the criteria in the Dublin Regulation	• The CJ ruled that the provision at stake cannot be interpreted in such a way that it disregards the best interests of the child.

Country	Area	Reference to EU law	Actors	Judicial Interaction Technique	Outcome
• Austria • Poland	• Area of Freedom, Security and Justice • Common European Asylum System • Dublin Regulation	• Article 67 TFEU • Article 78 TFEU • Article 24 CFREU • Article 15(2) Regulation (EC) No. 343/2003	• Bundesasylamt (Austrian Federal Asylum Office) • Asylgerichtshof (Austrian Asylum Court) • CJEU	• Vertical: Request for a preliminary ruling ex Article 267 TFEU from the Asylgerichtshof concerning interpretation of the humanitarian clause in the Dublin Regulation	• The CJ found that the national practice at issue was in contrast with Article 15(2) of the Dublin II Regulation.

3. Timeline



4. Description

a. *Facts*

Refer to ***Casesheets Nos. 6 and 7***.

b. *Reasoning of the CJEU*

Based on the judgment of the CJEU in the *MA, BT, DA* case, it could be inferred that the detention of an unaccompanied minor with no family member legally residing in the territory of a Member State would be in contrast with a combined reading of paragraphs 55, 59 and 61 of the ruling.

In the light of the first paragraph,

> "*Since unaccompanied minors form* ***a category of particularly vulnerable persons***, *it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that,* ***as a rule, unaccompanied minors should not be transferred to another Member State***."

According to the second paragraph,

> "*although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003,* ***the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof****, is that the child's best interests must also be a primary consideration in all decisions adopted by Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003*."

Finally, according to the latter paragraph,

> "*In the interest of unaccompanied minors, it is important, as is evident from paragraph 55 of the present judgment, not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status*."

Therefore, the Member State in which the unaccompanied minor is **physically present holds the responsibility to maintain the child's best interests as a primary consideration in all decisions concerning the minor under the Dublin Regulation.**

It follows that the said Member State has the **duty** *not to prolong more than is strictly necessary the procedure for determining the Member State responsible*, together with the duty **to ensure that unaccompanied minors have prompt access to status determination procedures.**

As a consequence, unaccompanied minors – as a rule – **shall not be transferred** when they have lodged an identical application which is still pending with another Member State (see paras. 62-64 of the judgement).

This does not infringe the principle of mutual trust because **the competent Member State under the Dublin Regulation is – as a rule – that in which they are physically present after having lodged an asylum application**, the physical presence being the primary element in the allocation of the responsibility for unaccompanied minors.

Since unaccompanied minors – as a rule – **shall not be transferred**, and **in the light of their vulnerability,** it would be very difficult to prove that the unaccompanied minor's detention is either necessary or is in his/her best interests. Indeed, the necessity to detain an asylum seeker is connected to that to perform his/her transfer and the assessment of the best interests of the child must be guided by the goals set out in Article 24 of the CFR.

Similarly, following the interpretation of the CJ in *K*, when the right to family unity of a minor refugee is at stake so that Member States are obliged to apply the humanitarian clause for purposes of family reunion, detention of a minor's relative applying for reunion pending procedures cannot be a legitimate option. In fact, it would run counter to the rationale of the obligation to enforce the discretionary clause, which is a **duty to facilitate the bringing together of family members and to preserve family unity** (see paras. 38-41 of the CJ's ruling in *K*).

This reading finds support in two very recent rulings of the ECtHR:

c) judgement of 7 December 2017, *S.F. and Others v. Bulgaria*, app. no. 8138/16

The case concerned an Iraqi family composed of the mother, father and their three children (aged sixteen, eleven and one and a half) who – prior to being granted international protection in Switzerland – had been briefly detained in a police facility at the border in Bulgaria. The applicants complained before the ECtHR that the detention conditions in Bulgaria had subjected the three children to inhuman and degrading treatment contrary to Article 3 ECHR.

Having successfully passed the admissibility requirement of the prior exhaustion of domestic remedy, the ECtHR decided the case on its merits. It recognised that the detention period of about 32 hours (according to the Bulgarian government) or about 41 hours (according to the applicants) was considerably shorter than the periods at issue in the ECtHR's previous jurisprudence.[104] However, **in the light of the particular vulnerability of minors** and **of the conditions faced by the applicants at the detention facility in Bulgaria**, which were all but appropriate for children, the Court ruled that – notwithstanding the very short duration of detention – it amounted to **a degrading treatment contrary to Article 3 ECHR**.

