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INTERNATIONAL MIGRATION AND THE LAW

LEGAL APPROACHES TO A GLOBAL CHALLENGE

Edited by

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ROUTLEDGE

This volume collects the final results of the Research Project of Relevant National Interest (PRIN) "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues" (2019-2024). Four research units have been financed by the Italian Ministry of University and Research to carry on the PRIN, namely the units of the following Universities: Salerno, Campania "Luigi Vanvitelli", Bari "Aldo Moro", and Teramo. The researchers have worked under the guidance of Angela Di Stasi, as principal Investigator, and Ida Caracciolo, Gianni Cellamare and Pietro Gargiulo, as associate Investigators.
Adopting a multilevel and multidisciplinary approach, the book aims to explore existing and future trends in the development of migration policy from the local to the global level, highlighting the challenges and gaps in the protection of migrants, and providing concepts and empirical findings with implications also for practitioners and lawyers.

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Legal Approaches to a Global Challenge

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DEVELOPING AND CONSOLIDATING THE PROTECTION OF UNACCOMPANIED MINOR MIGRANTS IN EUROPE: THE COURT OF JUSTICE'S ROLE

Angela Maria Romito

ABSTRACT: *With the analysis of some of the most recent decisions issued by the EU Court of Justice (CJEU), this chapter evaluates the protection offered to unaccompanied minor migrants (UMMs) in Europe in light of their right to family reunification. The analysis will highlight the legal lacunae, shortcomings, and problems that need to be remediated in recasting the current legislative system through the New Pact on Immigration and Asylum.*

SUMMARY: 1. Introduction. – 2. The right to appeal the refusal of take-charge requests under the Dublin III Regulation. – 3. The right to family reunification and child marriage. – 4. The time limit and the evolution of the notion of family ties. – 5. Concluding remarks.

1. Introduction

Although the pandemic decelerated the flow of migrants to Europe, the statistics show that migrant arrivals in Europe are again accelerating. As a result, irregular migration of unaccompanied (foreign) migrant minors (UMMs) has increased proportionally,[1] attracting the attention of European governments, non-governmental organizations (NGOs), the Courts, and academia.

The lack of *ad hoc* legislation tailored to child migrants in the EU legal system has created ambiguities and practical pitfalls, resulting in standards of protection that vary from State to State, depending on the

[1] According to Eurostat, in 2021, 31.2% of the total number of first-time asylum applicants recorded in the EU where children, see Statistics explained on Eurostat website. For detailed information up to December 2021, see *Refugee and Migrant Children in Europe: Accompanied, Unaccompanied and Separated. Overview of Trends*, January to December 2021, available online.

national approach.[2] As such, unaccompanied children are often afforded discretionary, time-limited, and otherwise uncertain status in the countries to which they migrated. While the specifics vary among the jurisdictions, a common outcome is the lack of unambiguous solutions and secure pathways to legal status. As a result, minors are often trapped in a protracted legal limbo.

Indeed, the legal framework is fragmentary, and the overlapping norms and multi-level guarantee systems do not always translate into adequate and uniform protection of minor migrants.[3] Unfortunately, the opportunity for reform has been missed even in the New Pact on Migration and Asylum, since child migrants are still subject to "special" rules within the legal framework established for adult migration flows.[4]

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[2] In some countries, the legal status (or simply protection from removal) afforded to UMMs expires when they become adults, exposing those transitioning to adulthood to new risks and uncertainties. In others, ambiguities, lacunae, or even intentional omissions in legal frameworks prevent them from applying for secure status at all, while the prolonged delays and inefficiencies in common systems cause them to live with no or uncertain legal status for years. J. ALLSOPP, E. CHASE (2019), *Best Interests, Durable Solutions and Belonging: Future Prospects for Unaccompanied Migrant Minors Coming of Age in Europe*, in *J. Ethn. Migr. Stud.*, 45(2), 293 ff.; see also M. SEDMAK, B. SAUER, B. GORNIK (eds.) (2019), *Unaccompanied Children in European Migration and Asylum Practices. In Whose Best Interests?*, Abingdon; G. ABEL, J. BHABHA (2020), *Children and Unsafe Migration*, in *World Migration Report*, IOM, 231 ff., available online; J. LELLIOTT (2022), *Unaccompanied Children in Limbo: The Causes and Consequences of Uncertain Legal Status*, in *Int. J. Refug. Law*, 34(1), 1 ff.

[3] For a comprehensive overview A.L. SCIACOVELLI (2022), *La protezione del minore migrante in Europa. Profili di diritto internazionale ed europeo*, Napoli.

