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THE RIGHT TO FAMILY REUNIFICATION FOR UNACCOMPANIED MINORS SEEKING ASYLUM: A CRITICAL ANALYSIS OF THE EUROPEAN REGIONAL COURTS' JURISPRUDENCE

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TABLE OF CONTENTS

1. Introduction

In 2023, of the 1 048 880 first-time asylum seekers who applied for international protection in the European Union (EU) - the highest number since the peaks recorded in 2015 and 2016 - 41 525 were unaccompanied minors (UAM)[1]. The need to address appropriately the arrival of children that come unaccompanied both at the EU and national level remains therefore a main necessity.

"[UAM] form a category of particularly vulnerable persons" states the Court of Justice of the European Union (CJEU)[2] . As stated by the jurisprudence, it cannot be denied that, as asylum seekers, children are a particular and vulnerable group: such vulnerability derives not only from the context of asylum itself, but also from the pre-existing fact that they are children who are still developing. Therefore, Refugee law concerning asylum-seeking that are UAM must have its own specificities, ensuring that such double-factored vulnerability is acknowledged accordingly.

At an international level, refugee minors are covered by the 1951 Convention Relating to the Status of Refugees (CSR). Furthermore, the 1989 Convention on the Rights of the Child (CRC) adds a new layer to their protection, by taking into account their age-related specificities and vulnerabilities. Regarding the protection of child refugees and UAM in EU law, the EU Charter of Fundamental Rights (CFR) promotes children's rights protection in compliance with the CRC. Moreover, the rights of UAM are regulated subsidiarily by the EU asylum and migration legal framework.

However, one certainty that derives from those legal instruments is that UAM seeking asylum in the EU have in theory the same fundamental rights as any other person – one of them being the right to family unity. Indeed, the right is expressed across various instruments in a substantially similar manner, and refugee protection cannot be separated from it. Therefore, there has been a development of the right to family reunification that may oblige Member States (MS) to reunite family members. This becomes even more urgent when relating to UAM, as they are exposed to higher risks such as trafficking or any form of exploitation that could result in additional harm. Moreover, the development of the principle of the best interests of the child

[1]Eurostat, Asylum applications - annual statistics <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844#Over_1_million_first-time_asylum_applicants_in_2023>, accessed 2 May 2024

[2] Case C-648/11 *MA and Others*, EU:C:2013:367, §55

(BIC) and its correlation to family reunification has been progressively highlighted in international, regional and national legal texts and jurisprudence.

Thus, even though the right to family reunification exists in international human rights law and European law, one can hardly talk about a general right. Indeed, not every asylum seeker entering the EU has automatically the right to reunite with their family members, as they face many legal and practical obstacles – UAM included. This leads not only legal scholars, but most of the international and European actors and activists in this field to conclude that when it comes to family reunification, the rights of UAM and the pursuit of their best interests are still lacking the protection they are due by law[3].

In this context, the role played by the European regional courts has revealed itself to be essential in the current process of ensuring a better protection of the right to family reunification. Indeed, whether it is in light of the European Convention of Human Rights (ECHR) for the European Court of Human Rights (ECtHR) or European law for the CJEU, these two judicial institutions have been enhancing the right to family reunification in its diverse forms and contexts throughout the years. As affirmed by the ECtHR, "[…] family reunion is an essential element in enabling persons who have fled persecution to resume a normal life"[4] and this has allowed the Court to extract mainly from Article 8 ECHR more positive and specific obligations for States to comply with regarding reuniting asylum seekers with their families. As for the CJEU, its jurisprudence on the issue has been relying mostly in interpreting detailed provisions of the current EU legislation, notably, in this context, the Family Reunification Directive (FRD), this way enlarging the acquis on asylum and immigration shared by the MS[5].

This said, when cases of family reunification arriving to these two courts involve children, the acknowledgement of their particular vulnerability has been progressively reaffirmed, and the number of decisions involving children in which reference is made to the

[3] See for example Barbara Gornik, Mateja Sedmak and Birgit Sauer, 'Unaccompanied minor migrants in Europe: between compassion and repression' in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied children in European migration and asylum practices: in whose best interests?* (New York: Routledge 2017), p.8. See also Jorg Werner, Martine Goeman, *Families constrained: An analysis of the best interests of the child in family migration policies*, Defence for Children The Netherlands 2015, https://defenceforchildren.org/wp-content/uploads/2015/12/20151021_DC_Families-constrained.pdf, p. 12

[4] *Tanda-Muzinga v. France* App no 2260/10 (ECtHR, 10 July 2014), §75

[5] Frances Nicholson, The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, 2nd edition, UN High Commissioner for Refugees (UNHCR), January 2018, https://www.refworld.org/reference/research/unhcr/2018/en/122578 [accessed 02 May 2024], p.25

child's best interest keeps on increasing[6]. Such reference is often made with the ECtHR and the CJEU finding that the principle of the BIC had not been sufficiently placed at the centre of the domestic courts' reasonings. Also, both have enhanced many times the need to take this principle as a primary or even paramount consideration in the balancing of interests regarding asylum seekers.

Therefore, when it comes to cases of family reunification directly related to UAM, the majority of decisions should be in favour of those children reuniting with their family members, as this would be *a priori* what ensures their best interest. With this being often not the case in national courts, it becomes important to analyse the way European regional courts approach the matter and the arguments they use to overcome the barriers to family reunification. Moreover, attention should be brought to the interest the ECtHR and the CJEU pay to the principle of the BIC and how they incorporate it in their own decisions. This will make clearer what level of protection these European regional courts confer to UAM and their right to family reunification. Moreover, it will also allow for the possibility to think about expanding the scope of such protection, namely through a more in-depth use of the principle of the BIC.

This thesis aims to answer the following research question: **To what extent have the CJEU and the ECtHR ensured the respect for the unaccompanied minors' right to family reunification, and what was the role of the best interests of the child in that case-law?**

The present thesis will start by analysing, in the first part, the current legal framework regarding the right to family reunification for unaccompanied minors in both human rights and EU law: how it emerged for refugees and how it develops when regarding children in international human rights law and European law, but also the obstacles that rise from the current legal status. The second and third part will be respectively dedicated to one of the European regional courts. The second part, dedicated to the ECtHR, will analyse how the Court approaches family reunification in general and will focus on decisions involving children and UAM more specifically. This will allow to further reflect on the use of the principle of the BIC and how such principle could strengthen the right to family reunification. The third part will do the same, but this time focusing on the EU and the case-law of the CJEU.

[6] Eleonora Frasca, Jean-Yves Carlier, 'The best interests of the child in ECJ asylum and migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children's rights?', (2023), 60, *Common Market Law Review*, Issue 2, pp. 345-390, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/60.2/COLA2023024, p.346

2. From international to European law: how the right to family reunification legally emerges for UAM that are asylum seekers and how it operates in practice

2.1. Being a refugee within the EU and the importance of family reunification: the legal background

2.1.1. International Refugee Law: how the right to family reunification emerges from family unity for refugees

There is no denying that any refugee, or more generally any person seeking international protection is in a situation of great vulnerability due to a combination of factors[7]. This means that it is essential to address their specific needs and give legal recognition to a situation of particular hardship towards which States must be sensitive to.

Such protection in international law came first with the Convention Relating to the Status of Refugees (Refugee Convention) and its Protocol, adopted by the UN General Assembly in 1951 and 1967 respectively. Despite not being exhaustive of the rights due to a refugee[8], it sheds the light on the need to interpret the already-existing human rights legal rules in a particular way when applying to refugees and asylum seekers. Therefore, specificities regarding general rights arise, as well as more obligations for States to ensure their full protection. This shows that "[i]nternational refugee protection has shown a capacity to evolve and develop [...] through the contribution of a variety of international instruments, the work of intergovernmental bodies, including regional organizations, and jurists"[9].

It is precisely with this in mind that the relation between refugees and the right to family unity needs to be addressed. Addressing such right of asylum seekers in general is indeed crucial because of their particular state of vulnerability: they are in a situation of great suffering and stress, which also affects the refugee's family[10]. Additionally, current research suggests that

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[7] For the definition of a refugee, see Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Art 1. See also Parliament and Council (EU) Directive 2011/95/EU 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 (recast) (Qualification Directive) [2011] OJ L. 337/9-337/26, Art 2(f)

[8] Refugee Convention, Art 5

[9] Bemma Donkoh, 'A Half Centuy of International Refugee Protection: Who's Responsible, Whats Ahead?', (2000), 18, *Berkeley Journal of International Law*, Issue 2, pp. 260-267, https://lawcat.berkeley.edu/record/1117180?v=pdf, p.263

[10] Mark Rohan, 'Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence', (2014), 15, *Chicago Journal of International Law*, Issue 1, pp. 347-375, https://chicagounbound.uchicago.edu/cjil/vol15/iss1/15/, p.367

family separation prevents refugees from integrating themselves in the host State[11]. Thus, family unity and refugee protection are necessarily intertwined because of the unique features of the situation that they face[12]. In this context, the international community has a legal duty to step in[13].

The right to family unity has been established through various international instruments and therefore is a right (albeit of ambiguous content) in international law[14]. It appears not only in the Universal Declaration of Human Rights[15], but also in the International Covenant on Civil and Political Rights[16] and the International Covenant on Economic, Social and Cultural Rights[17]. The importance of family unity is also mentioned in the International Convention on the Protection of the Rights of All Migrant Workers and Their Families[18], and the Convention on the Rights of the Child has also been influential in shaping the State's obligations to the family[19] because the rights of the child are intimately bound up with the rights of the family, as seen further. Additionally, the ECHR seems to point to the same direction, as it sets in Article 8(2) that the right to family life can only suffer interferences from States exceptionally.[20]

In Refugee Law, there is no mention of the principle of family unity in the main text of the Refugee Convention. Nevertheless, the Conference of Plenipotentiaries, in adopting the treaty, unanimously chose to include a Recommendation regarding that principle. It recognized family unity as "an essential right of the refugee," noting that "the rights granted to a refugee are extended to members of his family" and thereby recommending that States take "necessary measures for the protection of the refugee's family."[21]. Moreover, since other international agreements also include a right to family unity, the Refugee Convention cannot be interpreted as excluding such right[22].

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[11] Eilidh Beaton, 'The Right to Family Unification for Refugees', (2023), 49, *Social Theory and Practice*, Issue 1, pp. 1-28, p.12
[12] Rohan (n 10) p.368
[13] Beaton (n 11) p.13
[14] Rohan (n 10) p.350
[15] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Art 16
[16] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 17
[17] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Art 23
[18] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93, Art 44
[19] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Arts 9-10, 16
[20] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art 8(2)
[21] Rohan (n 10) p.368
[22] Ibid, p.369

This said, family reunification in the country of asylum is often the only way to ensure respect for the right to family life and unity of this category of people. It is important to remember that even though States have the duty to respect the right to family unity, it does mean necessarily that a general right to family reunification *per se* can be derived from it[23]. Discussions regarding its existence divide scholars between those who argue that a general right has been established[24], and those who say that it is clear that such general right does not exist[25]. However, full recognition is given to the right to family reunification in the more specific circumstances of a refugee family. The fact that, unlike other migrants, they are unable to enjoy the right to family unity in their country of origin removes the strongest legal justification for the denial of family reunification. Consequently, it activates the international community's positive obligation to uphold the principle of family unity[26].