[104] See, e.g., ECtHR, judgement of 19 January 2012, *Popov v. France*, app. nos. 39472/07 and 39474/07.

d) judgement of 10 April 2018, *Bistieva and Others v. Poland*, app. no. 75157/14

The case concerned the detention for almost six months of a Russian woman (Ms Bistieva) and her three children in a guarded centre for foreigners in Poland. The case originated from a failed asylum application by Ms Bistieva and her husband, who arrived in Poland in 2012 with the first two children. Following the rejection of their asylum claim, the family fled to Germany, where Ms Bistieva gave birth to a third child. In 2014, the German authorities sent her and the children back to Poland, where the woman was detained with the rest of the family. They were eventually released in June 2014 and moved back to Germany again, where they complained that the detention had violated their rights under Articles 5 and 8 ECHR.

Limiting its analysis to the claims under Article 8 (those under Article 5 were declared inadmissible due to the lack of exhaustion of domestic remedy), the Court found that the applicant's detention inhibited the effective enjoyment of the applicants' family life. However, it recognised that this interference could have been initially regarded as justified and proportional since the family presented a clear risk of absconding.

Nonetheless, having considered the **Convention on the Rights of the Child**, and the **existence of a broad consensus in international law on the paramount importance of the principle of the best interests of the child**, the ECtHR stated that the Polish authorities had miscarried the assessment of the impact of the detention on the family life of the applicants *in general* and of the children *in particular*. More precisely, they had underweighted the possibility of alternatives to detention and had not used the necessary due diligence in circumscribing the duration of the detention.

Considering that **the effectiveness of the child's best interests requires not only keeping the family together but also taking all the necessary steps to limit, as far as possible, the detention of families with children**, the Court concluded that there had been a violation of Article 8 ECHR, notwithstanding the evident risk of absconding could be (in principle) a legitimate justification for detention.

5. Analysis

a. Role of the Charter

In the *MA, BT, DA* case, at para. 59 the CJ stated that "*although express mention of the best interests of the minor is made only in the first paragraph of Article 6 of the Dublin III Regulation, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) of the Charter, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of the Dublin III Regulation.*" This means that the CJEU interprets the principle of the best interests of a child – codified in Article 24(2) of the Charter – as a full subjective right extending well beyond the single requirements contained in EU secondary legislation on asylum such as the legal representation of the minor, the rights to family unity, to social development, to safety and security, to be heard and obtain respect for his/her opinion, the duty to identify the unaccompanied minor's family members and so on. [105]

The effectiveness of the child's best interests implies that all sorts of decisions taken during procedures carried out under the Dublin III Regulation conform with the goal of granting the minor the highest possible standard of protection, which would be at odds with detention where any other alternative is possible.

[105] See, e.g., Article 6 of the Dublin III Regulation, Article 23 of the 2013 Reception Directive, Article 25 of the 2013 Asylum Procedures Directive.

In addition, in the light of the ECtHR's case law in *M.S.S.* and *Tarakhel* (see ***Casesheet No. 9***), where asylum seekers are children the vulnerability is doubled and as a consequence child protection must take precedence over any other consideration of immigration policy.[106]

Moreover, a very narrow reading of Member State discretion regarding recourse to detention for asylum seekers characterizes (in general) the recent case law of the CJ in *J.N.*[107] and *K. v. Staatssecretaris van Veiligheid en Justitie.*[108] Obviously, the Court does not rule out the option of detention of a third-country national seeking asylum. However, these cases concerned very specific situations to which Article 8 of the 2013 Reception Condition Directive allowing national authorities to detain asylum seekers on a list of grounds applies.

The CJ confirmed the validity of Article 8 in the light of Articles 6 and 52(1) and (3) of the Charter of Fundamental Rights of the European Union and reaffirmed that EU legislation respects the level of protection afforded by the second limb of Article 5(1)(f) ECHR, which permits the lawful detention of a person pending the execution of extradition or deportation.