[4] For critical remarks, see the ONG and civil society report, *Joint Statement on the impact of the Pact on Migration and Asylum on children in migration*, 14.12.2020, available online; specifically for Italy, ASGI (2021), *Unaccompanied Minors, Critical Conditions at Italian External and Internal Borders, Policy Paper, June 2021*, available online. Also see P. RINALDI (2019), *Unaccompanied Migrant Minors: Vulnerable and Voiceless,* in A. SUNGUROV (ed.), *Current Issues on Human Rights*, Madrid, 277 ff.; T. GAZI (2021), *The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?*, in *European Papers*, 1, 167 ff.; R. O'DONNELL (2021), *Spotlight on the Interests of the Child in Returns of Unaccompanied Children. Reflections for the New Pact on Migration and Asylum*, in *EU Migration Law Blog*; A.M. ROMITO (2022), *I minori stranieri non accompagnati nell'Unione europea: lo stato dell'arte e le prospettive di riforma*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 634 ff.

The lack of a comprehensive legal framework for child migrants based on a "child rights approach" forced the CJEU to strengthen protection through the hermeneutic interpretation of existing provisions. In fact, the CJEU has sought to bring coherence to the patchwork of existing EU rules, taking into account changes and developments in the real lives of child migrants. This approach has been reiterated in recent decisions where the Court has implemented earlier landmark cases, contributing to defining a higher standard of protection for UMMs and granting them new rights.[5]

Therefore, this chapter analyses three cases as examples of how the new rules raise highly sensitive issues in relation to young migrants. The central element of all the arguments is that respect for family life, and particularly preserving family unity, is in principle in the best interests of the child.[6] In particular, the first case concerns the interpretation of

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[5] Several recent decisions on minor refugees were delivered on 1 August 2022, such as ECJ, judgment 1.8.2022, *SW, BL & BC*, joined cases C-273/20 and C-355/20; ECJ, judgment 1.8.2022, *Germany v. XC*, case C-279/20; ECJ, Grand Chamber, judgment 1.8.2022, *RO*, case C-720/20; ECJ, Grand Chamber, judgment 1.8.2022, *I & S*, case C-19/21; see also ECJ, judgment 17.11.2022, *X*, case C-230/21. Still pending in March 2023, *CR*, case C-560/20.

[6] At the international level, the fundamental principle of family reunification has been given binding effect by Art. 23(1) of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR) to which all States of the European Union are party. Other international human rights instruments, such as the Convention on the Rights of the Child of 20 November 1989 (CRC), the Convention on Migrant Workers, and the International Covenant on Economic, Social and Cultural Rights of 18 December 1990 (ICESCR) contain similar provisions. Within Europe, it is expressly stated in Art. 8 of the European Convention on Human Rights (ECHR) and Art. 7 of European Union Charter of Fundamental Rights (CFR or Charter).

The best interests of the child is the cornerstone of child protection (together with the other guiding principles on children's rights: right to non-discrimination, the right to life, survival and development, the right to participation, or the right to express views and have them taken into account). It is enshrined in Art. 3(1) of the Convention on the Rights of the Child (CRC) and in Art. 24(2) CFR, also recalled in all the provisions referring to minors. For unaccompanied children, family reunification is normally considered as being in their best interests: UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, May 2021, available online.

In the EU legal system, the EU Charter as well as numerous secondary EU laws equally oblige Member States to take the best interests of the child into consideration and attached fundamental importance to the right to respect for

the Dublin III Regulation (RDIII),[7] and the other two the interpretation of Directive 2003/86/EC (FRD).[8] The novelty lies in the flexible interpretation of the protection of the family nucleus not limited to the immediate family but including close relatives outside the nucleus who play a role in, and contribute to, family life (the so-called extended family), thereby establishing a new legal remedy for family reunification and more favourable protection for underage spouses, as well as a new, pragmatic and evolutionary interpretation of family relationships.

2. The right to appeal the refusal of take-charge requests under the Dublin III Regulation

The protection of UMMs under the Dublin III Regulation is enshrined in several provisions: Arts. 8-11 and 16 promote family unity deriving from fundamental rights.[9] Art. 6 and Recital 13 state that the child's

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family life. The CJEU in the *J. McB* judgment (ECJ, judgment 5.10.2010, *J. McB*, case C-400/10 PPU, para. 53) underlined that the provisions in the Charter correspond to those in the ECHR, but are not limited by them, and therefore may provide further protection. In the Dublin context, the European Court has found that "respect for family life and, more specifically, preserving the unity of the family group is, as a general rule, in the best interests of the child", see ECJ, judgment 23.1.2019, *M.A. and others*, case C-661/17, para. 89. For comments see S. IGLESIAS SÁNCHEZ, K. CARR (2017), *The Right to Family Life in the EU Charter of Fundamental Rights*, in M. GONZALEZ PASCUAL, A. TORRES PERRES (eds.) *The Right to Family in the European Union*, Abingdon, 40 ff.

[7] Regulation 604/2013/EU, *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*, 26.6.2013, OJ L180, 29.6.2013, 31 ff. C. HRUSCHKA, F. MAIANI (2022), *Dublin III Regulation (EU) n. 604/2013*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law*, Munich, 1639 ff.