Although the right to family reunification is recognized by the international community, it finds its legal basis only through the interpretation of the right to family unity as expressed in international instruments. For example, in international refugee law, the Refugee Convention does not itself refer to family reunification, but the Final Act of the Conference of Plenipotentiaries at which it was adopted recommends that governments "take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained … [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption"[27].

As for the ECHR, there is again no explicit mention of a specific duty for States to take measures regarding family reunification. Notwithstanding, Article 3 (protection against inhuman degrading treatment), Article 5 (deprivation of liberty), and Article 8 (right to respect for private and family life), taken alone or in conjunction with Article 14 (non-discrimination), are used to support the rights of migrant, refugee and asylum-seeking children and their family members[28]. In particular, the jurisprudence of the ECtHR has played a decisive role on interpreting the substance of Article 8 ECHR, leading to the creation of obligations regarding

[23] Ibid, p.356
[24] Ibid, p.358
[25] Ibid, p.363
[26] Ibid, p.364
[27] Nicholson (n 5) p.5
[28] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child*, 2022, https://fra.europa.eu/en/publication/2022/handbook-european-law-child-rights, p.200

the reunification of families in the context of immigration and asylum, as it will be demonstrated further.

2.1.2. EU law: the development of the right to family reunification for refugees

Differently than in international law, EU law addresses directly family reunification for asylum seekers.

First of all, the EU legal system fully acknowledges that asylum seekers form a particular category of vulnerable people[29]. Starting with the CFR, Article 18 states "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention […] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union"[30]. Over the years, the EU developed an entire legal framework on asylum and protection of people seeking international protection[31] in which it defines the different status that can be granted, the procedural aspects regarding applications, conditions of stay, etc; as well as the rules to establish which Member State is responsible for examining an application or the rules for returning asylum seekers.

Starting with the Dublin Regulation, it sets out the maintenance of family unity as the primary binding criterion for determining the MS responsible for examining the substantive application for international protection[32]. In the Qualification Directive, Article 23 explicitly protects family unity, and the Directive provides for benefits such as residents permits, access to education or access to accommodation that are meant for all family members of the beneficiary of international protection. Moreover, the Reception Conditions Directive, which applies from the moment someone applies for international protection in a MS of the EU, also intends to ensure full compliance with family unity, in accordance with the CFR and the

[29] Nesa Zimmermann, *La notion de vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme: Contours et utilité d'un concept en vogue*, (Schulthess Verlag 2022), p.42

[30] European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Article 18

[31] Qualification Directive; Council (EU) Directive 2003/86/EC on the right to family reunification (FRD) [2003] OJ L. 251/12-251/18; Parliament and Council (EU) Regulation 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 (recast) (Dublin Regulation) [2013] OJ L. 180/31-180/53; Parliament and Council (EU) Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) (Asylum Procedure Directive) [2013] OJ L. 180/60-180/87, Parliament and Council (EU) Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive) [2013] OJ L. 180/96-180/111; Parliament and Council (EU) Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) [2008] OJ L. 348/98-348/107

[32] Dublin Regulation, Arts 7(3), 9-10, 16-17. See also Recital (16)

ECHR[33]. As for the Return Directive, it is enhanced that the common standards and procedures to be applied in MS for returning illegally staying third-country nationals are in accordance with refugee protection and human rights obligations[34] - which includes the respect for family life[35].

2.1.3. The Family Reunification Directive: more favourable rules for refugees

The FRD provides for a substantive right to family reunification, as it is "a necessary way of making family life possible […]"[36]. It applies generally to third-country nationals who are legally residing in a MS and wish to be joined by their family members. However, recital 8 states that "[s]pecial attention should be paid to the situation of refugees on account of the reasons which obliged them from leading a normal family life there […]". Therefore, there are specific provisions that apply to the family reunification of those who have acquired a refugee status recognized by the MS. The latter are encouraged to give priority and facilitate the family reunification of those refugees, as they are required to process their applications efficiently and within a reasonable time frame, taking into account their specific circumstances and vulnerabilities. Namely, Article 12 prohibits MS from imposing requirements such as those that regular applicants have to fulfil according to Article 7[37].

Finally, it is worth paying attention to the individual proportionality test set out in Article 17. It means that MS have an obligation that goes further than considering whether there are insurmountable obstacles to exercise the right to family life in the country of origin of the sponsor or the family member – which ultimately means a higher level of protection of the right to family reunification for refugees.

Given that the situation of beneficiaries of international protection is fundamentally different from that of other migrants, since they are unable to enjoy family life in their country of origin, allowing for family reunification has been an important development of international and European law. The latter went further with the granting of a substantive right to family reunification for those who've acquired a refugee status within the UE.

[33] Reception Conditions Directive, Arts 12, 18(2a) and (5)
[34] Return Directive, Art 1
[35] Ibid, Arts 5(b), 17(2)
[36] FRD, Recital 4
[37] Ibid, Art 12(1) and (3). See also Arts 4 and 11(2) regarding refugees

2.2. Unaccompanied minors as an even more vulnerable category of refugees: strengthening of the right to family reunification

2.2.1. International guarantees for unaccompanied minors

Children are real rightsholders, not merely beneficiaries of protection; however, given their specific characteristics and needs, they are subject to special regulations[38]. Indeed, "[f]rom the Western perspective, childhood is generally thought to be one of the most vulnerable periods of an individual's life as this is a time of intense formation of self-understanding, self-identity and worldviews."[39].

This is why the UN adopted the CRC which sets out a specific legal protection, establishing that "a child means every human being below the age of eighteen years"[40]. Moreover, Article 14 of the ECHR guarantees the enjoyment of the rights set out in the convention "without discrimination on any ground", including age. Finally, the ECtHR has accepted applications by and on behalf of children irrespective of their age[41], and in its jurisprudence, has embraced the CRC definition of a child[42]. It is clear that the international community is concerned with creating a legal protection of children and their rights, as well as specific obligations for States to secure their development.

One striking aspect of children's rights is the link they establish with rights of the family, especially the respect for family life. Indeed, there is a real interest in the preservation of the loving family unit for the sake of their development[43]. Such idea is reflected in the CRC, as it is "[…] not merely an explication of children's rights, but also an expression of the rights belonging to the family"[44]. There is a clear policy to keep families unified, and in keeping with the right to family unity expressed in other instruments[45].

Such concern is only enhanced when addressing a specific category of children – UAM seeking asylum. Not only do they suffer from being deprived of their normal life like all other seekers of asylum, but by being separated from their families they also let go of their emotional

[38] *Handbook on…* (n 28) p.19
[39] Gornik, Sedmak and Sauer (n 3) p.4
[40] CRC, Art 1
[41] See for example, *Marckx v. Belgium*, App no 6833/74 (ECtHR, 13 June 1979), where the applicant child was six years old when the Court delivered the judgment.
[42] See for example, *Çoşelav v. Turkey*, App no 1413/07 (ECtHR, 9 October 2012), §36
[43] Beaton (n 11) p.25
[44] Rohan (n 10) p.354
[45] Ibid.

development[46]. All of this makes it evident that the consequences of family separation are particularly negative for children refugees and asylum seekers.

This said, refugee children have particularly strong rights to family reunion – some scholars even defending the idea that such rights are even stronger than the family reunion rights of refugee adults[47]. What is certain is that family reunification is a crucial right in a context of doubled-vulnerability, as it is the case UAM seeking asylum.

In line with the CRC[48] and the principle of non-refoulement set out in the Refugee Convention[49], an UAM is ought to stay in the country of asylum when there is a "reasonable risk" that the return to the country of origin would amount to refoulement, to the violation child's human rights, and/or to a situation in which the child would not be safe or provided with proper care and enjoyment of rights[50]. It is only when family reunification in the country of origin is not in the child's best interests or not possible that measures for parents to reunify with their children and/or regularise their status should be put in place[51].

In the CRC, the right to family reunification of UAM arises from the combination of many legal provisions - some defending that this international convention is "[…] the primary basis for the establishment of the right"[52]. It provides States with a specific duty to cooperate in family tracing initiatives "to obtain information necessary for reunification with [the UAM's] family"[53]. The latter provision is particularly important, as it sets an explicit duty to assist in reunification[54] according to which host States must be proactive in family reunification procedures – a duty that is not as enhanced when those applications concern adults. Additionally, Article 10 requires States to deal with applications by a child for parents to enter and leave a country in a "positive, humane, and expeditious manner.". This alters the traditional balance between State sovereignty and human rights, as it places a higher burden on the State

[46] Gornik, Sedmak and Sauer (n 3) p.5
[47] Beaton (n 11) p.21
[48] CRC, Arts 9-10
[49] Refugee Convention, Art 33
[50] Council of Europe, Family Reunification for Refugee and Migrant Children: Standards and promising practices, 2020, https://edoc.coe.int/en/refugees/8183-family-reunification-for-refugee-and-migrant-children-standards-and-promising-practices.html, p.38
[51] Ibid, p.38
[52] Rohan (n 10) p.358
[53] CRC, Art 22
[54] Rohan (n 10) pp. 357-358

to show that it has a legitimate reason for exclusion. That said, States have a margin of discretion regarding the specific implementation of that positive obligation[55].

2.2.2. European law and the additional layer of protection of the right to family reunification for unaccompanied minors

The area of asylum and migration falls under the EU's competence to legislate (Articles 2–4 of the TFEU), which means that EU law has indeed the power to introduce provisions that aim directly at the protection of children in that context[56].

However, it remains true that European children's rights law is largely influenced by the CRC[57], as all the MS are parties to the convention. Also, "the EU relies on "general principles of EU law" (written and unwritten principles drawn from the common constitutional traditions of the MS) as sources of EU law alongside the EU treaties. Consequently, and as all EU MS have ratified the CRC, the EU legislation is influenced by the CRC's principles and provisions[58]. It is within this context that the EU's legal protection of asylum-seeking children entering the territory arises.

Starting with the CFR, Article 24 includes two of the 'CRC general principles': the BIC principle (Article 3 of the CRC) and the child participation principle (Article 12 of the CRC), therefore setting the child as a holder of rights– including asylum seekers who have or not been granted an international protection status. Also, Article 24(3) provides for children specifically the right to respect for private and family life – enhancing the particular role in plays in the protection of this vulnerable category of rightsholders. The provision clarifies the content of the right, particularly what it means to maintain contact with the parents.

Continuing to EU secondary law, UAM seeking international protection are meant to be protected by specific legal rules from the moment they arrive to European territory[59]. Such concern is then replicated throughout the legislation regulating asylum and international protection procedures: the Directives contain provisions that concern directly and specifically minors and UAM[60]. Altogether, they provide for "specific needs of unaccompanied children,

[55] Ibid.
[56] *Handbook on…* (n 28) p.24
[57] Ibid, p.29
[58] Ibid.
[59] See Parliament and Council (EU) Regulation 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019], OJ L 295/1-295/131, Article 80(3)
[60] Qualification Directive, Art 31; Asylum Procedure Directive, Art 25; FRD, Art 10(3); Reception Conditions Directive, Art 24; Dublin Regulation, Art 8(4); Return Directive, Art 10

including as regards legal aspects such as legal guardianship and legal representation, age assessment, […] asylum procedures, detention, and expulsion, as well as aspects relating to the living conditions of the children"[61].