However, it also clarified that

> "*Although the proper functioning of the Common European Asylum System requires, in practice, that the competent national authorities have at their disposal reliable information relating to the identity or nationality of the applicant for international protection and to the elements on which his application is based, that provision cannot justify detention measures being decided without those national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued. Such a determination involves ensuring that […] in each individual case, detention is used only as a last resort. Moreover, it must be ensured that that detention does not exceed, in any case, as short a period as possible*."[109]

This conclusion aligns well with the limits to the detention option and the reading of the interplay between detention procedures under the Return Directive and the Dublin III Regulation that can be found in the case law of the ECtHR. In particular, in the *Khlaifia and others v Italy* case,[110] the ECtHR ruled that

> "*where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of lawfulness set by the ECHR, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*"[111]

The legal standards on detention shall include an exhaustive list of grounds and binding time limits enacted by law and the existence of effective remedies through which the lawfulness of detention may be challenged.[112]

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[106] See also ECtHR, judgement of 12 Jan 2007, *Mubilanzila, Mayeka and Kaniki Mitunga v. Belgium*, app. no. 13178/03, para. 55; judgement of 12 July 2016, *A.B. and Others v. France*, app. no. 11593/12, para. 110; judgement of 19 January 2010, *Muskhadzhiyeva and Others v. Belgium*, app. no. 41442/07, paras. 61-62; judgement of 5 July 2011, *Rahimi v. Greece*, app. no. 8687/08, paras. 51-96.

[107] CJ, judgement of 15 February 2016, *J.N.*, C-601/15 PPU.

[108] CJ, judgement of 14 September 2017, *K. v. Staatssecretaris van Veiligheid en Justitie*, C-18/16.

[109] *Ibid.*, para. 48.

[110] ECtHR, judgement of 15 December 2016, *Khalaifia and others v. Italy*, app. no. 16483/12.

[111] *Ibid.*, para. 92.

[112] See, with reference to return, CJ, judgement of 5 June 2014, *Mahdi*, C-146/14 PPU, para. 60; judgement of 30 November 2009, *Kadzoev*, C-357/09 PPU, para. 65.

Consistently with the two Courts being so restrictive with regard to the detention of asylum seekers (in general), it can be inferred that *a fortiori*, due to the particular vulnerability of minors, detention should not be an option at all. *In principle*, the detention of minor asylum seekers should be integrally and expressly ruled out by the EU legislator and national law and *in practice* it should not be applied by the Member States in any case. This is because, with reference to minors the principle of the best interests of the child comes into play (see above, ECtHR, *Bistieva and Others v. Poland*) either directly – e.g. in the determination of the Member State responsible for the unaccompanied minor's asylum application – or indirectly – e.g. in the determination of the Member State responsible for examining asylum and family reunion requests filed by a refugee minor's relative, also when that relative is not covered by the scope of the notion of 'family member' under the Dublin Regulation, provided that he/she can demonstrate a relationship of dependency of the minor.

b. Judicial dialogue

Vertical interaction between the national court and the CJEU through the preliminary reference procedure.

c. Impact of the CJEU decision

The detention of minors is regularly possible under the 2013 Reception Conditions Directive (Article 11) and the Dublin III Regulation (Article 28). However, this possibility is surrounded by a number of guarantees, as clarified in Article 11, paras. 2-3 of the Reception Conditions Directive:

> "*2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible*."

It must be recalled that these acts were adopted prior to the above ruling. The Commission's proposals for the recast Reception Conditions Directive and Dublin IV Regulation (on which see ***Casesheet No. 9***) does not outlaw the detention of minor asylum seekers (see Article 11 of the proposed Reception Conditions Directive). On the contrary, they widen the grounds on which it is possible in order to avoid secondary movement, and eliminate any reference to the notion of the vulnerability of minors.

d. Additional relevant cases

Check the footnotes of this Casesheet for the relevant case law of the CJEU and the ECtHR.

National decisions

- Federal Supreme Court (Switzerland), decision of 26 April 2017, 2C-1052/2016, 2C-1053/2016

The case concerned an Afghan family consisting of the eight-month pregnant mother, the father and their three minor children, who reached Switzerland via Norway and Germany to seek asylum. The Swiss Ministry for Migration (Staatssekretariat für Migration, SEM) rejected their request on the ground that Switzerland was not the competent State.

This decision was upheld on appeal before the Federal Administrative Court. In the attempt to send the family back to Norway and to prevent them from absconding, the mother and her newborn child were detained at the Zurich airport facility and separated from the father, who was sent to a deportation centre in Zug (CH), and from the other three minor children, who were placed in a child house. The parents requested the competent court to review the administrative detention and to order immediate release. However, the six-week detention orders were confirmed by the administrative judge and on 25 October 2016 the whole family was returned to Norway.