[8] Directive 2003/86/EC, *on the right to family reunification* (FRD), 22.9.2003, OJ L251, 3.10.2003, 18 ff. See R. PALLADINO (2012), *Il ricongiungimento familiare nell'ordinamento europeo*, Bari, 143 ff.; J. BORNEMANN, C. AREVALO, T. KLARMANN (2022), *Family Reunification Directive 2003/86/EC*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law*, cit., 432 ff.

[9] The goals of Arts. 8-11 are further reinforced by Recitals 14 and 16-18 of the Regulation. These recitals comprehensively proclaim the importance of family unity in the Dublin system and provide detailed aims to ensure that the application of the Regulation leads to the processing of claims of family members together. This referencing is extensive, and the weight given to individual rights and family unity is considered to be even more substantial than that of-

best interests must be a primary consideration in all actions concerning children.

On 1 August 2022, the CJEU ruled on an important issue concerning unaccompanied minors: the right to appeal the refusal of the "take-charge" request of the receiving member State where a relative resides. [10] This is a novelty in EU asylum law.

The case concerned an Egyptian national who applied for international protection in Greece while still a minor. He wished to be reunited with his uncle legally residing in the Netherlands who was able to care for him. Based on Art. 8(2) RDIII, [11] the Greek authorities made a take-charge request to Dutch authorities. However, the Dutch Secretary of State rejected it because the child's identity and the alleged family relationship could not be confirmed. The asylum seeker and his uncle wanted to file a complaint against the refusal. Dutch authorities rejected it as manifestly inadmissible under Art. 27 RDIII, which did not allow contesting such administrative decisions. [12]

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fered in many human rights treaties. U. BRANDL (2016), *Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.) *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff, 143 ff., 150-151.

[10] ECJ, Grand Chamber, judgment 1.8.2022, *I.S.*, case C-19/21. See A. FAVI (2022), *Il diritto a un ricorso effettivo nell'ambito del "sistema Dublino" alla luce del (mancato) dialogo tra Corte di giustizia e legislatore dell'Unione: note a margine della sentenza C-19/21, I.S.*, in *BlogDUE*, 1 ff.; M. KLAASSEN (2022) *A Boost for Family Reunification through the Dublin III Regulation? The CJEU on the Right to Appeal Refusals of Take Charge Requests*, in *EU Law Analysis*; A. PERTSCH, R. NESTLER (2022) *Law Must Be Enforceable: Why the CJEU Confirms Remedies for Family Reunification within the EU and What It Implies*, in *VerfBlog*. See also the expert opinion on the case issued on September 2020 by the Migration Law Clinic of the VU University Amsterdam, *An Individual Legal Remedy against the Refusal of a Take Charge Request under the Dublin III Regulation*, available online.

[11] As known, the provision introduces a "binding responsibility criterion" aimed at establishing which member State shall examine an application for international protection lodged by an unaccompanied minor who has an adult relative lawfully residing in the European Union. That criterion prevails over all other criteria contained in the regulation. Provided the requirements listed in Art. 8(2) are fulfilled, the norm entails two clear, precise, and unconditional obligations for the member State where the relative lives: it "shall unite the minor with his or her relative" and it "shall be [...] responsible" for the examination of the minor's asylum claim.

[12] Based on Art. 27(1) RDIII, an asylum seeker expressly has the right to appeal a transfer decision made by the sending State.

In the appeal against the rejection, the District Court of The Hague, under Art. 267 TFEU, asked the CJEU whether Art. 27(1) RDIII, in conjunction with Art. 47 CFR, is to be interpreted as obliging the member State that received the request based on Art. 8(2) of that regulation to grant the unaccompanied minor or their relative the right to judicial remedy against the decision rejecting the take-charge request. If this interpretation were not to be accepted, the referring court asked whether, in the case at hand, the right to judicial remedy could be derived from Art. 47 CFR in conjunction with Art. 7 and Art. 24(2) thereof.

Starting from a literal analysis of the regulation, the CJEU observed that the provision does not expressly grant the right to appeal the refusal of a take-charge request by the receiving State. However, it does not rule out the possibility of challenging the decision.

The CJEU, recalling its previous case law (namely *Ghezelbash*),[13] confirmed the comprehensive approach to the interpretation of the right to effective remedy under the Dublin system to conclude that RDIII constitutes not only an interstate instrument for examining a claim for international protection, but is also intended to afford rights to asylum seekers. It would undermine the integrity of the Dublin system to only grant a remedy against a decision to transfer, but not against the decision not to transfer: there would be a risk of losing practical effectiveness (*effet utile*) if there were no possibility of a judicial review of the take-charge request refusal within the framework of the family unity related criteria. The Court therefore concluded that, having regard to the right to effective remedy, an asylum seeker could appeal both the misapplication of the criteria set out in the regulation and the refusal of the take-charge request.[14]

However, such reasoning is a substantial novelty for European judges. The Court disregarded the hermeneutic criterion linked to the literal provision and the purposes of the legislative act that contains it. Instead, the Court stated for the first time that when dealing with UMMs, the right to appeal the refusal of a take-charge request must also be grounded in CFR, specifically considering the fundamental right to family unity and the best interests of the child – as protected by respectively Arts. 7 and 24(2) CFR – and the right to judicial remedy – enshrined in Art. 47. Although Art. 7 CFR does not clearly enshrine a

[13] ECJ, judgment 7.7.2016, *Mehrdad Ghezelbash*, case C-63/15.