Most importantly, the link between the protection of UAM and family reunification is consistently enhanced by the same EU sources of law. Preserving the family unit and ensuring the respect for family life of these children is a concern that is before-hand taken into consideration, as certain provisions create the need for MS to ensure that families are maintained together[62]. However, the crucial point is that, from the moment an UAM applies for international protection in a MS of the EU, the latter has the obligation to start, as soon as possible, the procedures of family tracing for minors who are on their territory or at the borders of the territories[63]. This search is carried out through the tracing services and must always be held in compliance with article 10 of the CRC. Regarding the Dublin Regulation, "[…] even though the Dublin III Regulation does not have family reunification as a primary objective, in practice it has the potential to bring separated families together"[64]. Indeed, when an asylum seeker is an UAM, the MS where a family member or a sibling is legally present is designated as the responsible MS, if this is in the best interests of the child.

Finally, the most relevant legal instrument is the FRD, which requires Member States to authorise the entry and residence of the parents of UAM with a refugee status in the situation where it is not in the child's best interests to join his/her parents abroad[65]. In the absence of a parent, Member States have the discretion to authorise the entry and residence of the child's legal guardian or any other member of the family[66]. The definition and rights attached to 'family' are therefore more generous in the context of unaccompanied children than for most other categories of child migrants"[67].

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[61] *Handbook on…* (n 28) p.199
[62] Qualification Directive Arts 23, 31(4); Reception Conditions Directive, Arts 11(4), 12, 24(2), 23 (5); Return Directive, Art 17(2)
[63] Reception Conditions Art 24(3); Dublin Regulation, Arts 6(5), 7(3); Qualification Directive, Art 31(5)
[64] Stamatis Melissourgo, Arjen Leerkes and Mark Klaassen, 'Stuck in Greece? Unaccompanied Minors' Stratified Access to Family Reunification on the Way to Other EU Member States', (2023), 25, *European Journal of Migration and Law*, pp.301-327, https://familyreunificationnetwork.org/sites/default/files/2023-09/emil-article-p301_3.pdf, p.315
[65] FRD, Art 10(3a)
[66] FRD, Art 10(3b)
[67] *Handbook on…* (n 28) p.208

2.3. The obstacles to family reunification for unaccompanied minors within the EU

Despite the many efforts made in international and European law, there still is a clear discrepancy between formally declared rights to family reunification for UAM seeking asylum and their implementation within the MS. Such barriers to the right to family reunification for these individuals come from the law itself and the procedures that are currently in place, or even from other factors.

The first legal obstacle that undermines the protection of UAM and their right to be with their families is the fact that such protection is highly dependent on the legal status the UAM is granted. Indeed, the FRD, only grants explicitly that right to sponsors that are UAM with a refugee status. Although in its Guidelines for the application of the EU FRD[68], the European Commission noted that "the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees" and encouraged MS to grant similar rights to both groups, the truth is that 15 MS continue to make that distinction[69]. This means that beneficiaries of subsidiary protection are not covered by Chapter V of the Directive, facing a far more complex and demanding procedure[70]. This leaves the UAM's right to family reunification completely dependent on the granting of a status that can be randomly attributed, depending on other factors than the material situation itself.

Another critical aspect of the current legal context that limits family reunification for UAM is the preconceived notion of family used in EU law. Indeed, according to the FRD, UAM refugees benefit from a right to be joined by their parent(s) only. Any other relative who was part of the family unit in the country or origin is excluded from such right and is therefore entirely left upon the goodwill of the concerned MS to accord a visa to enter the territory on humanitarian grounds. More importantly, "[…] where only the parents are permitted to reunite and they have other minor children, they are faced with a decision either of remaining separated from the child beneficiary of international protection or of leaving behind their other child(ren)"[71]. Such a narrow definition of the family members allowed to reunite with the UAM leads to a chilling effect of family reunification.

[68] European Commission, Communication from the Commission to the European Parliament and the Council on Guidance for application for Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, pp. 24-25
[69] *Family Reuni…* (n 50) p.44
[70] Ibid.
[71] Nicholson (n 5) p. 195

In light of the above, it is clear that secondary EU law is still ill-suited for the family reunification of UAMs. Despite all the special provisions regarding UAM, in the end they face almost as many obstacles as any other person applying for family reunification in the context of asylum.

Focusing on the UAM that have been granted a refugee status, there are obstacles in terms of the procedure of family reunification itself that undermine their right to reunite with their families. To begin with, and despite Article 5(4) of the Directive, the generous time limits to make decisions (or the absence of any time limit) create a risk to lead to unnecessary prolongation of a situation of family separation– which is only aggravated if we are talking about UAM[72]. Even more alarming regarding the length of those procedures, is the fact that a lot of UAM reach the age of majority during the procedures. This creates the risk of getting their applications rejected due to the fact that certain national legislations make them no longer entitled to family reunification or to the same additional guarantees they had as unaccompanied children[73]. This is relevant, as according to the European Union Agency for Asylum, in 2022 93% of all UAM applicants were 14-to-17 years old. This leaves them in a situation of great uncertainty, because when they reach 18 years of age, their migration status will take precedence and family reunification will only become more difficult[74].

Another important obstacle to family reunification for UAM concerns the age assessment procedures applicants may have to go through in the previous phase of asylum procedures[75]. This refers to the procedures through which authorities seek to establish the legal age of a migrant to determine which immigration procedures and rules need to be followed[76]. As it was shown before, the vulnerability of children is recognised as the most effective legal basis for defending the interest of UAM[77]. Therefore, an erroneous age assessment will refrain a child from benefitting of special rules regarding family reunification in general – which is often the case, as methods of age assessment are applied despite the fact that they are unreliable and defined by a wide margin of error[78]. The effect of such policies is problematic "[…] especially

[72] Ibid, p.213
[73] *Family Reuni…* (n 50) p.39
[74] Barbara Gornik, 'At the crossroads of power relations The Convention on the Rights of the Child and unaccompanied minor migrants', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied children in European migration and asylum practices: in whose best interests?* (New York: Routledge 2017), p.24
[75] Asylum Procedure Directive, Art 25(5)
[76] *Handbook on…* (n 28) p.205
[77] Gornik, Sedmak and Sauer (n 3) p.10
[78] Gornik (n 74) p.24

as it prioritises age assessment [...] over applying the benefit of the doubt (and thus approving child-specific protection to young adults)"[79].

Lastly, even though States have made a progressive effort in creating specific procedures that help to respect the obligation to take into consideration the best interests of the child[80], the latter remain for most of the national actors a mere formality instead of being the determinant step to decide on family reunification cases. For example, "the child protection actors involved in the process [in Greece] report that despite the usefulness of the form, the transfer of the child is denied by the requested member state often without any explanation of how the best interests of the child were taken into consideration and how the BID performed in Greece weighed in on this decision"[81]. NGOs and other institutions keep reporting that the child's best interest is constantly neglected when it comes to cases of family reunification, as other considerations are given more weight, namely the economic, social and political cost for the host societies [82].

In addition to these legal obstacles, UAM face other barriers relating to their experience and real situation in the access to family reunification. For example, the lack of financial conditions that usually comes with being an UAM, despite MS being encouraged to provide the minor with support needed to submit an application[83]. Another issue is the fact that the application for family reunification can only be made either by the sponsor or the family member(s), depending on what is determined by the MS concerned[84], which in practice does not give enough flexibility to procedures that already drag for too long.

[79] Ibid.
[80] European Asylum Support Office, *Age assessment practices in EU+ countries: updated findings*, 2021, EASO. Age assessment practices in EU+ countries: updated findings (europa.eu), p.13
[81] *Family Reuni…* (n 50) pp.70-71
[82] Gornik (n 74) p.29
[83] *Family Reuni…* (n 50) p.39
[84] FRD, Art 5(1)

3. The evolution of the role played by the ECtHR in ensuring an effective right to family reunification for unaccompanied minors

3.1. Background of the jurisprudence: ECtHR and its role on the protection of family reunification in general

The issue of family reunification for UAM seeking international protection in the EU has not been dealt in depth by the ECtHR, as the number of decisions regarding that category of minors is still limited. Notwithstanding, it remains true that the Court's interpretative approach of the ECHR provisions has created many positive obligations throughout its case-law. In particular, jurisprudence regarding Article 8 has set the way for enlarging State's responsibility to ensure the respect for private and family life through family reunification, as well as it has increasingly enhanced the need to take into account children's specificities in accordance with the CRC. Therefore, many of the cases contain legal arguments and interpretations that are relevant for the purpose of ensuring a more effective right to family reunification for the specific category of UAM in need of international protection in the EU.

3.1.1. The foundation of a right to family reunification in Article 8 ECHR

The turning point for the protection of family reunification under Article 8 ECHR came with the recognition by the ECtHR that the provision does not translate only in negative obligations for States to not interfere with one's family life – it also implies positive obligations regarding the entry of non-citizens to join a person lawfully residing in that country in order to ensure the latter's right of respect for family life.

The first decision on that regard was made in the case *Abdulaziz, Cabales, and Balkandali v. the United Kingdom*[85] concerning three women who had applied for family reunification so their husbands could join them in the UK. Despite the fact that the women were lawfully and permanently settled, their applications for reunification were rejected. The Court established that the non-interference language of Article 8 ECHR may include "positive obligations inherent in an effective 'respect' for family life" although States are given a "wide margin of appreciation" in putting the article into effect, such that the State's obligation varies from case to case"[86]. However, it also established a legal standard that, for a violation of Article 8 to exist where reunification is denied by a State, (1) there needs to be an existing or intended family

[85] *Abdulaziz, Cabales, and Balkandali v. the United Kingdom*, App no 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985)
[86] Ibid, § 67. See also Rohan (n 10) p.360

life; and (2) there must be obstacles preventing establishment of family life in another country. In that case, the Court found that the second part of the test had been failed[87].

The ECtHR therefore sets a balancing test to establish whether there is a State's obligation to reunite family members based on the specific circumstances of the case – but nevertheless opens the door to allow for family reunification when it is not explicitly predicted in the law. This could even mean that there is a general right to family reunification for refugees and international protection seekers, because "[the *Abdulaziz*] rationale is inapplicable to the case of refugees. A refugee is necessarily outside of his or her country against his or her will. Therefore, it is not the case that the refugee is merely choosing to live in a state in which he or she would prefer to experience family life; instead, the refugee is forced to be in the country of refuge and is by necessity not in the country of choice [...]"[88].

In the following cases *Gül v. Switzerland*[89] and *Ahmut v. the Netherlands*[90]*,* the Court applied that same two-pronged test and concluded that the States had indeed not violated Article 8 by denying family reunification to the applicants. In *Gül,* it found that insufficient obstacles had been shown in order to determine that "Ersin's move to Switzerland would be the only way for Mr Giil to develop family life with his son"[91]. In *Ahmut*, the Court concluded when balancing the parties' interests, it found insufficient reasons to conclude that Ahmut's interests outweighed those of the State in controlling immigration. More importantly, the ECtHR imposed a "high obstacle requirement"[92] , in the sense that it has to be impossible or at least extremely difficult for a person to continue elsewhere the family relation they experienced prior to migration.