Meanwhile, the applicants had lodged a complaint before the Federal Supreme Court contending that their separation from their children and their stay in detention without any alternative having been considered by the competent authorities had violated their right to family life *ex* Article 8 ECHR. They also contended that their arrest and detention had been in violation of Articles 3 and 5(1)(f) ECHR.

The Federal Supreme Court stated that, under the circumstances of the case with the appellants having already been returned to Norway, examination of its merit could be pursued in the general interest of law due to the high relevance of the case and to the risk of repetition. On Article 3, the Court maintained that the applicants had intended to lodge a complaint only regarding the violations of their own rights and not (even implicitly) that of their children. Therefore, although it recognised that the detention and separation from their children had caused significant levels of stress, the Court concluded that this could not amount to a violation of Art. 3 ECHR. Neither did the Court respond to the allegation of violation of Article 5(1)(f) ECHR, allowing the appeal only on the basis of Article 8 ECHR.

On the latter, the Federal Court held that, although in principle the detention of families with minor children may be justified in certain circumstances, by separating the minor children from their parents and sending them to a child home the competent authorities had created a situation in which they transformed accompanied minors into unaccompanied minors, which is the opposite of what they are required to do by law. Such interference can be justified and acceptable only if the conditions in Article 8(2) ECHR apply, namely when the decision respects the principle of proportionality. It follows that the detention must be the *extrema ratio* and it is the duty of the competent authorities to assess any available alternative to protect the family's unity and the best interests of the children.

Having highlighted that the competent authorities had failed to appreciate the best interests of the child, the Court found a violation of Article 8 ECHR, allowed the appeal and confirmed that the appellants had been unlawfully detained.

Case Study 2 - The rights of third country national minors seeking international protection and/or family reunion/reunification in Europe

Level I

In 2016, an Afghan minor, aged 16 with a documented generalized anxiety disorder (GAD), irregularly entered Hungary with her adult brother in a mass mixed influx via Turkey. They were immediately apprehended and put into a reception centre for adults with very poor living conditions without being granted the possibility of lodging an asylum application. After four months, the situation in the centre escalated and the minor's brother took part in violent riots and protests, which ended up in his arrest and the detention of the child for a period of some two months. Following a court order, the child was released and sent to an appropriate reception centre for minors pending the execution of an expulsion order to a safe third country (Turkey). That order had been issued in the minor's alleged "best interests" since the Hungarian authorities had identified the presence of an uncle of hers in Turkey. However, this relative was a student and protested that he did not have the means to look after the child and the stress of the deportation was hampering the health condition of the minor. Assisted by an NGO engaged in strategic litigation on refugee rights, the minor contested the deportation order in the light of the ECtHR ruling in *Mayeka and Mitunga v Belgium* [2008] and asked for the issue of *interim* measures to stay the execution of the deportation order. She contended that her separation from her brother had disproportionally impacted both her health condition and her right to family unity, that the Hungarian authorities had not complied with their positive obligations to seek the best interests of the child under EU law and the ECHR and neither had they ensured that the applicant would in fact be looked after in the "safe third country" of destination.

You are asked to play the role of the First Instance Court and to assess the claims of the applicant in the light of relevant EU law, the Charter and the ECHR.

- Which fundamental rights would you balance in this case?
- Which provision of the Dublin Regulation should apply?
- Would you consider the Hungarian authorities' balancing exercise between the minor's interest and the public interest in migration control to be legitimate and proportional?
- Which criteria would you use in order to evaluate the applicant's plea?
- What weight should be given to the particular vulnerability of the minor's health situation in the evaluation of the removal decision?
- What decision (if any) would you make in order to ensure an effective remedy to the claimant for the inadequate reception conditions?
- Does national legislation conform with the ECtHR's 'necessity test' concerning cases of detention of children?