[14] ECJ, Grand Chamber, *I.S.*, cit., para. 45.

right to extended family unity, the comprehensive interpretation of Arts. 24(2) CFR and 6(1) and 8(2) of RDIII, together with Recitals 14 and 16, and Art. 6(3)(a) and (4), leads to the conclusion that respect for family life and particularly the possibility for a UMM to be united with a caring relative during the processing of their application is generally in the best interests of the child.

In the Court's view, the RDIII reflects a further step towards the protection of individuals' rights, with family unity being valued as an equally important aim of the Dublin system as speedy responsibility allocation procedures. [15]

Consequently, the UMM asylum seeker (but not their relative) [16] has the right to invoke the protection of these fundamental rights before the national court. Therefore, a judicial remedy must be made available within the national legal system. [17]

In its reasoning, the Court noted that if the UMM applicant had applied for asylum in the Netherlands, and if the Greek authorities had agreed to take charge of them (Greece being the first arrival country and thus the member State responsible for examining the application for international protection), they would undoubtedly have been entitled to challenge the transfer decision of the Dutch authorities. In such situation, they could claim violation of the family unity right stemming from Art. 8(2) of the Regulation. It was therefore clear that a similar remedy should also be available to the applicant wishing to challenge the decision refusing the take-charge request. The Court then emphasised that such interpretation of Art. 27(1) allows full respect for the fundamental rights of the child that Art. 8(2) of the Regulation seeks to protect.

This decision is important for several reasons. First, it gives asylum seekers an additional tool to enforce the application of the Dublin crite-

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[15] Recitals 5 and 9 of the Dublin III Regulation both show that the Dublin system not only demands a 'swiftness and rapidity in the interest of States' and the 'effectiveness of the Dublin system', but also 'objective and fair criteria for the person concerned' and 'the protection granted to applicants under that system'. M. GARLICK (2016), *The Dublin System, Solidarity and Individual Rights* in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System*, cit., 159 ff.

[16] Given that Art. 27 does not confer any right to the applicant's relatives.

[17] Paras. 47-49. The Court reasoned that Art. 27 does not grant appeal rights to the family member at all, who therefore also does not have the right to appeal the refusal of a take-charge request.

ria for family reunification. Indeed, based on Art. 8(2) RDIII, it requires the member State that received the take-charge request to grant UMM asylum seekers the right to appeal the refusal decision. Second, it mitigates the discrepancy of the interpretation of individual remedies under RDIII in EU member States and overcomes the lack of legal clarity.[18] Importantly, the extensive and generous interpretation of Art. 27 RDIII, which could not have been achieved through the literal reading of the provision, is bound to the EU's primary law, so that a newly "created" judicial remedy is perceived primarily as a tool ensuring the protection of fundamental rights.

Consequently, the precedent set in the *Ghezelbash* case is reinforced by a higher and more precise standard of protection for UMMs. In accordance with the current negotiations of the Dublin IV system,[19] the legislator cannot deviate from this standard. Specifically, Art. 33(1) of the Proposal for a Regulation on asylum and migration management[20] would need to be reconsidered in order to comply with the level of protection established by the Court.[21]

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[18] The situation varies among EU member States: contrary to the Dutch Council of State, courts in other member States, such as Germany and the United Kingdom (before Brexit), allowed a legal remedy in the requested member State against the refusal of a take-charge request. At the same time, in Sweden and Austria, an individual remedy has been refused.

[19] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] Brussels, 23.9.2020, COM/2020/610 final.

[20] The Commission's proposal is an attempt to limit the effects of the Court's ruling in *Ghezelbash*: it provides for a limitation of the right to appeal, stating that the scope of the legal remedy shall be limited to the risk of ill-treatment within the meaning of Art. 4 of the Charter and the application of the criteria relating to family life.

[21] For critical remarks, see L. VAN ZELM (2108), *Dublin IV: Violating Unaccompanied Minor's Best Interests in the Allocation of Responsibility*, in *Leiden Law Blog*; see also ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270*, October 2016, available online. To note is that new Art. 33(2) directly provides for a short period of two weeks from the notification of a transfer decision within which the individual concerned may exercise the right to effective remedy, whereas Art. 27(2) of Dublin III leaves it to member States to determine the time-limit, requiring only that it be reasonable.