Again, the narrowing of the balance of interests' test would not appear as affecting refugees who by definition have great obstacles in their way from enjoying family life in the country of origin. In particular, in *Ahmut,* the deciding factor during the Court's usual balancing test was the fact that Ahmut had made a conscious decision to live apart from his child and therefore maintenance of the status quo, as willingly entered into by the applicant, was not seen as interference violating Article 8 – something that could never be argued regarding refugees. Rohan explains: " it is a basic and necessary fact that refugees are in flight from their homes,

[87] *Ibid, § 68*
[88] *Rohan (n 10) p.370*
[89] *Gül v. Switzerland, App no 23218/94 (ECtHR, 10 October 1994)*
[90] *Ahmut v. the Netherlands, App no 21702/93 (ECtHR, 28 November 1996)*
[91] *Gül (n 89) §39*
[92] *Rohan (n 10) p.362*

not, like Ahmut, simply choosing to live in a place they deem more suitable. Moreover, it would be unthinkable that the refugee's being apart from his or her family is somehow an acceptable status quo into which the refugee entered willingly"[93]. Refugees therefore fulfil the strict test for family reunification set out in the above three cases by virtue of the status they have been granted, but the same could not be said about asylum seekers who find themselves in a similar situation as refugees but do not possess an adequate status under the law to request family reunification.

That is why subsequent cases nuancing the test abovementioned becomes even more relevant. In *Şen v. the Netherlands*[94], the ECtHR was called to decide upon a case concerning the family reunion of the daughter of a Turkish family residing lawfully in the Netherlands under resident permits and who had had two other children born there and attending school. They applied unsuccessfully for a residence permit for the child that had remained first in Turkey with other family members. On account of the rejection of their application, they complained of an infringement of their right to family life, as enshrined in Article 8 ECHR. The ECtHR first considered the facts of the case based on the applicable principles set out in *Gül* and *Ahmut*. Although the case appeared at first to be similar to *Ahmut*, the Court declared that it could not be expected from the entire family to give up their residence status in the Netherlands: indeed, the integration of the two children born in that country was an important factor to remain in the host State. In that sense, it differed from the *Ahmut* judgment, because the Court considered, in the present case, these circumstances to be a major obstacle in returning the family Sen to Turkey. Under these conditions, the most appropriate way to develop family life was therefore, given the young age of the third applicant, by bringing her to the Netherlands[95].

The ECtHR has showed its intent to take into consideration the particular circumstances of the families who could be facing a violation of their rights under Article 8 ECHR[96] – the decision *Şen* is relevant because to make the balance between the applicants' and the State's interests, the Court did not overlook the situation of the other children involved, and it recognized that forcing the applicants to leave the Netherlands and the place where two of their children were already fully integrated to reunite with their daughter was indeed unfair in the balance of interests. Indeed, it acknowledged a basic idea behind family unity – when dealing

[93] Ibid, p.371
[94] *Şen v. the Netherlands*, App no 31465/96 (ECtHR, 21 December 2001)
[95] Ibid, §40
[96] See also *Tuquabo-Tekle and Others v. the Netherlands*, App no 60665/00 (ECtHR, 1 March 2006)

with decisions concerning the family, each member has to be considered and ensuring their integration and development presupposes that they are kept together.

The establishment by the ECtHR of a positive obligation for States deriving from Article 8 ECHR to provide for family reunification, even if dependent on a certain number of criteria, has opened the door to a higher level of protection of the right to family reunification – which can only benefit seekers of international protection. Moreover, as the ECtHR has made a progressive effort of taking more into account the interests of all family members, it should help to have a more extensive view on what constitutes a great obstacle to the exercise of family life in the country of origin – and this way allow for family reunification in situations that are more complex.

3.1.2. The creation by the ECtHR of specific obligations regarding family reunification that acknowledge the particular situation of refugees and unaccompanied minors

When developing the right to family reunification, the ECtHR has enhanced the idea that States are also under the obligation of making sure that such right is indeed effective – either during the application process or in the aftermath of the decision itself. Additionally, in light of its effort to take into account the particularities of the applicants when assessing the fair balance between the applicants' personal interests and the State's own legitimate interests, the Court has progressively acknowledged the special circumstances in which refugees – and also UAM in particular – find themselves and how important family unity is for the normalization of their lives. This had led the ECtHR to create – still under Article 8 – positive obligations regarding family reunification of refugees.

First, it should be noted that ECtHR's jurisprudence regarding rules of evidence for asylum seekers has considered that, in view of the particular situation in which they find themselves, it is appropriate in many cases to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support of them[97]. Nevertheless, it also states that where information is submitted which gives good reason to doubt the veracity of the asylum seeker's statements, the asylum seeker is required to provide a satisfactory explanation for inconsistencies in his or her account[98]. Even though such consideration derives from Article 3 and not Article 8, it represents a first step towards acknowledging the vulnerable position of refugees and asylum seekers in general, and to facilitate their access to family reunification.

[97] *F.N. and Others v. Sweden*, App no 28774/09 (ECtHR, 18 December 2012), §67
[98] Ibid.

There are two fundamental decisions regarding refugees and their effective right to family reunification: *Tanda-Muzinga v. France*[99] and *Mugenzi v. France*[100]. Both cases concern asylum seekers who had been granted a refugee status and afterwards submitted applications for family reunion to be able to live with their children, who were then in their home countries. Although the principle of family reunification had been recognised in both cases, the national authorities refused to issue visas for those children on account of difficulties in establishing the children's civil registration status.

For each case, the ECtHR started by accepting that "the national authorities are faced with a delicate task when having to assess the authenticity of civil-status documents […]. The national authorities are, in principle, best placed to assess the facts on the basis of the evidence gathered by or submitted to them"[101]. However, the Court explicitly acknowledged the existent consensus at the international and European level concerning the need for refugees to benefit from a more favourable family reunification procedure than that foreseen for other foreigners - and highlighted States' obligation to institute a procedure that took into account the events that had disrupted and disturbed his family life and had led to his being granted refugee status[102]. Therefore, it found itself competent to "ascertain whether the domestic courts, in applying and interpreting the provision, secured the guarantees set forth in Article 8 of the Convention, taking into account the applicant's refugee status and the protection of his interests protected by it"[103]. Hence, in each decision the ECtHR analysed the quality of the family reunification procedure itself.

In *Tanda-Muzinga v. France*, the Court found that they were no sufficient explanations and reasons given to the applicant in due time in order for him to understand the precise objections to his requests[104]; that he had encountered too many difficulties when seeking to participate effectively in the proceedings and in putting forward the "other evidence" establishing family ties[105]; and that that the almost three and a half years of time lapse for the national authorities to cease contesting the parent-child relationship between the applicant and his children had been excessive, having regard to the applicant's specific situation and what was at stake for him in

[99] *Tanda-Muzinga* (n 4)
[100] *Mugenzi v. France*, App no. 52701/09 (ECtHR, 10 July 2014)
[101] *Tanda-Muzinga* (n 4) §72. See also *Mugenzi* (n 100) §51
[102] Ibid, §73. See also *Mugenzi* (n 100) §52
[103] Ibid.
[104] *Tanda-Muzinga* (n 4) §78
[105] Ibid, §79

the verification procedure[106]. Therefore, it concluded that "the national authorities did not give due consideration to the applicant's specific situation, and […] that the decision-making process did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for family life under Article 8 of the Convention. Accordingly, the State has failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other"[107].

As for *Mugenzi v. France,* the Court noted that it was a summary medical examination which proved decisive in evaluating the doubtful authenticity of the birth certificates submitted in the visa applications even though other elements had been brought[108]– and in particular, noted that the applicant had referred to his children from the start of their asylum applications and that OFPRA had certified the composition of their family[109]. Thus, the Court observed that the applicant had been confronted with multiple difficulties over the years, in spite of the fact that he had already undergone traumatic experiences[110]. Lastly, it had taken almost five years for Mr. Mugenzi to obtain a final decision on his application; in the Court's opinion, these time periods were excessive, given the applicants' specific situation and what was at stake for them in the verification procedure[111]. It therefore concluded in the same way as in *Tanda-Muzinga v. France* by stating that the safeguards inherent to Article 8 ECHR had been violated[112].

In both decisions, the ECtHR enhanced what had already been argued by the main international and European institutions through soft law[113]: apart from allowing for family reunification of refugees, States have a real duty to make such right effective through procedures that take account of the applicant's vulnerability and his particularly difficult personal history, and by paying close attention to arguments of relevance to the outcome of the dispute.

Moreover, the ECtHR has also recognized that the interaction between young age and migratory status as a source of "extreme" vulnerability leads to a greater need of States to assist family reunification. In the case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, which deals with the detention and deportation of an UAM, the Court found that since dealing with an

[106] Ibid, §80
[107] Ibid, §82
[108] *Mugenzi* (n 100) §59
[109] Ibid
[110] Ibid, §59-60
[111] Ibid, §61
[112] Ibid, §62
[113] See for example, *Communication…* (n 68)

unaccompanied foreign minor, the Belgian State was under an obligation to facilitate the family's reunification[114] - which according to the Court, not only it failed to comply it, but actually hindered it with its actions[115].

This set of decisions shows how the ECtHR has enhanced the need to interpret Article 8 ECHR considering the circumstances of asylum seekers. This has led the Court to point out obligations for States regarding the procedures for the family reunification of refugees in order to ensure the effectiveness of their right to family unity. This is relevant, as these decisions reinforce the need to reduce obstacles that are regularly faced by those who seek international protection – and, in particular, UAM.

3.2. The rising role of the best interests of the child in the ECtHR's jurisprudence regarding family reunification

The ECtHR has contributed to promote the effectiveness of the right to family reunification for refugees, by deducing specific obligations for States regarding that category of asylum seekers that take into account the vulnerable circumstances they find themselves in. As an important part of its jurisprudence relating to this issue comprehends cases of reunification with family members that are minors, it is worth paying attention to what role the principle of the BIC has played in the Court's reasonings.

3.2.1. The insufficient attention given to the child's best interests leads to violations of the ECHR

To start with, it is worth remembering that the ECtHR has held that, when deciding whether there is a violation of Article 8 regarding the obligation of providing for family reunification, the particular circumstances of a child being involved do play an important role in the balancing of interests. Indeed, national authorities are under the duty to take into account the age of the child concerned, her situation in his/her country of origin and the level of dependence in relation to his/her parents, to decide whether the State had or not a positive obligation to provide for family reunification[116]. However, it remains uncertain what is the actual weight that is given to those considerations, and to what extent they are given a higher priority when doing the balancing of interests.