Level II

Pending procedures, the minor's brother was eventually released and allowed to lodge a late asylum application jointly with the minor sister. However, due to past experience and on the advice of friends, the two applicants decided to make a secondary movement to Austria via the Czech Republic. However, they were identified on the way by the Czech authorities and had to file an asylum request there to avoid expulsion. Pending lengthy procedures, they managed to abscond again and attempted another secondary movement to Austria, where they lodged an asylum request. However, they were not informed that under Austrian law for a relative (who is not the parent or the guardian) to be the legal representative of a minor a court order is required. Since the adult brother made a request to be the legal representative of his sister, the minor was qualified as an unaccompanied minor with no family member legally present in any Member State. In the meantime, a rejection decision was issued to the brother on account of the fact that the competent Member State to examine his asylum application was the Czech Republic because 13 months had passed since the date of the first irregular entry in Hungary. Following the Czech Republic's acceptance of the take-back request, the brother was transferred there while the minor stayed in Austria in a dedicated reception centre. However, in-depth analysis of the minor's family ties revealed the presence of a distant relative in Hungary, so an order transferring the minor to Hungary was issued, although she had declared on several occasions that she did not feel comfortable with that relative and that she did not want to be removed. Assisted by a lawyer, the minor contested the deportation order on the ground that her right to be heard had been neglected in favour of the possibility of reuniting her with a distant relative. Therefore, the determination of her best interests had been erroneous.

You are asked to play the role of the First Instance Court and to assess the claims of the applicant in the light of relevant EU law, the Charter and the ECHR.

1. Which fundamental rights would you balance in this case?
2. Which provision of the Dublin Regulation should apply?
3. Which Member State is responsible for the applicant's asylum request?
4. Should the separation of the applicant from her brother have been avoided by means of compulsory recourse to discretionary clauses? How discretionary are the discretionary clauses in Article 17 of the Dublin III Regulation?
5. Would you consider the Austrian authorities' determination of the best interests of the child as resulting from balancing the minor's right to be heard and consideration of the minor's wishes with the opportunity for the minor's family reunion with a distant relative legally residing in Hungary to be legitimate and proportional?
6. Which criteria would you use in order to evaluate the applicant's pleas?
7. What decision would you make in order to ensure an effective remedy for the claimant?

Level III

Meanwhile, the minor's adult sister irregularly entered the EU via Poland and lodged an asylum request there. Pending procedures, she made a secondary movement to Austria in order to reach her minor sister. She submitted another request for asylum in Austria and a request for family reunion with her minor sister in Austria. Pending procedures, her minor sister turned 18. The Austrian authorities rejected her application for asylum on the ground that – at the date of the final decision on her family reunion request – her sister was no longer a minor and that the Member State responsible for examining her application was the Republic of Poland. The adult sister brought an appeal against that decision before the Austrian Asylum Court maintaining that the reference date to assess her request had to be that of the lodging of the application instead of that of the final decision. She also contended that there was a relationship of dependency between her and her sister due to the health condition of the latter and that she was willing and had the professional skills to assist her sister.

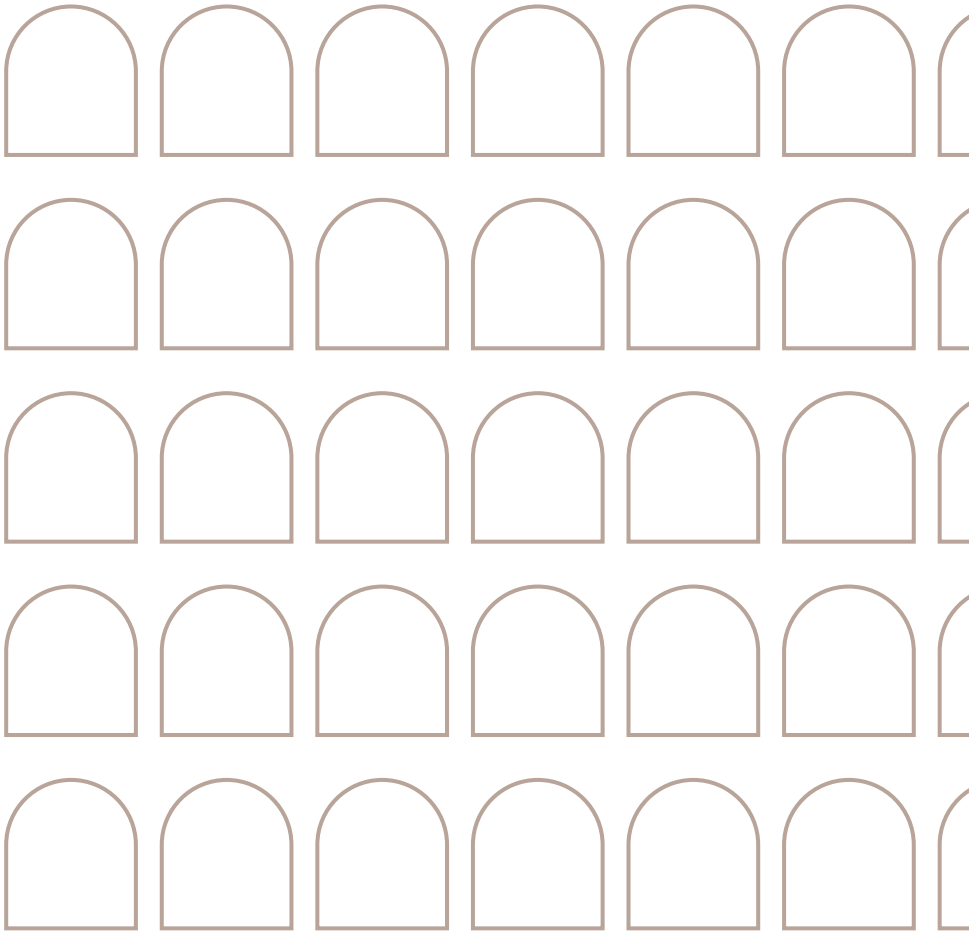
You are asked to play the role of the Austrian Asylum Court and to assess the claims of the applicant in the light of relevant EU law, the Charter and the ECHR.