3. The right to family reunification and child marriage

With regard to the full recognition of the family reunification right of UMMs, worth noting is the decision issued on 17 November 2022 in which the CJEU clarified whether a refugee who is an unaccompanied minor residing in a member State must be unmarried under national law in order to enjoy the right to family reunification with relatives in the direct ascending line.[22] The request for a preliminary ruling concerns the interpretation of Art. 2(f) and Art. 10(3)(a) of Directive 2003/86/EC (FRD).

The European Court was asked to hear the case of the mother of a married minor refugee who together with her two younger sons wanted to join her daughter in Europe. Eight months after the child married in Lebanon, the young spouse moved to Belgium where her husband had a valid residence permit. On her arrival, the local authorities refused to recognize her marriage certificate because child marriage is against Belgian law. She was considered an unaccompanied minor and assigned a legal guardian. After applying for international protection, she was granted refugee status. A few months later, the girl's mother applied to the Belgian Embassy in Lebanon for a visa for family reunification with her daughter and humanitarian visas for her underage sons. Their applications were rejected because, according to domestic legislation on foreign nationals, the nuclear family consists of spouses and unmarried minors. Consequently, the Minister for Asylum Policy and Migration argued that family reunification could only apply to unmarried minors, not to those who had married in a jurisdiction where child marriage is legal. According to the Belgian authorities, the applicant's daughter was no longer considered a member of her parents' nuclear family following a marriage that was valid in the country in which it was contracted. The applicant challenged these decisions before the referring court. The main question was whether marriage prevented a minor from being considered "unaccompanied" and, consequently, excluding them from exercising the right to family reunification with their ascending relative.

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[22] ECJ, judgment 17.11.2022, *X,* case C-230/21. For a comment, see M. KLAASSEN (2022), *Op-Ed: "The Right to Family Reunification for Married Unaccompanied Minors: An Analysis of X. v Belgische staat (C-230/21)"*, in *EU Law Live*. More broadly, for a comment on the most recent decisions on the issue, see C. FRATEA (2023), *La tutela del diritto all'unità familiare dei minori migranti tra sistema europeo comune di asilo e direttiva sul ricongiungimento familiare: una lettura alla luce della giurisprudenza della Corte di giustizia dell'Unione europea*, in *Rivista OIDU*, 12 ff.

Before reaching its conclusion, the Luxembourg Court first considered the general scheme of the FRD, recalling that it lays down the conditions for the right to family reunification of third-country nationals and stateless persons residing lawfully in the territory of the member States and establishes more favourable conditions for refugees to exercise their right to family reunification, including the possibility of reuniting with first-degree relatives in the refugee's direct ascending line.[23] Under Art. 10(3)(a) of the Directive, the latter option is not discretionary for unaccompanied minors in order to guarantee the best interests of the child. According to the Court, this provision establishes a precise positive obligation that corresponds to a clearly defined right.[24] Next, the Court examined the UMM concept and its relevance to the right to family reunification. Based on settled case law, the Luxembourg Court applied the traditional hermeneutic approach, paying attention to the wording, general scheme, and objective of this Directive, taking into account the legal context in which it is found and the general principles of EU law. In this perspective, the Court established two cumulative conditions that must be met for an applicant to be considered a UMM: the person concerned must be under 18 years of age, and must be unaccompanied in accordance with Art. 2(f) FRD. There are no additional conditions referred to the marital status of the minor.[25]

In addition, the Court specified that the situation of a married minor applying for family reunification with their relative sponsor in the ascending line (referred to in Art. 4(1) of Directive 2003/86/EC) is not comparable to that of a married unaccompanied refugee minor whose first-degree relative in the direct ascending line applies for family reunification (under Art. 10(3) FRD). This is because the refugee minor residing alone in the territory of a State other than their country of origin is in a particularly vulnerable position, thus warranting enhanced pro-

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[23] On the genesis of the Directive, see J. HARDY (2012), *The Objective of Directive 2003/86 is to Promote the Family Reunification of Third Country Nationals*, in *Eur. J. Migr. Law*, 14, 439 ff.; see also M. BALBONI (2015), *Il diritto al "ricongiungimento familiare" dei minori tra tutela del loro superiore interesse e dell'interesse generale in materia di politica migratoria*, in S. AMADEO, F. SPITALERI (ed.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino, 165 ff.; M. CASTIGLIONE (2020), *L'interesse superiore del minore al ricongiungimento familiare tra sovranità statale e Regolamento Dublino III*, in *Dir., Imm. e Cittad.*, 109 ff.

[24] ECJ, *X*, cit., para. 28.

[25] *Ivi*, para. 29.

tection.[26] This different situation justifies the latter's right to family reunification, not subject to the conditions laid down in Art. 4(2)(a) but to those in Art. 10(3)(a). Therefore, according to the Court, the interpretation of the context of Art. 10(3)(a), in conjunction with Art. 2(f) FRD, justifies the promotion of family reunification with first-degree relatives in the direct ascending line outside the European Union without giving rise to unequal treatment.