[114] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (ECtHR, 12 October 2006), §85
[115] Ibid, §82
[116] *Şen* (n 94), §37

An important first sign given by the ECtHR was the introduction of the principle of the BIC in its decisions concerning children. in the case *Neulinger and Shuruk v. Switzerland*, it acknowledged explicitly that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount"[117]. Such declaration by the ECtHR reinforces the effectiveness of the CRC and the role it plays in interpreting not only the ECHR, but European and national legislation itself. For example, the requirement to consider the BIC in expulsion cases where children are involved has been increasingly recognized by the ECtHR over the last decade or so[118]. Also, when dealing with detention, the Court has underlined many times that national authorities are to take the BIC into consideration and therefore examine alternatives to detention[119].

Regarding family reunification, it means that paying particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents, becomes even more important, as national authorities can be held accountable for whether they've made that assessment or not[120].

Additionally, decisions such as in *El Ghatet v. Switzerland*[121] represent an important step towards more attention being brought to the BIC in in asylum and migration-related issues. The case concerned a divorced Egyptian man and his son residing in Egypt. They submitted an application to the ECtHR complaining that the Swiss authorities' refusal of their request for family reunification violated their right to respect for family life as provided in Article 8 ECHR.

In its decision, the Court followed the usual rationale regarding possible violations of Article 8 ECHR concerning family reunification and found that no clear conclusion could be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory. It enhanced that the child lived with his mother who took care of him alongside side his grandmother, that he had strong social, cultural and linguistic ties to his country of origin, and there were no other major threats to his best interests in the country of origin[122] - in that sense agreeing with the Swiss courts. However, the Court found a violation of Article 8 ECHR as the

[117] *Neulinger and Shuruk v. Switzerland*, App no 41615/07, (ECtHR, 6 July 2010), §135
[118] Nicholson (n 5) p.14
[119] *Rahimi v. Greece*, App no 8687/08, (ECtHR April 2011), §106–110; *Popov v. France*, App no 39472/07; 39474/07 (ECtHR, 19 January 2012), §119–121
[120] See for example, *Tuquabo-Tekle* (n 96*)*, §44
[121] *El Ghatet v. Switzerland*, App no 56971/10 (ECtHR, 8 November 2016)
[122] Ibid, §50-52

BIC had not been sufficiently placed at the centre of the domestic court's reasoning when denying family reunification[123]. It noted that "the Federal Supreme Court in its judgment […] and other domestic courts examined the best interests of the second applicant, who was a child at the time the request for family reunion was lodged, in a brief manner and put forward a rather summary reasoning in that regard"[124].

Even though in this particular case, the decision itself did not directly enforced the right to family reunification, it helped to reiterate the crucial idea that "while the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State"[125], the obligation remains for States to ensure that "the domestic courts […] place the best interests of the child at the heart of their considerations and attach crucial weight to it"[126]. Not doing so leads to a violation of the requirements of Article 8 ECHR[127].

3.2.2. The scope of protection of the right to family life in light of the best interests of the child

Another crucial aspect regarding the BIC has to do with the direct link its establishes between the promotion of family unity and the best development of the child – which consequently points to family reunification decisions as being the most favourable *a priori*.

In *Neulinger and Shuruk v. Switzerland*, the ECtHR explained that the "child's interest comprises two limbs[128]. On one hand, it emphasizes the importance of preserving the child's connections with their family, and that "family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family"[129]. On the other hand, it also acknowledges that it's crucial for a child to develop in a healthy environment "and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development"[130].

This deep interaction between preserving the family unit and ensuring the BIC for his/her development has been crucial to declare violations of Article 8 ECHR. Indeed, the case *Jeunesse*

[123] Ibid, §53
[124] Ibid.
[125] *I.A.A. and Others v. the United Kingdom*, App 25960/13 (ECtHR, 8 March 2016), §46
[126] *El Ghatet* (n 121) §99
[127] Ibid, §47
[128] *Neulinger* (n 117) §136
[129] Ibid.
[130] Ibid.

v. The Netherlands[131], which deals with the deportation of a third-national parent, is a good example of the Court's line of reasoning – and even though it does not concern a proper decision on family reunification, it is still relevant to see how it gives meaning to the BIC when looking at Article 8 ECHR. The case dealt with a Surinamese woman, who had been living in the Netherlands with her husband (who had acquired Dutch nationality) and their two young children, both born and raised in the Netherlands. Her presence in the Netherlands had been irregular for several years, and she was ordered to leave the country along with her children, having spent four months in detention pending deportation.

After recalling the paramount importance of the BIC[132], the Court found that "noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation"[133]. The Court enhanced that the mother was the one playing a significant role in caring for the children, especially given the father's work schedule, and that children had strong ties to the Netherlands, their country of nationality[134]. It therefore concluded that "[i]n view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands"[135].

This shows how having the BIC as a primary consideration can indeed bring more weight to the particular facts of the case and have an impact on the balancing of the competing interests at stake, namely the personal interests of a particular family in ensuring their family life and the public order interests of governments in controlling immigration.

3.3. How the best interests of the child can promote the effectiveness of the right to family reunification for unaccompanied minors in particular

It has been shown that the ECtHR has played a defining role in increasing the effectiveness of the right to family reunification for refugees through Article 8 ECHR, and how it has enhanced the need to take due account of the State's authorities assessment of the BIC when dealing with the right to family unity.

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[131] *Jeunesse v. The Netherlands*, App no 12738/10 (ECtHR, 3 October 2014)
[132] Ibid, §118
[133] Ibid, §119
[134] Ibid
[135] Ibid, §121

Although t the ECtHR did not deal in many cases specifically with UAM seeking asylum in Europe and their right to family reunification, it remains true that previous decisions that touch upon broader principles of family unity and the BIC in asylum and immigration cases are to play a significant role in the event of a case being brought up. In addition to that, one cannot undermine the influence that the ECtHR's jurisprudence has on other jurisdictions, namely at the CJEU. Thus, it is worth exploring how strengthening the weight of the principle of the BIC could help overcome some obstacles faced by UAM that have arrived to Europe seeking asylum, when trying to reunite with their families.

3.3.1. The best interests of the child – a principle that lacks development by the ECtHR

The ECtHR has provided increasingly detailed guidance on how the BIC are to be determined and taken into account in the family reunification context, which means that there has been an improvement of the legal position of children when it comes to their private and family life[136]. However, some authors also point to the fact that judgments remain fluctuant and unpredictable: Werner and Goeman have stated that " from the terminology used by the Court it can be derived that the Court views the 'best interests of the child' principle as an important aspect in the broader balance of interests. However, the ECtHR still does not apply the term 'best interests of the child' in all cases and when it does apply this term, it is not used in a consequent manner"[137]. Indeed, contradictions or inconsistencies may arise because of different factors: differences in national legislation, evolution of jurisprudence, as well as the permeability of the concept "best interests" – which ultimately makes the latter subjective and open to different interpretations.

3.3.2. The best interests of the child allow for other factors to take precedence over the child's migratory

It is recognized that the ECtHR's decisions are context-specific and based on a careful examination of the facts and legal arguments presented in each case. In the specific case of UAM that are asylum seekers in the EU, this more "casuistic" approach undoubtedly favours them regarding access to family reunification, especially for those who have not been granted a refugee status but face in practice similar difficulties.

[136] Nicholson (n 5) p.195
[137] Werner and Goeman (n 3) p.16

To start with, the ECtHR has confirmed that UAM are extremely vulnerable[138] and therefore entitled to special protection[139]. Additionally, the Court has acknowledged in past decisions that the extreme vulnerability of children to violence, abuse or exploitation due to their young age takes precedence over considerations relating to the child's migratory status. For example, in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the Court stated "In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. [The applicant] therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention"[140].

Even though the reasoning in case regarded the prohibition of torture or inhuman/degrading treatment, which indeed is a right that is absolute (unlike the right to family unity a), the extreme vulnerability of UAM combined with the BIC taken as a primary consideration could certainly help the Court to reinforce the importance for these minors to be reunited with family members.

In concrete, a number of cases concerning the right to family reunification of sponsors with subsidiary protection status have been recently brought to the ECtHR[141]. The Court declared in *B.F. and D.E. v. Switzerland* that considering the BIC in those applications weighed in favour of finding a positive obligation to grant family reunification under Article 8 ECHR[142] . This opens the door to more possibilities for UAM to reunite with their families.

[138] *S.F. and Others v. Bulgaria*, App no 8138/16 (ECtHR, 7 December 2017), §79
[139] See for example, *Popov* (n 119) §91
[140] *Mubilanzila* (n 114) § 55. See also *S.F.* (n 138), §79; *Popov* (n 119), §91
[141] *M.A. v. Denmark*, App no 6697/18 (ECtHR, 9 July 2021); *M.T. and Others v. Sweden*, App no 22105/18 (ECtHR, 20 October 2022); *B.F. and D.E. v. Switzerland*, App no 13258/18, 15500/18, 57303/18 et al. (ECtHR, 4 July 2023)
[142] *B.F.* (n 141) §120

4. The evolution of the CJEU's case-law and an effective right to family reunification for unaccompanied minors

4.1. The jurisprudence of the CJEU and its role on the protection of family reunification for asylum seekers and unaccompanied minors

4.1.1. The reinforcement of family reunification as the general rule for refugees

The issue of family reunification has been addressed multiple times by the CJEU, as it is a matter that relates not only to people seeking international protection, but generally migrants entering the EU borders. Therefore, the Court has been required to interpret the EU acquis on asylum and immigration in line with Member Sates' obligations under the CFR, including notably the right to family life (Article 7); to non-discrimination (Article 21); the best interests principle (Article 24(2)); the right to good administration (Article 41); and to effective judicial protection (Article 47)[143]. This means that the CJEU is also responsible for deciding whether the implementation of European legislation by its MS is compliant with the CFR.

More importantly, the Court has ruled that the right to respect for family life, set out in Article 8 of the ECHR also covers the right to family reunification[144], in the sense that it follows the interpretation made by the ECtHR which recognizes that Article 8 ECHR creates positive obligations inherent to an effective respect for family life.

In particular, it is worth noting that the CJEU was called to examine the FRD in the case *European Parliament v. Council of the European Union*[145], in which the European Parliament claimed that Articles 4(1), 4(6) and 8 of the Directive breached the fundamental rights to family life and non-discrimination. In particular, the last paragraph of Article 4(1) made it possible for MS to verify whether a child aged over 12 who arrives independently from the rest of his/her family meets a condition for integration; Article 4(6) allowed MS to only admit applications submitted by children aged under 15; and Article 8 made it possible to impose a waiting period of up to three years between submitting a family reunification application and family members being issued a residence permit.

According to the European Parliament, the possibility to introduce such conditions rendered the right to family reunification - which according to Article 8 ECHR can only be interfered

[143] Nicholson (n 5) p.25
[144] See for example, Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, EU:C:2002:434, §41
[145] Case C-540/03, *European Parliament v. Council of the European Union,* EU:C:2006:429

with for a legitimate reason – mainly because the provisions do not require the MS to weight the respective interests at stake. In its decision, the Court considered it possible for MS acting within this margin of appreciation to apply the derogations within the Directive in a manner consistent with protecting fundamental rights[146]. Moreover, for each one of these provisions, the CJEU has enhanced that they "must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member States to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships"[147]. Finally, it recalled that in any event, implementation of the Directive is subject to review by the national courts, which are obliged to make preliminary references if they encounter difficulties in interpreting it.