1. Which fundamental rights would you balance in this case?
2. Which provision of the Dublin Regulation should apply?
3. Which is the Member State responsible for the asylum request of the applicant?
4. Which criteria would you use in order to evaluate the applicant's pleas?
5. Should the separation of the applicant from her ill sister have been avoided by means of compulsory recourse to discretionary clauses? How discretionary are the discretionary clauses in Article 17 of the Dublin III Regulation?
6. Is the determination of the reference date for the assessment of the minor's right to family reunion correct in the light of the relevant case law of the CJ?
7. If the answer to the previous question is in the negative, can the Austrian authorities' disregarding of the situation of dependency between the applicant and her ill sister when deciding on the applicant's transfer to Poland be declared in contrast with the best interests of the child and the Charter? Can the exceptional circumstances of the case give rise to a situation in which the Dublin transfer must be interrupted in order to comply with the Charter (see – *mutatis mutandis* – CJ, C-578/16 PPU - *C. K. and Others*)?

Level IV

Having obtained subsidiary protection, the minor's sister applied for family reunification with her husband and minor daughter under Austrian law, which extends the scope of the Family Reunification Directive (Directive 2003/86/EC) to beneficiaries of subsidiary protection. However, the application was filed after the three-month term foreseen in the Directive for a request for a visa for a stay of more than three months for the purposes of family reunification (Article 12(1)). Therefore, it was rejected as it had been submitted outside the prescribed period and the delay could not be considered justifiable under national legislation. On appeal, the Court of first instance dismissed the claim as unfounded. Therefore, the appellant lodged an appeal against the judgment of the Court of first instance. She claimed, *inter alia*, that the first instance Court had failed to conduct an assessment of whether her delay in presenting the family reunification request was justifiable in the light of the objective and purpose of the provision in Article 12(1) of Directive 2003/86/EC. In addition, she maintained that the Court of first instance had interpreted this provision as a ground for exclusion from family reunification, denying any *effet util* of the Directive. Finally, she pointed out that the original assessment of her claim failed to respect the principle of proportionality and to factor in the best interests of the child, as required under Article 5(5) and Article 17 of the Family Reunification Directive. The Austrian Court of Appeal raised the question of whether extension of the scope of the Family Reunification Directive by national legislation based on the more favourable provisions in Chapter V of the Directive implies that a question regarding the application of national legislation is excluded from the jurisdiction of the ECJ or whether it is in the interest of the EU to ensure that provisions of national law transposing an act of the Union and making it applicable beyond the scope of that act are interpreted uniformly. Therefore, it stayed the proceeding and filed a preliminary ruling to the CJ.

You are asked to play the role of the Austrian Court of Appeal and to write the questions you intend to submit to the ECJ for a preliminary ruling.



Publications Office
of the European Union

doi:10.2870/288798
ISBN:978-92-9466-126-5
QM-07-21-127-EN-N