Given that Art. 10(3)(a) seeks to provide additional protection to those refugees who are unaccompanied minors, it would be contrary to the objective of special protection to limit the benefit of the right to family reunification (with first-degree relatives in the direct ascending line) only to unmarried unaccompanied refugee minors. Therefore, the provision must mean that a UMM residing in a member State does not have to be unmarried to acquire the status of sponsor for family reunification with a first-degree relative in the direct ascending line.

In answering the question put to them, the judges could have confined themselves to the letter of the applicable provision: the condition of the absence of marriage is not laid down and is therefore not relevant. However, to strengthen its decisions, the CJEU further highlighted that the particular vulnerability of minors is not mitigated by marriage. On the contrary, it noted that the fact that an underage female is married can lead to serious forms of violence. Finally, the Court held that the marital status of an unaccompanied refugee minor might be challenging to establish, particularly in the case of refugees from countries that do not issue reliable official documents. Both of these considerations are very significant because the Court emphasised arguments that go beyond a normative interpretation, showing sensitivity to the reality of individuals to whom the European provisions are addressed, thus offering an evolutionary interpretation of existing law. It is expected that it will be applied to numerous other contexts with foreigners in a state of vulnerability as recipients.

In conclusion, the CJEU judges stated in the ruling that unaccompanied minors need special protection and should benefit from such protection regardless of marital status, compelling national authorities to primarily recognize the minor status of an applicant rather than their marital status.

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[26] See, to this effect, ECJ, judgment 12.4.2018, *A and S*, case C-550/16, para. 44.

4. The time limit and the evolution of the notion of family ties

Other important questions concern the time limit for exercising the right to family reunification and the concept of "family life". Two decisions issued by the CJEU on 1 August 2022[27] dwell on these questions (when children must be minors to claim the right to family reunification, the existence of actual family ties, and the duration of a residence permit after entry of the person joining the family). The request for a preliminary ruling relates to the interpretation of Art. 16 of Directive 2003/86/EC.

The cases concerned visa applications for family reunification of Syrian nationals with their minor children who had been granted refugee status in Germany. In both cases, the applications for family reunification had been submitted within three months of the sponsors' refugee status being recognized – when they were still children – so that in the applicants' point of view, they had submitted their applications on time.[28] However, the applications were rejected because the children had by then come of age.[29]

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[27] ECJ, judgment 1.8.2022, *Bundesrepublik Deutschland v. SW and others*, joined cases C-273/20 and C-355/20. See notes of F. GAZIN (2022), *Immigration - Regroupement familial des réfugiés*, in *Europe*, 11, comm. 367. On the same day, with judgment 1.8.2022, *Bundesrepublik Deutschland v. XC*, case C-279/20 the ECJ further states that the same principle applies if the application for family reunification is submitted by a minor with a father who was a refugee in Germany.

[28] The time limit for the introduction of the application by minors who reach the age of majority during the family unification procedure is not delved into in the decision, and FRD does not contain a time limit to exercise the right to family reunification. However, on the issue, the CJEU already clarified that while late application can lead to more restrictive requirements, it cannot, in itself, lead to the right to family reunification being denied altogether. In ECJ, judgment 7.11.2018, *K and B*, case C-380/17, the Court held that applications lodged beyond the three-month timeframe must still be processed under the ordinary rules that apply to all other third country nationals; late application alone is not a sufficient basis for rejection. The Luxemburg Court nevertheless indicated that in the case of children who reach the age of majority during the procedure, an application should be made "within a reasonable time" as allowing reliance on this right without any time limits would be incompatible with the FRD aims. For the purposes of determining a reasonable period, the Court held that the three-month period which Member States may apply in respect of the more favourable provisions for refugees under the third subparagraph of Art. 12(1) is of "indicative value". As a result, the aged-out youth must "in

The Federal Administrative Court asked several questions concerning the interpretation of Art. 16(1)(a) FRD and the compatibility of German legislation with the provisions of Art. 2(f) of Directive 2003/86/EC. The national court also asked whether these provisions are to be interpreted as not precluding national legislation under which the parents of an unaccompanied minor refugee residing lawfully in Germany are granted the right of residence only for as long as the refugee is still a minor, and what the requirements are in terms of a genuine family relationship within the meaning of Art. 16(1)(b) FRD.

The issue of children reaching the age of majority during the family reunification procedure is not new to the European Court. As already held in its precedents (*A, S*, and *État belge*),[30] the Court reaffirmed that the specific reference age of a refugee to be considered a minor and thus benefit from the right set out in Art. 10(3)(a) – whether it be the reunification of parents with minor children with refugee status, or the reunification of minor children with parents with refugee status –[31] must be established at the time of entry and asylum application of the reference person. Thus, the "ageing out" of the sponsor cannot be used to undermine the rights of unaccompanied children under this Directive.