The Parliament also said that articles 4(1) and 4(6) both establish discrimination founded exclusively on the child's age which is not objectively justified and is contrary to Article 14 of the ECHR. However, the CJEU argued that "[i]n this context, the choice of the age of 12 years does 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 the latter 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 give rise to more difficulties"[148].

Therefore, the CJEU highlighted that, despite those provisions, the FRD remains in total accordance with Article 8 and the jurisprudence of the ECtHR, and it also enhances the relevance of Articles 5(5) and 17 in the interpretation of all provisions. This said, the FRD remains the object of many interpretative discussions and is seen to this day as promoting a certain level of legal uncertainty.

Throughout the years, the CJEU has clarified that despite the vast margin of appreciation MS have in deciding how to implement the Directive, they may encounter limitations when there is found to be an obligation to promote family reunification. As a matter of fact, in the *Chakroun* case[149] the CJEU went further and explicitly stated that "[…] authorisation of family reunification is the general rule […] Furthermore, the margin for manoeuvre which the MS are recognised as having must not be used by them in a manner which would undermine the

[146] Ibid, §60 -66, 85, 98
[147] Ibid, §87. See also §73, 99, 101
[148] Ibid §74-75, 89
[149] Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken,* EU:C:2010:117

objective of the Directive, which is to promote family reunification"[150]. In that specific case, it led the Court to conclude that "[…] Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim [for support]"[151]. Such decision helps to see the CJEU's potential role in keeping in check national legislations when it comes to providing for family reunification.

4.1.2. The CJEU's jurisprudence and the effectiveness of the right to family reunification for refugees and for unaccompanied minors

The EU has created a legal framework that facilitates family reunification for beneficiaries of international protection that have been granted a refugee status. However, it has also been underlined that many obstacles remain in practice in order for them to fully access reunion with family members. It is precisely in that scenario that the CJEU has already helped to overcome some of these difficulties.

Regarding UAM, one of the topics that has been addressed several times by the CJEU in the recent years concerns the relevant date to determine the status of a child as a minor during the procedures they go through. Indeed, their right to family reunification gets often compromised due to different interpretations of the age requirement in cases where majority is attained in the pending of the proceedings.

That is precisely what the CJEU addresses in the case *A and S*[152], which concerns the right to family reunification of an UAM refugee with her parents. A, a 17-year-old Eritrean girl, who had arrived unaccompanied in the Netherlands, lodged an application for asylum, and had turned 18 at the time of the decision granting her asylum. Two months later after that decision, her application to reunite with her family was refused to her by the Dutch administration on the grounds that she was already an adult, who according to the FRD does not have the right to family reunification with parents. In a preliminary ruling, the CJEU was asked to answer whether a child entering and asking for international protection in an EU Member State

[150] Ibid, §43
[151] Ibid, §52
[152] Case C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie*, EU:C:2018:248

attaining majority during the proceedings, shall be still seen as a child for the purpose of family reunification, once (s)he applies for it.

The Court clarified that despite the Directive not defining the relevant date to assess if the condition "below 18 years old" is met to confer the right to family reunification, it does not mean that it is up to the discretion of each MS to decide over the matter[153]. On the contrary, it "[…]must normally be given an autonomous and uniform interpretation throughout the European Union, and that interpretation must take into account, inter alia, the context of the provision and the objective pursued by the legislation in question"[154]. It also enhanced that the principles of equal treatment and legal certainty would be attacked if the right to family reunification became dependent on the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority[155]. Therefore, the Court concluded that the only way to ensure that UAM do meet more favourable conditions is by determining as the relevant date the one which the child submitted the asylum application with a view to obtaining refugee status[156].

Since this decision, the CJEU has extended the logic of its ruling in *A and S* to situations in which the UAM reaches majority during not the asylum procedure, but the family reunification procedure itself[157]. In *B.M.M.*[158], the Court found that the Belgian judicial practice of declaring an appeal against a decision refusing family reunification inadmissible, based on the fact that the minor had reached the age of majority in the course of the dispute, was also contrary to the FRD[159]. Indeed, the Court held that given that the minority is to be assessed at the moment of the application for asylum, then "an action cannot be dismissed as inadmissible solely on the ground that the child concerned has reached majority in the course of the court proceedings"[160].

Even more recently, at the beginning of 2024, the Court declared in another preliminary ruling that a recognised UAM refugee has the right to family reunification with his or her

[153] Ibid, §45
[154] Ibid, §41
[155] Ibid, §55.
[156] Ibid, §60
[157] See for example, Joined Cases C-273/20, C-355/20, *Bundesrepublik Deutschland (Regroupement familial avec un mineur réfugié)*, EU:C:2022:617; Case C-279/20, *Bundesrepublik Deutschland (Regroupement familial d'un enfant devenu majeur)*, EU:C:2022:618
[158] Joined cases C-133/19, C-136/19 and C-137/19, *B. M. M. and Others v État belge*, EU:C:2020:577
[159] Ibid, §54-55
[160] Ibid, §55

parents even if he or she reached the age of majority during the family reunification procedure itself[161].

All these decisions illustrate the Court has generally accepted that UAM maintain their full right to family reunification conferred by refugee status retroactively, provided that the asylum application was lodged while being a minor[162]. Such rulings allowed to overcome procedural barriers that were raised by national authorities, and they underline the need to comply with the objectives set out in the FRD and more specifically to "afford the most extensive protection in order to respond, in so far as possible, to the particular vulnerability of unaccompanied minors […], and of young adults who have refugee status"[163].

Finally, there is a judgment from 2022 that acknowledges the need to grant a high level of protection to UAM at all circumstances in family reunification[164]. The case concerned a Palestinian 15-year-old minor who had arrived to Belgium to join her spouse, and whose marriage had not been recognized by the Belgian authorities, leading to her being granted a refugee status as an UAM. She then applied for family reunification as a sponsor to be reunited with her mother, but it was denied on the basis that her marital status meant that the mother was no longer part of the nuclear family. The CJEU had to answer in a preliminary ruling whether Article 10(3)(a) of Directive 2003/86, read in conjunction with Article 2(f) of that directive, must be interpreted as meaning that, in order to acquire the status of sponsor for the purposes of family reunification with his or her first-degree relatives in the direct ascending line, an UAM refugee residing in a MS must be unmarried.

To answer the question, the Court focused on the analysis of the provisions set out in the FRD. Firstly. it recalled that the right to family reunification granted to unaccompanied refugee minors is not subject to a margin of discretion on the part of the MS or to stricter conditions as those existing in Article 4(2)(a)[165], and also that the definition in Article 2(f) only lays down two conditions: that the person concerned is a 'minor', and that he or she is 'unaccompanied'[166]. Therefore, no mentions to the marital status of the minor are made, nor to any requirement for the minor to be unmarried to be considered an UAM. Moreover, the Court enhanced that the distinction made between the minor children of a parent sponsor (who cannot be married) and

[161] Case C-560/20, *Landeshauptmann von Wien (Family reunification with a minor refugee)*, http://data.europa.eu/eli/C/2024/1991/oj
[162] Frasca and Carlier (n 6) p.369
[163] Case C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie*, EU:C:2017:824, Opinion of AG Bot, §54
[164] Case C-230/21, *Belgische Staat (Réfugiée mineure mariée),* EU:C:2022:887
[165] Ibid, §48
[166] Ibid, §31

the UAM refugee sponsor "appears to demonstrate its intention not to restrict the benefit of Article 10(3)(a) […] only to unmarried unaccompanied refugee minors"[167]. Secondly, the Court acknowledged the particularly vulnerable position of an UAM refugee residing alone in the territory of a State other than his or her State of origin and stated clearly that such state of vulnerability "is not mitigated as a result of marriage"[168]. Thus, "[i]n the light of that context, an interpretation of Article 10(3)(a) […] which restricts the benefit of the right to family reunification with their first-degree relatives in the direct ascending line only to unmarried unaccompanied refugee minors would run counter to [the] objective of special protection" that is provided in this legal instrument[169]. Finally, this interpretation was deemed by the CJEU to be the one that was consistent not only with the principles of equal treatment and legal certainty, but also with Article 7 and Article 24(2) and (3) of the CFR[170].

With this judgment, the CJEU relied on literal and teleological interpretations to reinforce the right to family reunification of UAM with a refugee status, regardless of their marital status. This is particularly important as it enhances the obligation to take into account the particularities of minors in all situations, especially regarding family reunification. It sets a high level of protection that is more consistent with the reality that is often seen in these procedures, and it could help promoting measures regarding all the UAM and the barriers that are created in order for them to reunite with their family members

4.2. The development of the best interests of the child in the CJEU's jurisprudence regarding family reunification

4.2.1. Previous considerations: the best interests of the child in EU law

In EU Law, the first mention to the BIC lies in the CFR. Article 24(2) requires that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. It is based on the CRC[171], and additionally European legislation places the standards of the Convention at the heart of all actions concerning UAM[172]. More specifically, the best interests principle underpins the

[167] Ibid, §35
[168] Ibid, §45
[169] Ibid, §37, 43-44
[170] Ibid, §48
[171] (EU) Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17- C 303/35
[172] Gornik, Sedmak and Sauer (n 3) p.1

implementation of the legal rules set out in all the abovementioned Directives and Regulations[173], included the FRD[174].

One of the consequences of ensuring the BIC in all decisions, namely during the process of family reunification, is that it requires responsible authorities to establish a specific procedure to determine what those best interests are[175]. They need to provide reasons for their decision (positive or negative) and explain how the BIC were taken into consideration in the decision process; such reasons need to be reflected in the written reply in order to verify the respect for Article 24(2) CFR [176]. Another practical reflection of this concern is the fact that in the EU asylum and migration policies, there are provisions demanding MS to ensure that children have a legal representative for the purpose of ensuring the safeguard of their best interests[177].

Over the past 20 years, the CJEU has increased the number of references to the BIC in its cases in many fields of EU Law[178] and in accordance with international instruments such as the CRC[179]. A good example is the case *Detiček*[180], which regarded the proceedings between a couple concerning the custody of their daughter. The Court held that according to Article 24(2) CFR, a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can only be justified if another interest of the child has such importance that it takes priority[181]. Most importantly, the CJEU stated clearly that "One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child" – therefore demonstrating how the best interests of the child can play a role in assessing the best solution[182]. It has also occurred in a few cases that the CJEU gave indications on how to undertake the assessment of 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

[173] Asylum Procedures Directive Art 25(1a) and (6); Qualification Directive Arts 20(5), 31(4) and (5); Reception Conditions Directive Arts 11(2), 23 and 24; Dublin Regulation Arts 6 and 8, Return Directive Arts 5(a), 10(1) and 17(5)
[174] FRD, Art 5(5)
[175] *Family Reuni…* (n 50) p.68
[176] Ibid.
[177] Reception Conditions Directive, Art 24(1); Qualification Directive, Art 31(1)
[178] See for example, Case C-413/99, *Baumbast and R v Secretary of State for the Home Department,* EU:C:2002:493, §73
[179] See for example, Case C-490/20, V.*M.A. v Stolichna obshtina, rayon „Pancharevo"*, EU:C:2021:1008, §63
[180] Case C-403/09 PPU, *Jasna Detiček v Maurizio Sgueglia*, EU:C:2009:810
[181] Ibid, §59.
[182] Ibid, §54.

ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium"[183].

Regarding migration and asylum, the BIC principle has also been recently approached by the CJEU with more regularity in its judgements, and since 2021, the number of references to Article 24(2) CFR has increased significantly. Such growing weight of children's rights is partly due to the fact that many preliminary questions that are sent by national courts concern the interpretation of EU secondary law provisions in light of Article 24(2) CFR[184]. This is very important, as the increase of references to the BIC is likely to have an impact on the Court's jurisprudence and the subsequent implementations of its decisions at the national level, as it acknowledges the weight it must have in the courts' reasonings.

The first time the CJEU has ever considered the child's best interests in its asylum and migration-related caselaw was actually in *Parliament v. Council*, in which he referred to the principle repeatedly and described it as a "consideration of prime importance"[185]. More importantly, the Court mentioned for the first time explicitly Article 24(2) CFR, which at the time still lacked binding force, read in conjunction with the right to respect for family, as an interpretative instrument of the entire FRD[186]. This allowed the CFR to gain "a certain constitutional scope virtually foreshadowing the importance it would later acquire in the Court's interpretation of EU migration law"[187].

Furthermore, in the case *MA and Others*[188], the CJEU referred again to the BIC, this time in relation to the Dublin Regulation. The case concerned an UAM who had submitted subsequently applications for international protection, firstly in Italy and the Netherlands, and afterwards in the United Kingdom. The Court was asked to interpret the provision of the Dublin Regulation establishing that in the absence of a family member in the EU's territory, the MS responsible is "the one in which the child has lodged the application for international protection"[189]. Unlike the referring court, that suggested that the notion must be understood as the country of the first application, the CJEU considered instead that in the event of subsequent applications lodged by UAM in more than one MS, the MS responsible is that "in which the

[183] See for example, Case C-133-15, *Chavez-Vilchez and Others*, EU:C:2017:354, §71
[184] Frasca and Carlier (n 6) p.346
[185] *European Parliament* (n 145) §73. See also paras.50, 58, 59, 63, 76, 84, 87, 90, 101 and 103
[186] Ibid, para 87
[187] Frasca and Carlier (n 6) p.351
[188] *MA* (n 2)
[189] Dublin Regulation, Art 8(4)

minor is present"[190]. Such interpretation relied on the fact that "the child's best interests are to be a primary consideration" – in the present case, that meant acknowledging the situation of UAM and therefore the need to make the Dublin procedure as prompt and safe as possible[191]. With this reasoning, the Court made considerations linked to the BIC prevail over the logic of the Dublin system[192] - which demonstrates how this principle can become determinant in situations where children, and more precisely UAM, are not receiving the level of protection they are due by law.

The CJEU has paved the way for the BIC principle to become more and more important in its decisions, namely through Article 24(2) CFR, but also thanks to the provisions that expressly refer to the principle in the current legislation. Indeed, it has evolved from one of the interests to be considered among others, to a real obligation for MS to take it into account at all stages of procedure "involving minors, providing the referring Court with framework to assess whether the decision taken by the MS authorities complies with [that] obligation"[193]. Thus it is relevant to analyse how by applying it the CJEU has helped UAM in the process of reuniting with their families.

4.2.2. The best interests of the child contributes to decisions that take more into account the particular circumstances of unaccompanied minors

One of the main issues regarding UAM in the context of asylum and migration is the fact that they are often treated like adults, as national authorities tend to neglect their particular vulnerability as children[194]. Throughout its decisions, the CJEU has progressively introduced stricter obligations for MS regarding the way those asylum seekers need to be treated, and the BIC has played a substantial role.

An example of that case-law is the case *TQ v Staatssecretaris van Justitie en Veiligheid*[195], in which the Court ruled on a return decision against an UAM illegally staying in a MS. The case concerned TQ, a Guinean national who entered the Netherlands as an UAM at the age of 15 years and four months and subsequently applied for a residence permit on the grounds of

[190] *MA* (n 2), §60
[191] Ibid, §55
[192] Frasca and Carlier (n 6) pp.356-357
[193] Frasca and Carlier (n 6) p.352
[194] See for example, Mateja Sedmak, Blaž Lenarcˇicˇ, Zorana Medaric´ and Tjaša Žakelj, 'Not our children' Unaccompanied minor asylum seekers in Slovenia, in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied children in European migration and asylum practices: in whose best interests?* (New York: Routledge 2017)
[195] Case C-441/19, *TQ v Staatssecretaris van Justitie en Veiligheid*, EU:C:2021:9

asylum. The Dutch authorities decided ex officio that TQ was not eligible for a residence permit due to him being over 15 years of age, this decision constituting a return decision. TQ appealed, stating that he did not know where his parents live and would not be able to recognise them if returned and likewise did not know of any other family members. The referring court submitted questions to the CJEU that involved the interpretation of BIC in the Return Directive, which gave the Court the opportunity to reaffirm the fundamental nature of the rights of the child and provide some clarifications[196].

To begin with, the CJEU analysed whether in light of the Returns Directive and the CFR before issuing a return decision against an UAM, the MS concerned must be satisfied that adequate reception facilities are available for that minor in the State of return. The Court highlighted that the Returns Directive contains specific rules applicable to UAM – which qualify them as "vulnerable persons" – and that the MS have the obligation to, when implementing that directive, take due account of the 'best interests of the child'[197]. Indeed, it enhances that "An unaccompanied minor cannot therefore systematically be treated as an adult"[198] and recalls the need to "take due account of a number of factors when deciding whether or not to adopt a return decision against an unaccompanied minor, inter alia the age, sex, particular vulnerability, state of physical and mental health, the placing in a foster family, the level of school education and the social environment of that minor"[199]. Most importantly, despite the fact that Article 10 of the Return Directive distinguishes between the obligations of the Member State 'before deciding to issue a return decision in respect of an unaccompanied minor' and 'before removing' such a minor 'from the territory of a Member State', the MS is still under the obligation to take due account of the BIC at all stages of the procedure[200]. That includes inquiring as to the presence of family members or of a nominated guardian or adequate reception facilities in the State of return. Not being the case, "the consequence would be that, although that minor was the subject of a return decision, he or she could not be removed […] pursuant to Article 10(2) of Directive 2008/115"[201] as it would be against their best interests. The Court also reminded that the UAM needs to be heard concerning the conditions under which he or she might be received in the State of return[202].

[196] Ibid, § 45.
[197] Ibid, §42-43
[198] Ibid, §43
[199] Ibid, §47
[200] Ibid, §51
[201] Ibid, §50-52
[202] Ibid, §59

Secondly, answering the second question referred to by the Dutch court, the CJEU declared that notwithstanding that the national rules make a distinction between UAM under the age of 15 years and those over the age of 15 years, "the criterion of age cannot be the only factor to be taken into account in order to ascertain whether there are adequate reception facilities in the State of return. It is necessary for the Member State concerned to carry out an assessment on a case-by-case basis of the situation of an unaccompanied minor as part of a general and in-depth assessment, rather than an automatic assessment based on the sole criterion of age"[203]. Finally, the Court made clear that "In the event that adequate reception facilities in the State of return are no longer guaranteed for the unaccompanied minor in question at the stage of his or her removal, the Member State concerned will not be able to enforce the return decision"[204].

This case illustrates how the CJEU has reinforced the obligation to place the BIC at the core of the assessment of a child affected by a return decision, allowing for decisions that are more in accordance with their individuality. Regarding the protection of UAM, this decision opens the door to decisions made by national authorities that are more respectful of the particularities of each situation.

4.2.3. The criterion of the best interests of the child favours family unity and reduces the barriers to family reunification

Similarly, to the ECHR, it is interesting to see that EU law establishes a link between the best interests of the UAM and the right to family unity. As a matter of fact, EU legislation that does not directly deal with family reunification constantly phrases that when assessing the BIC, MS must in particular take due account of family reunification possibilities. It leads to the conclusion that when an UAM enters the EU in search for asylum and international protection, ensuring the respect for its best interests will always encompass the discussion on his or her right to family reunification.

A link between the child's best interests and family unity can be perceived in many early judgements of the CJEU, even when they were not directly related to family reunification. Indeed, the Court started to refer to the BIC always in conjunction with the right to respect for family life set out in Article 7 CFR[205] - it served as a further guarantee of the latter and was in

[203] Ibid, §66
[204] Ibid, §78
[205] See for example, Joined Cases C-356/11 and C-357/11, *O. and S,* EU:C:2012:776, §76 and 80

that context not an objective in itself[206]. Throughout time, the principle has acquired its autonomy, but even in that case it has been determinant to decide in favour of maintaining families together in situations relating to asylum seekers.

A clear example is the case *M.A. and Others* from 2019[207], which dealt with a couple of third-country-nationals who lodged an asylum claim while their child was receiving medical treatment in Ireland. The applicants challenged a transfer decision from that MS and the CJEU was asked to interpret Article 20(3) of the Dublin Regulation. The Court's response was that the provision "must be interpreted as meaning that, in the absence of evidence to the contrary, [it] establishes a presumption that it is in the best interests of the child to treat that child's situation as indissociable from that of its parents"[208]. With this decision, the CJEU makes it clear that preserving the unity of the family group is, as a general rule, in the child's best interests[209] - a rationale that is only beneficial in asylum situations involving minors.

Another case that is not directly related to family reunification but shows how the BIC favours family unity is *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)*[210]. The case concerned an UAM wanting to reunite with his uncle in the Netherlands – who was not a "family member" but a "relative who can take care of the child" according to the Dublin Regulation[211]. They had received a decision refusing the take charge request and were unable to challenge it under national jurisdiction based on the remedies provided by Article 27(1). However, the CJEU held that an UAM who applies for international protection and wishes to reunite with one of his relatives legally present in another MS has the right to a judicial remedy against such decision[212]. What is interesting in this particular case is how predominant the BIC principle is in the Court's reasoning: indeed, the uncle is a member of the minor's extended family and is therefore not covered directly by the right to family unity. However, the CJEU stated that "since Article 7 [CFR] must be read in conjunction with the obligation to have regard to the child's best interests, as a primary consideration[…] the interest which an unaccompanied minor may have in being united with members of his or her extended family for the purposes of the examination of [the] application

[206] Frasca and Carlier (n 6) p.352
[207] Case C-661/17, *M.A. and Others*, EU:C:2019:53
[208] Ibid, §87-90
[209] Frasca and Carlier (n 6) p.357
[210] Case C-19/21, *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor),* EU:C:2022:605
[211] Dublin Regulation, Art 2
[212] *Staatssecretaris* (n 210) §55

for international protection must be regarded as being protected by those provisions […]Moreover, it follows from [Article 8(2]), recitals 14 and 16, and Article 6(3)(a) and (4) of that regulation that respect for family life and, more specifically, the possibility for an UAM to be united with a relative who can take care of him or her, while his or her application is being processed, is, as a general rule, in the BIC[213]. Such finding by the Court reflects how promising the consideration of the BIC can be when it comes to ensuring possibilities for UAM to be close to their families.