Any other interpretation would be inconsistent with the objectives of the FRD, which include promoting family reunification and providing specific protection to refugees, in particular unaccompanied minors, and with the requirements of Arts. 7 and 24(2) of the Charter.[32] On the contrary, making the right to family reunification conditional on the date of the decision could, instead of incentivising States to process the

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principle" submit the application within three months of being granted refugee status. See ECJ, *A and S*, cit., para. 61.

[29] According to national law, the ascendant who applies for reunification with his or her child who is legally resident in Germany has a right of residence limited in time to the period during which that child is a minor. As a consequence, if the minor reaches legal age before the decision on reunification is taken, the ascendant application is rejected. The CJEU's judgement overturned a German law on family reunification.

[30] ECJ, judgment 12.4.2018, *A, S*, case C-550/16, and ECJ, judgment 16.7.2020, *État belge*, joined cases C-133/19, C-136/19 and C-137/19.

[31] Specifically, case C-279/20 referred to the family reunification procedure of a minor with her father who was a refugee in Germany. The referring court asked the same question in the case at hand.

[32] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 39.

applications of unaccompanied children expeditiously, have the opposite effect and frustrate the objective of ensuring that the best interests of the child are in practice a primary consideration of member States.[33] It would also be contrary to the principles of equal treatment and legal certainty, as it would make this fundamental right dependent on other random and unpredictable factors. It would also depend on arbitrary circumstances beyond the applicant's control, such as the length of the administrative procedures or the staffing and sickness levels of the competent authorities.[34]

The Court therefore concluded that, in order to ensure equal treatment and certainty for all unaccompanied minors, the date of the decision on the application for entry and residence for the purpose of family reunification submitted by the refugee's parents is not decisive for the assessment of their status as minors.[35] The relevant date for assessing the applicant's status as a child is the date of the application for international protection, with the result that the parents of a child who becomes an adult during the procedure continue to benefit from the family reunification right under FRD.[36] However, the application for family

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[33] *Ivi*, para. 43.

[34] *Ivi*, para. 45.

[35] *Ivi*, para. 48: "In that regard, it should be pointed out that, as the Court has already held, the age of the applicant or, as the case may be, of the sponsor, cannot be regarded as a material condition for exercising the right to family reunification, within the meaning of recital 6 and Article 1 of Directive 2003/86, in the same way as those laid down in particular in Chapter IV of that directive, which are concerned by Article 16(1)(a) thereof. Unlike the latter provisions, the age requirement is a requirement in respect of the very eligibility of the application for family reunification, which is certainly and predictably going to change, and which can therefore be assessed only at the time of the submission of that application (see, by analogy, judgment of 16 July 2020, État belge (Family reunification – Minor child), C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 46)".

[36] The same conclusion is warranted under the right to respect for family life enshrined in Art. 8 ECHR (see, for example, ECHR, judgment 14.6.2011, application no. 38058/09, *Osman v. Denmark* as well as ECHR, judgment 10.7.2014, application no. 2260/10, *Tanda-Muzinga v. France*, and ECHR, judgment 10.7.2014, application no. 52701/09 *Mugenzi v. France*), and international legal guidance (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 16 November 2017, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on*

reunification must be submitted within a reasonable time, i.e., within three months of the date on which refugee status was granted to the reunified parent.

In its decision on the preliminary question at hand, the Court also added that where family reunification had been applied for by the parents of a minor refugee who in the meantime has reached the age of majority, they should be granted a residence permit valid for at least one year if their application is accepted. The fact that the child benefiting from refugee status has reached the age of majority cannot lead to a shortening of the duration of the residence permit.[37] Under EU law, the unaccompanied minor does not have to be unmarried for the parents to be eligible for family reunification. In addition, under the best interests procedure (BIP), unaccompanied minors are eligible for family reunification as long as they were minors at the time of their asylum application, regardless of whether they reached the age of maturity during the asylum procedure or after their status was recognized. They then retain their right to be reunited with their parents under EU law as long as the application is submitted within a reasonable time (in principle, three months after refugee status is granted).

The Court went further in its reasoning, dwelling on the assessment of a genuine family relationship and adding some important new elements. This is the most interesting part of the decision, as it paves the way for a broad extension of the right to family reunification. A pragmatic approach to family ties is required given that family separation, in the case of refugees, is not a deliberate choice, but rather the result of forced displacement due to persecution and war.[38]

Specifically, the CJEU held that mere first-degree ascendancy is insufficient to establish a genuine family relationship. It applied the traditional hermeneutic approach: the relevant provisions of Directive 2003/

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the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, paras. 15 and 35).

[37] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 51. It follows that Art. 16(1)(a) FRD precludes national legislation that, in the case of family reunification of parents with an unaccompanied minor refugee, requires that the refugee is still a minor on the date of the decision on the application for entry and residence for the purposes of family reunification submitted by the sponsor's parents.

[38] ECJ, judgment 12.12.2019, *TB*, case C-519/18, paras. 49-50.

86/EC and the Charter protecting and promoting the right to family life.[39] Conversely, it is left to the holders of this right to decide how they wish to conduct their family life. In particular, the law contains no requirements regarding the intensity of family relationships.[40] The Court recognized that these families were unable to lead a real family life during the period of separation due to the specific situation of their children as refugees, and that it cannot be assumed that any family relationship between a parent and children immediately ceases to exist once the minor reaches the age of majority. The existence of family life depends essentially on the actual existence of close personal ties. Using a "constructive" and flexible method of interpretation, the CJEU departed from formal considerations to conclude that it is not necessary for the child sponsor and the parent to live in the same household or support each other financially to qualify for family reunification. Occasional visits and regular contact of any kind may be sufficient to consider that they are re-establishing personal and emotional ties and the existence of a genuine family relationship.[41]

5. Concluding remarks

The Court's increased activity to improve the protection of UMMs reflects the growing phenomenon of child and adolescent migrants and exposes the limitations of the current legal framework.

Definitely, the extensive migratory flows of unaccompanied minors crossing international borders have become one of the most complex and challenging aspects of modern migration crisis. When dealing with migrant children travelling alone, deprived of the care and protection of family, the adult paradigm, as set by international refugee law, must be left aside and the acknowledgment of a child-centric approach on the protection of this specific group of migrants must be adopted.[42]

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[39] ECJ, judgment 4.3.2010, *Chakroun*, case C-578/08, para. 43 and ECJ, judgment 14.3.2019, *Y.Z. and others*, case C-557/17, para. 53.

[40] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 62.

[41] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 68. Similarly, under Art. 8 ECHR, the concept of 'family life' is rooted in genuine personal ties. See ECHR, judgment 17.1.2012, application no. 1598/06, *Kopf and Liberda v. Austria*.

[42] E. PAPOUTSI (2020), *The Protection of Unaccompanied Migrant Minors*

The case law analysed paints a reassuring picture of the protection of the right to family unity in contexts where migrant children are involved either as beneficiaries of international protection or as members of their families. In the above-mentioned cases the Court took a fundamental rights approach, underscoring the particular vulnerability of unaccompanied minors and stressed how the right to family reunification serves the crucial role of fostering a more coherent understanding of the principle of best interest of the child. Still, by putting the focus on the promotion of family reunification and not on the control of immigration towards Europe, the Court has taken a step closer to add broader assessment of the right of the most vulnerable migrants. While revealing the punitive and exclusionary approach of States towards irregular migration, case law has attempted to mitigate the effects of aseptic enforcement by hermeneutically attributing new rights to the most vulnerable migrants.

The Luxemburg Court's favourable interpretation of the relevant provisions of both the Family Reunification Directive and the Common European Asylum System Act (Dublin III Regulation) made it possible to interpret those provisions that could affect the effectiveness of the right to family reunification of minors in a way that takes into account, in addition to the objectives of these acts, above all the need to fully implement Arts. 7 and 24(2) CFR.[43]

The hope for the future is that the Court's judgments, based on an effective child's rights approach and a supportive interpretation of the concept of family unity, will promote more effective ways of fulfilling member States' responsibilities to manage and protect migrant minors. Indeed, the CJEU's method of interpretation could provide some input to the reform in order to consider a more constructive approach to protecting migrant children.[44] Widening the scope of inquiry, one might then wonder which is the legal value of the Court's statements and their

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Under International Human Rights Law: Revisiting Old Concepts and Confronting New Challenges in Modern Migrant Flows, in *AUILR*, vol. 35, 2, 219 ff.

[43] C. FRATEA (2023), *La tutela del diritto all'unità familiare dei minori migranti*, cit.

[44] The report on migration and asylum for 2022 (COM/2022/740 final, 6.10.2022) while affirming the need for structural reforms of the European asylum system "in order to enable the Union to address both crisis situations and longer-term trends", refers to the advisability of envisaging measures specifically affecting the family sphere of migrant minors.

implications for the various proposals in the New Migration and Asylum Pact.

The Pact is an opportunity to improve asylum systems in Europe. Therefore, in the interest of good migration management, it would be advisable that the Court's rulings be reconsidered to ensure vulnerable migrants' effective protection.

However, there is a high risk that the final redrafting of the ongoing reform will not take into account the potential legal impact of the rulings, and that the legislation actually under negotiation, – which is the result of compromises among Member States political will –, may well erase or reframe the Court's ruling in the part that relates to child migrants.[45]

If the political strategies do not take these new elements into account, it will be the responsibility of domestic courts to keep a higher level of protection of migrants' minors by referring relevant cases to the CJEU. Its rulings will constitute a valuable contribution to the clarification of the applicable laws and at the same time will provide guidance for national judges as to the protective regime for refugees who are unaccompanied minors.

That is not the expected goal, but at least it is a concrete way to protect the youngest and most vulnerable victims of migration flows.

[45] This has already occurred, as the proposed Art. 15 of RDIV ignored the *M.A.* ruling (ECJ, judgment 6.6.2013, case C-648/11) and reversed the Court's decision.