Regarding cases that deal directly with family reunification, the BIC has also played a big role each time the Court had to decide on what was the criteria for determining relevant date for assessing the status of a child as a minor. In the already mentioned *A and S* case, the BIC was indeed referred to: it served to support the argumentation ("such an interpretation could have the opposite effect, frustrating the objective […] 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")[214]. More recently, the Court ruled on twin cases that also concerned family reunification procedures and the assessment of the status as minor[215]. In both cases the CJEU highlighted the BIC and its articulation with Article 7 CFR[216]. This emphasis given by the CJEU is relevant because the rest of the reasoning is made by placing the best interests of the minor much more at the centre of decisions that involve family reunification.

Finally, taking due into account the BIC in family reunification cases helps overcoming some barriers such as documentary evidence for the sake of family reunion. Indeed, in case *E*[217], the CJEU considered that rejecting on that basis the application for family reunification lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, was against the obligation to consider the BIC[218]. The Court clearly stated that "none of the information in the file before the Court reveals that the State Secretary took account of E.'s age, his situation as a refugee in Sudan, the country in which he was, according to the statements made by A., placed into a foster family without any family

[213] Ibid, §47
[214] *A and S* (n 163), §58
[215] *Bundesrepublik Deutschland (Family reunification with a minor refugee)* and *Bundesrepublik Deutschland (Family reunification with a child who has attained majority)* (n 157)
[216] Ibid, §38 and §41
[217] Case C-635/17, *E*, EU:C:2019:192
[218] Ibid, §78

ties, or that child's best interests, as they appear in such circumstances"[219]. It also enhanced again the link between ensuring those interests and reuniting with family, and how it must influence the procedure: "If A.'s claims were to prove truthful, granting the application for family reunification at issue in the main proceedings could be the only means of ensuring that E. has the opportunity to grow up in a family environment. As stated in paragraph 59 of the present judgment, such circumstances are liable to influence the extent and intensity of the examination required"[220].

4.3. How the best interests of the child can promote the effectiveness of the right to family reunification for unaccompanied minors

4.3.1. Increasing the role of the BIC as a substantive right and a fundamental principle

Throughout the analysis of the Court's jurisprudence in the recent years, it is undeniable that the principle of the BIC has gained a bigger weight and importance, as it is part of the Court's reasonings in a growing number of cases, namely in the area of migration and particularly in family reunification issues . However, it remains true that its actual role is often only secondary, serving mainly as an interpretative rule instead of being considered as a real substantive right as it figures in Article 2(1) CRC[221].

The Court has relied mostly on the BIC as a safeguard principle that helps to guarantee the respect of the fundamental right to respect for family life. Many times, Article 24(2) of the Charter is combined with Article 7 and Article 24(3) in order to reinforce interpretations of secondary EU law provisions that are more favourable to UAM and children in general, as well as ensuring that the procedural rules envisaged for minors in the EU are duly effective. Therefore, it is referred to when the CJEU feels the need to "complement the texts in order to ensure the genuine enjoyment of the substance of the rights of the child when there cannot be sufficiently protected by technical rules"[222].

This said, the Court is still very reluctant to truly decide on the exact meaning of the BIC in each case, and only rarely did it mention the factors that had to be taken into account in the assessment of those interests. Although the CJEU has referred that the BIC needs to be interpreted in reference to the CRC, it has not yet embraced its third dimension, which is the BIC as a substantive right. This could be related to the fact that those questions have so far been

[219] Ibid, §77
[220] Ibid
[221] Frasca and Carlier (n 6) p.384
[222] Frasca and Carlier (n 6) p.386

brought up in the context of preliminary rulings, and thus the substantive dimension has been left to the appreciation of national jurisdictions.

Nevertheless, increasing the role of the BIC has the potential to extend the protection of minors through EU law. In that regard, the CJEU has given some signs of how the primary consideration of the child's bests interests can give rise to rights of family members of the minor that are not explicitly in the law. The case *Chavez-Vilchez*[223], which relates to family reunification in the context of a third-national parent wanting to obtain a right of residence to live with her child who is a EU citizen, is groundbreaking in that regard. In this case, the BIC as it is in the CFR did not serve to interpret EU law, but to actually trigger it. The Court had to determine whether the parent could derive a right of residence from Article 20 TFEU[224], in order to ensure the real enjoyment of the minor's rights inherent to the EU citizenship. This means determining which parent is the "primary carer of the child"[225], and for that conduct an assessment of the relationship of dependency between the child and each parent, which has to take into account the BIC concerned, and of all the specific circumstances.

What is particularly relevant is that the Court clearly declared that 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 European Union if a right of residence were refused to that third-country national"[226]. Therefore, the analysis of the BIC gains much more importance, because it becomes the determinant factor to ascertain whether EU primary law is applicable or not[227]. This certainly opens the door to the CJEU applying the BIC in other cases that in principle fall outside the scope of EU law as a way to introduce higher levels of protection of their rights, namely regarding UAM that are not granted a refugee status and are therefore much more dependent on national legislation in order to reunite with their family members.

4.3.2. Family reunification with other family members: the example set by the CJEU

A concrete example of how granting more importance to the BIC could lead to new possibilities of family reunification for UAM regards the particular situation of siblings.

[223] *Chavez-Vilchez* (n 183)
[224] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47
[225] *Chavez-Vilchez* (n 183), §70
[226] Ibid, §71
[227] Frasca and Carlier (n 6) p.378

Refugees that are UAM only have the right to reunite with their first-degrees relatives in the direct ascending line without applying stricter conditions that are laid down in the FRD[228]. This means that for the parents to join their child in the EU, they must leave their other children in the third-country – and only subsequently apply to reunite with them. Leaving aside the consideration of the BIC of those minors, reasonable doubts can be raised whether the right to family reunification of the UAM can become really effective.

However, in the already mentioned recent case from 2024 *Landeshauptmann von Wien (Family reunification with a minor refugee)*, the CJEU extended the right to family reunification of the UAM sponsor in order to also allow the entry into the EU of her adult sister who was seriously ill and totally dependent on the assistance of her parents. The Court declared that "Article 10(3)(a) […] must be interpreted as requiring a residence permit to be granted to the adult sister of an unaccompanied minor refugee […], where a refusal to grant that residence permit would result in that refugee's being deprived of his or her right to family reunification with his or her first-degree relatives in the direct ascending line, conferred by that provision"[229]. In order to reach that conclusion, the Court started by recalling the need to interpret Article 10(3) in light of Article 7 and Article 24(2) and (3) of the Charter, but also made very clear that the right to family reunification conferred by that provision only included her two parents[230]. However, "the exceptional situation and […] the particular seriousness of [the sister]'s illness" compromises the effectiveness of the exercise of the right in such a way that it would deprive *de facto* the UAM of being reunited with both of them[231]. Thus, the only way to ensure the UAM's reunification with her parents was to also grant a residence permit to the sister.

Even though this decision does not mean that a right to family reunification granted to the UAM sponsor with his/her parents necessarily includes the siblings, it still opens the door to some reflection. Indeed, serious illness is not necessarily the only factor that can create a situation where children (or other family members) are "totally and permanently dependent on the assistance of […] parents"[232]. Other situations related to siblings and other family members could deprive in practice the UAM with refugee status in the EU from their right to family reunification with their first-degree relatives in ascending line. In that context, assessing in depth the BIC could help unblocking some of those situations, especially when it has been

[228] FRD, Art 10(3)
[229] *Landeshauptmann* (n 161), §61
[230] Ibid, §51, 53
[231] Ibid, §57, 59
[232] Ibid, §61

consistently reiterated by the Court that there is an obligation of MS to examine applications for family reunification in the interests of the children concerned and with a view to promoting family life

5. Conclusion

The international community and the EU have acknowledged the need to provide for a higher level of protection for UAM seeking asylum, and also the importance of restoring family unity in order to ensure their best interests. However, when it comes to the right to family reunification, only a few of those UAM benefit effectively from it. Indeed, most of them lack a refugee status that enables them to be joined by their family members, or/and the family reunification procedures undermine their state of vulnerability as minors and asylum seekers, therefore failing the obligation to deal with it accordingly.

In that context, the ECtHR and the CJEU have been playing a defining role in promoting the effectiveness of family reunification for UAM. Despite the fact that they have different jurisdictions and thus their decisions do not impact in the same way, both of them have enhanced the link between the specific vulnerability of asylum seekers and the right to respect for family life and family unity. In particular, the ECtHR's interpretation of Article 8 ECHR throughout its case-law has paved the way for the creation of an obligation for States to promote family reunification under certain circumstances that benefit asylum seekers, in particular because the Court's decisions contributed to to take into account their specific context and the interests of all family members. Moreover, the CJEU has underlined the need to interpret the FRD in light of the objectives of promoting family reunification; and its decisions regarding preliminary rulings reflect the need for MS to interpret the existing provisions in a way that truly facilitates family reunification for refugees.

The development of references to the BIC in cases of asylum and migration by the ECtHR and the CJEU has also been of great importance. Indeed, they reinforce the need to interpret the existing law in light of the CRC and to acknowledge the specific circumstances of minors. Additionally, both courts have established the link between ensuring the child's best interests and restoring family life: thus, when stating the obligation to take into account the BIC, the balancing of interests is more likely to be in favour of family reunification possibilities. They have also have pointed out several times the obligation to take into account the child's best interests in the family reunification procedures, no matter what the outcome of the decision is. This has had direct and indirect consequences for UAM, and generally has opened the door to interpretations of the current legal framework that are more favourable to them reuniting with their families.

This said, it is worth noting that the two European regional courts have dealt with this issue in different circumstances: the ECtHR had to analyse Article 8 ECHR and the BIC in light of individual complaints and never regarding UAM specifically; as for the CJEU, the subject has been always been brought so far through preliminary questions submitted by national courts and therefore all the rulings concern matters of interpretation that will affect individuals indirectly. Notwithstanding, the evolution of their reasonings influence each other, especially in the context of the protection of fundamental rights. Also, both are suited to enhance the protection of the UAM's right to family reunification in different manner. Indeed, by deducing that a State can be forced to reunite family members and by imposing the assessment of the BIC in the balancing of interests, the ECtHR opens the door to family reunification for UAM that would be *a priori* left to the margin of discretion of MS of the EU. As for the CJEU, the constant mention to the need to interpret EU law in light of Article 24(2) CFR continues to foster a more effective right to family reunification for UAM refugees after the implementation of the FRD by MS.

Family reunification for all UAM seeking asylum is dependent on the adoption of more favourable rules by MS at the national level. Therefore, allowing them to reunite with their families can only be promoted through interpretations of the law that put more weight on the BIC. Moreover, as the EU moves closer to adopting a New Pact on Migration and Asylum, which allegedly establishes a new common procedure to grant and withdraw international protection that will lead to a faster processing of claims at EU borders[233], concerns raise regarding whether the BIC will be fully ensured and outweighed in all procedures concerning UAM. This only enhances the need for the European regional courts to continue to promote the development of the BIC in all its dimensions, in order to foster a higher level of protection that takes due account of their vulnerability.

[233] European Parliament, 'MEPs approve the new Migration and Asylum Pact' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240408IPR20290/meps-approve-the-new-migration-and-asylum-pact> accessed on 2 May 2024

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